European Commission

Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC.

Question	Answer
I am looking at the definition of 'Transferable Securities' under the ISD and MiFID. Within both definitions they refer to: (1) 'the capital market' (2) 'instruments of payment' Neither of theses terms are defined but we are looking for guidance on these terms or any examples of what they refer to.	The notion of 'capital market' is not explicitly defined in MiFID. It is a broad one and is meant to include all contexts where buying and selling interest in securities meet. 'Instruments of payment' are securities which are used only for the purposes of payment and not for investment. For example, this notion usually includes cheques, bills of exchanges, etc.
I am trying to understand the EU's understanding of MiFID's Article 2(1)(c) exemption. I would be grateful for any guidance on how the word 'incidental' is interpreted for the purposes of this MiFID exemption and what the scope of this exemption is understood to be.	The purpose of this exemption is to exclude from MiFID scope (and thus in particular from the authorisation requirements) activities which, if carried out on a professional basis, would constitute the provision of an investment service or activity. As all exemptions, this one should be read in a restrictive way to exclude only such services which are provided incidentally in the course of other activity. 'Incidentally' should be understood in this context as a service that arises out of is linked to the main activity of the person and it should not represent a significant part of his or her activities. For example, this may be a situation where a client of a tax advisor or a lawyer empowers him or her to buy or sell particular financial instrument(s) on the client's behalf. If performed on a professional basis, this would constitute the provision of the investment services of 'execution of orders' or 'reception and transmission of orders'.
I would also like to know whether there will be/have been any discussions at the European level on the meaning of the A(7) activity (placing of financial instruments without a firm commitment basis). I am trying to understand the scope of this activity, and in particular, whether this activity is associated with primary market activity or whether the A(7) activity may also apply when funds are being raised by private companies (private equity activity).	Placing is the service provided by an investment firm to an issuer whereby the firm undertakes to place financial instruments with investors on behalf of the issuer. Placing can be carried out either on a firm commitment basis or not depending on the type of commitment that firms undertake towards the issuer. It refers to services provided by the investment firm related to primary market activities associated with the issuance of new instruments (including private equity).
The tests should be conducted before giving any advice, recommendations or offer. What time interval between the suitability/appropriateness-test and giving advice/recommendation and trade is acceptable? I was rather more concerned with the Financial Instrument's 'price fluctuations' (volatility risk) than the 'client circumstances' in relation to the time of suitability test. As you know the price of FIs can change more dramatically than the personal circumstances of clients, thus the time-interval between a 'Suitability Test', 'given FI Recommendations', 'Contract' and 'Execution' may be decisive in the end price a customer pays and/or attractiveness of the recommended FI product and services. I know the scenario is like 'shooting a moving object' and it is difficult to depict it in regulations.	There is no explicit requirement in the Directive as to the period between the assessment of the suitability and the actual provision of the service which is considered as acceptable. Therefore, the answer to this question is a matter of assessment on a case-by-case basis. Essential for this assessment is the requirement of MiFID to provide to the client a suitable recommendation (in the case of investment advice or portfolio management). That is why, for example advice provided a very long time after the information gathering for the purposes of suitability may not be suitable any more (e.g. if some changes have occurred in the client's personal circumstances or in relevant financial markets). It is for the firm to ensure that it has provided a suitable recommendation to its clients. The same principle applies in respect to the appropriateness test (where other services are provided). It is the responsibility of the investment firm to provide a service which is appropriate for the client at the moment when the service is provided.
The client must understand the complexity of the Product & Services (P&S) she/he is trading with. What happens if this is too complex for him? Is a financial advisor still allowed to recommend or sell him the P&S if the suitability test (without this P&S complexity factor) is positive?	The suitability test is required by MiFID for the services where the client places a greater reliance on the recommendation given by the firm – investment advice and portfolio management. That is why an investment firm is only allowed to provide such recommendation if the firm is satisfied that this recommendation is suitable for the clients. The assessment of the client's knowledge and experience is an essential part of the suitability test and it cannot be carved out. That is why Article 35(1)(c) Directive 2006/73/EC (MiFID Level 2 Directive) explicitly stipulates that the client should be able to understand the risks involved in the transaction. If this is not the case, the investment firm is not allowed to provide such a recommendation.
I'm looking for detailed information regarding the requirements CFD providers have to fulfil under MiFID.	Contracts for differences are financial instruments as defined in Annex I, Section C of MiFID (e.g. financial CFDs, CFDs on commodities or emission allowances). Therefore, persons providing investment services in relation to those instruments will have to be authorised under MiFID and comply with its operating conditions. There are no special provisions relating only to CFD providers under MiFID. However, a limited number of CFD contracts may be outside the scope of the directive (e.g. CFDs on sport results). In those cases they may be regulated under national law and will not benefit from the MiFID passport.

Where can I see which Member States have transposed MiFID, which Member States are yet to (with proposed dates) and proposed implementation dates by State?	The Member States' transposition process of all Lamfalussy Directives (including MiFID) is reflected in the so-called Lamfalussy League Table – a scoreboard which monitors the progress made. This table is currently updated at least once a month and it is published on our web page at http://tinyurl.com/yqyxrt. We have published information about the time schedule of the transposition process on our MiFID transposition state of play webpage at http://tinyurl.com/29x2vo.
Can a firm be a systematic internaliser for derivatives? Rules related to SI seem to apply to shares only. However the SI definition is based on 'dealing on own account by execution of client orders'.	Yes. The definition of systematic internaliser (Article 4(1)(7) of the MiFID) does not make any reference to a specific financial instrument; therefore an investment firm can be a systematic internaliser for all types of financial instruments included in Annex I of the MiFID. However, the obligations under Article 27 of the MiFID only apply to those firms that are systematic internalisers with respect to liquid shares.
Does the Commission agree that, when an investment firm that carries out portfolio management for an eligible counterparty places an order (resulting its decision to deal) with another entity for execution, it would be carrying out reception and transmission of orders (as expanded by Recital 20 to Directive 2004/39/EC) and therefore (in accordance with Article 24(1) of Directive 2004/39/EC), the investment firm would not be required to comply with the obligations described in Article 19(1) of Directive 2004/39/EC (assuming that the investment firm is authorised to receive and transmit orders)? Under Article 24(1) of Directive 2004/39/EC, investment firms that are authorised to execute orders on behalf of clients or to receive and transmit orders are permitted to enter or bring about transactions with eligible counterparties without being obliged to comply with the conduct of business obligations set out in Article 19 of Directive 2004/39/EC or the best execution obligations described in Article 21 of Directive 2004/39/EC. Under Article 45(7) of Directive 2006/73/EC, an investment firm providing the service of portfolio management is required to comply with the best execution obligations set out in Article 21 of Directive 2004/39/EC to the extent that it executes the decisions to deal on behalf of its client's portfolio. Where the investment firm places an order (resulting from its decision to deal) with another entity for execution, Article 45(1) of Directive 2006/73/EC requires the firm carrying out portfolio management to comply with the obligation under Article 19(1) of Directive 2004/39/EC to act in the best interests of the client. The question in respect of which we seek clarification is whether, in the situation where an investment firm carries out portfolio management for an eligible counterparty, the investment firm would (in accordance with Article 24 of Directive 2004/39/EC) not be obliged to comply with the obligations set out Article 19 of Directive 2004/39/EC when placing orders (resulting from the firm's decision to deal) with another entity for execution. The argument in favour of this is that when placing an order (resulting from the firm's decision to deal) with another entity for execution, the firm would be carrying out the investment service of reception and transmission of orders. Although there is arguably no 'reception' of the order per se (because the order arises as a result of the manager's own decision to deal), the scope of the 'reception and transmission' activity is widened by Recital 20 to Directive 2004/39/EC. Recital 20 provides that 'For the purposes of this Directive, the business of reception and transmission of orders should also include bringing together two or more investors thereby bringing about a transaction between those investors'. By placing an order with a third party broker the investment manager is bringing about a transaction between two investors – its portfolio management client and that broker (the broker would normally either act as principal or as agent for an unnamed (and usually undisclosed) underlying transaction counterparty). On this basis, the investment	The services of reception and transmission of orders, execution of orders or dealing on own account are not considered to be part of the portfolio management service. So when a portfolio manager places an order with another investment firm for execution or when it executes a decision to deal it is considered to provide only the service of portfolio management. However, as the activities (placing of an order or execution of a decision to deal) pose the same regulatory risks as far as investor protection is concerned, Article 45 specifies that some form of best execution applies to them. In particular, paragraphs 1 to 6 of the MiFID implementing directive state that portfolio managers should be subject to obligations similar to those related to best execution when placing orders for execution with other investment firms while paragraph 7 specifies that when portfolio managers deal or transact directly with execution venues all of the obligations of Article 21 apply. Article 24(1) applies only to the services of execution of orders, reception/transmission of orders and dealing on own account but not to portfolio management. Therefore the Article 19, 21 and 22 protections apply when an investment firm manages a portfolio of an entity which would qualify as eligible counterparty for the above mentioned services and the entities should thus be offered the same protections as professional or retail clients.

firm would be carrying out reception and transmission of orders and so (in accordance with Article 24 of Directive 2004/39/EC), when doing so for an eligible counterparty it would not be obliged to comply with the obligations set out in Article 19 ofDirective 2004/39/EC (assuming that the investment firm is authorised to receive and transmit orders).	
Is there a matrix of which MiFID rules apply to which client classification (retail, professional and eligible counterparty)?	At this stage Commission services have not produced such a matrix.
1. How many systematic internalisers are likely across all EU states? 2. What is the cut off date for firms registering as systematic internalisers? 3. What notice will be given to the market when a firm sets up a systematic internalising business? 4. What happens if no firm becomes a systematic internaliser?	1. We have no estimates at this stage as to the likely number of systematic internalisers (SIs). 2. Firms that intend to carry on systematic internalisation from the commencement of MiFID will need to ensure they are authorised as investment firms by that date. There is no separate registration system for SIs. 3. An SI is required to make public certain quotes under Article 27 of MiFID. Each competent authority is required to publish a list of SIs in respect of shares admitted to trading on a regulated market that it has authorised as investment firms (Article 21(4) of Regulation (EC) No 1287/2006). The Committee of European Securities Regulators is obliged to publish a consolidated list under Article 34(5) of that Regulation. 4. If no firm becomes a systematic internaliser no firm will be subject to the obligations of Article 27 of MiFID.
1. If I have a policy legally agreed with my investor that stipulates I put all my business through a single trading entity am I breaking MiFID rules? 'Putting business through' means executing with a single trading entity like a Retail Services Provider in the UK or a Stock Exchange or perhaps an ECN (sending orders for execution from instructions received from my client). The question relates only to transactions in equities. 2. If my legally agreed policy with my client states they will only pay the execution price under my existing terms and conditions that have already been in force legally for a number of years, am I breaking MiFID rules? 3. If I change my best execution policy and do not get agreed sign off from my clients am I breaking MiFID rules?	1. MiFID obliges investment firms to take all reasonable steps to obtain the best possible result when executing client transactions. The Directive and its implementing measures do not prescribe how many venues an investment firm has to use or how many investment firms it should rely on for execution services. However, Article 21(3) of MiFID states that the order execution policy must include in respect of each class of instruments, information on the different venues where the investment firm executes its client orders and the factors affecting the choice of execution veneue. The policy must at least include those venues that enable the investment firm to obtain on a consistent basis the best possible result for client orders. An investment firm may either choose to execute orders directly or use other investment firms for execution services. When an investment firm executes directly, it will need to comply with Article 21 of MiFID. It is possible that a firm uses a single execution venue for the execution of its client orders but whether or not it complies with Article 21 will depend on the specific circumstances (e.g. type of clients, financial instruments, etc). It is expected that the greatest competition among execution venues will be in the area of share trading. As more venues attract liquidity and compete, it will become harder for investment firms to execute orders at only one venue and still meet the best execution obligations. CESR has published detailed guidance on this subject at www.cesr.eu . When an investment firm does not execute orders but merely transmits them to another investment firm for execution, it will have to comply with Article 45 of the MiFID implementing Directive. Again, it is possible that it relies mainly or solely on the services of only one investment firm, but whether or not an investment firm complies with its obligations will depend on the specific circumstances as mentioned above. In both cases (executing directly or relying on another investment firm for execution) an investment firm will need to closely monitor and periodically review the execution quality delivered by that execution venue or investment firm and make changes as necessary It may be possible that a client gives an instruction to the investment firm to always execute orders at a specific execution venue. However, the investment firm should not induce the client to do so. Recital 68 of the MiFID implementing Directive states that an investment firm should not induce client to instruct it to execute an order in a particular way, by expressly indicating or implicitly suggesting the content of the instruction to the client, when the firm ought to reasonably know that an instruction to that effect is likely to prevent it from obtaining the best possible result for the client. 2. Article 19(3) of the MiFID and Article 33 of the implementing Directive oblige the investment firm to inform its clients on all costs and associated charges related to the provision of investment services, including the services of order execution. Clients therefore need to be informed about the details of fees, commissions or mark-ups which the investment firms charge for execution services. As long as those fees are properly disclosed prior to the provision of services as required by Article 29 of the implementing Directive and reported to the clients in line with the obligations set out in Article 40 of the implementing directive,the investment firms are free to set their fees as they desire. 3. Article 21(3) second subparagraph of MiFID obliges investment firms to give their clients appropriate information on the execution policy. Investment firm must obtain the prior consent of their clients to the execution policy, so any significant changes to the policy need to be agreed by clients.
Should client instructions received outside market hours be treated as orders at the time of receipt and executed sequentially when the market opens? Article 47 specifies that investment firms must, when carrying out client orders, carry out otherwise comparable client orders sequentially, unless the characteristics of the order or prevailing market conditions make this impracticable. Generally this will mean that orders should be carried out in the order they are received by the firm. How does this apply when instructions to buy or sell received from clients outside market hours. Should they all be treated as 'orders' at the time the instruction is received, and therefore be carried out sequentially when the market opens, or should they all be treated as orders received at the time the market opens so that they are able to be executed.	Article 47(1)(b) of Directive 2006/73/EC provides that an investment firm must carry out otherwise comparable client orders sequentially and promptly unless the characteristics of the order or prevailing market conditions make this impracticable, or the interests of the client require otherwise. The general principle should be respected unless a deviation can be duly justified on the grounds indicated above. One instance foreseen by the Directive that may justify not treating client orders sequentially is the reception of orders by different media, as provided by Recital 78 of Directive 2006/73/EC. While it is clear why it could be impracticable to require sequential execution of order received on different media, it is less clear why it would be impracticable to execute orders sequentially when they are received outside market hours. Note that Article 48 of Directive 2006/73/EC specifies a number of conditions that need to be met before an investment firm can be permitted to aggregate client orders.

In the case of new issues particularly, clients who know they are to receive shares on a particular future date may give an instruction some days beforehand to sell those shares on that future date. Must all such instructions be carried out sequentially in order of receipt when the market opens on the day that the new shares are first able to be traded.	
Can the Compliance Function and/or the functions of the Money Laundering Compliance Officer be outsourced to a third party either located in a member state or in a third country?	Regarding the outsourcing of the compliance function under MiFID please refer to Question 267. The compliance function may also be outsourced to a service provider located in a third country provided that the investment can ensure that all the conditions in Article 14 are met. Article 34 of the Anti Money Laundering Directive (Directive 2005/60/EC) requires that investment firms establish adequate and appropriate policies and procedures of internal control, risk assessment, risk management and compliance management in order to forestall and prevent operations related to money laundering or terrorist financing. This Directive does not contain specific provisions on outsourcing. It will be for the competent authorities of the Member States to assess whether procedures and processes of the investment firm which outsource the compliance function to a service provider are acceptable according to national law implementing the Anti Money laundering Directive.
What exactly is the MiFID definition of a client?	MiFID defines client as 'any natural or legal person to whom an investment firm provides investment and/or ancillary services' (Article 4(1)(10)).
1. 'Eligible counterparties should be considered as acting as clients'. Does this mean that MiFID's client dispositions are applicable to counterparties? 2. Are there guidelines on what the definition is of 'eligible'?	1. As regards eligible counterparties, Article 24 of MiFID provides that best execution obligations under Article 21, together with conduct of business obligations under Article 19 and client order handling obligations under 22(1), do not apply with respect to the services mentioned in Article 24 (ie, execution of orders on behalf of clients, dealing on own account, and reception and transmission of orders). At the same time, as indicated by Recital 40 of MiFID, eligible counterparties should be considered to be acting as clients. One consequence of this is that the protections of Articles 13 and 18, relating inter alia to conflicts of interest and client assets, will continue to apply. 2. Eligible counterparties are defined in Article 24 of the MiFID and Article 50 of Directive 2006/73/EC.
Can (for example) a bank define a liquidity provider or the internal trading desk as a client? If so then the next question is: Can the bank ask this type of client to send orders so that these orders will be crossed with orders received from the bank's other clients? If the answer is Yes, is the bank then an MTF?	No, a client has to be a person different than the investment firm. If client orders are crossed with the firm's internal trading desk the firm will be dealing on own account with those clients.
Whilst Article 25(2) requires data retention by firms for all transactions in financial instruments which they have carried out, whether on own account or on behalf of a client, Article 25(3) refers to firms which execute transactions in any financial instruments admitted to trading on a regulated market. Does execute mean 'the act of complying with an instruction to trade by an unequivocal acceptance (only conditional where relevant upon the rules of an RM or MTF) where the characteristic of the acceptance is a commitment by the accepting firm to deliver or transfer a certain amount of a specific instrument for a certain value of cash or other consideration' OR is it the same as carried out? E.g.: 1. if Firm A passes an order to a member (M) of an RM and M then places the order on an order book and it is executed, only M will have executed that order but both M and A will have carried it out. 2. if Firm A passes an order to an SI (or market maker) to trade at the public quote and the SI then deals by trading against its own capital, the SI will have executed but A will not have. A will have carried out a transaction. 3. if a client instructs Firm A to trade for him and Firm A does either of 1 or 2, Firm A will still not have executed because A's acceptance of the instruction is not characterised by a commitment to deliver a certain amount of an instrument for a specified price – that creation of certainty only occurs with the execution on market. This is even if Firm A is instructed only to trade at a specific price, A's acceptance of the instruction is to see if this can be done – what A does is not an execution of that instruction but compliance with it. 4. Firm A trades anonymously with what turns out to be Firm B in a MTF; matching is	The answer to this question is discussed in CESR's Level 3 guidelines on MiFID transaction reporting (http://www.cesr.eu/index.php?docid=4611). The MiFID transaction reporting regime is based on reporting of executed transactions and not directly information on individual orders. It is therefore necessary to separate execution of a transaction from reception and transmission of orders. CESR notes that there will be many different circumstances in which transactions take place. In some cases a client will go to an investment firm who then executes a transaction with a market counterparty. However, there may also be more complex situations where more than one investment firm is involved in the transaction chain (e.g. the client goes to Firm A who then goes to Firm B who in turn deals with a market counterparty). Such a chain may involve several transactions between intermediaries or it may include passing of an order by an investment firm to another investment firm for execution. CESR members have considered the conditions under which, in such a transaction chain, the investment firms involved may be said to be executing transactions as opposed to simply receiving and transmitting orders. CESR members note that based on current differences in market structures (including the size of the market) the treatment of such a chain may, to some extent, differ from one Member State to another.

a commitment under the rules of the MTF to 'deliver or transfer a certain amount of a specific instrument for a certain value of cash or other consideration' to each other and so both execute and carry out.	
Where can I find the official list of EEA regulated markets?	At this stage we still publish the list of regulated markets provided for in Article 16 of Directive 93/22/EEC (the Investment Services Directive). The latest update of this list, which includes regulated markets in EEA countries (as notified by Norway and Iceland) was published in the Official Journal on 22 February 2007 (OJ C38) and also on our MiFID web page (http://tinyurl.com/yyulyz). After the application date of MiFID (1 November 2007) we will start drawing up the list as provided for in Article 47 MiFID. According to this provision the updated list will be published in the Official Journal annually. Additionally, it has to be updated and published on our web page on a regular basis.
1. The reference to 'financial institution' is to a class of entity that must be recognised as an eligible counterparty. Is that reference intended to be narrow i.e. to 'financial institution' as defined in 2000/12/EC; or is it intended to be general? If it is general, then there are many financial institutions (undefined) who could fall within this obligation, seemingly unintentionally. 2. Is the obligation to ensure that investment firms obtain an express confirmation from prospective counterparties intended to apply to the first subparagraph of Art. 24(3) only, or to the paragraph numbered 1. i.e. Art.24(1)?	1. The reference to 'financial institution' for the purposes of Article 24 MiFID is not limited to the notion of 'financial institution' as defined in 2000/12/EC as recast by Directive 2006/48/EC and has to be understood in a broader sense. It is meant to cover regulated institutions in the securities, banking and insurance sector whether regulated at European level or not. 2. Article 24(2) MiFID sets out the entities which should be treated as eligible counterparties per se – i.e. the investment firm does not need to undertake any further steps. On the other hand, Article 24(3) MiFID gives an option to Member States to recognise as eligible counterparties also entities other than the ones mentioned explicitly in Article 24(2) MiFID. The conditions that such entities have to fulfill are set out in Article 50 of Directive 2006/73/EC. For this type of entity the investment firm has to obtain the express confirmation that it agrees to be treated as eligible counterparty (Article 24(3) 2nd sub-paragraph MiFID).
Are Hedge Funds which are currently unregulated, captured within the MiFID requirements or are they out of scope? In regards to Fund of Hedge Funds – are these structures subject to MiFID requirements? If so, do they constitute reportable transactions to Exchanges?	Hedge funds and their managers benefit from the exemption under Article 2(1)(h) which exempts 'collective investment undertakings and pension funds whether coordinated at Community level or not and the depositaries and managers of such undertakings'. Further details about the application of this exemption are given in the answer to question 21.2. If hedge fund products (including fund of hedge funds) are sold or advised on by intermediaries, those intermediaries will not themselves be exempt from MiFID unless they are acting in their capacity as managers of collective investment schemes or come within one of the other exemptions from MiFID set out in Articles 2 and/or 3 thereof. Transactions executed in financial instruments must be reported to regulators, not to exchanges, under Article 25 of the MiFID. However, firms can make use of the exchange's facilities in order to report to regulators. As financial instruments, transactions in units in funds of hedge funds would be subject to reporting requirements if executed by an investment firm. See also answers to questions 38 and 70.
How is Private Equity impacted by the MiFID? Which obligations do PE firms have to implement to be MiFID compliant?	If a private equity firm conducts, on a professional basis, investment activities such as investment advice, underwriting or placing, then it will normally be required to be registered as an investment firm under MiFID. The only exceptions would be if it came within one of the exemptions in Articles 2 and/or 3 of Directive 2004/39/EC, in particular the exemption for collective investment undertakings and pension funds and their managers. Further details about the application of this exemption will be given in the answer to question 21.2. The authorisation and operating conditions of investment firms under MiFID are set out in Title II of Directive 2004/EC/EC.
Is it MIFID's intention that market professionals should not be permitted to waive Client Money protection (rights to segregation of funds due and payable to them)?	Yes. The requirements concerning safeguarding of client assets (instruments – Article 13(7) MiFID and funds – Article 13(8) MiFID) are part of the organisational requirements applicable to investment firms and their application does not depend on the type of client to whom the service is provided.
1. Is it intended that the Article should apply to affiliates of a firm just as it does to unconnected clients? 2. To what extent is it intended to apply to OTC/'direct' trades with other market professionals for own account? Does this activity constitute 'executing an order' for purposes of Article 21 (1)? 3. Are we correct to assume that securities financing transactions (stock loan/repo) (SFTs) will not and cannot be covered by the Article, given that SFTs have no central price-formation mechanisms and (more fundamentally) that these are OTC 'products', contractually based, and priced according to the unique characteristics (eg as regards credit risk) of each counterparty?	1. Article 21 applies to all clients of an investment firm, including any legal entities which may be affiliated with the investment firm. 2. Article 21 applies when an investment firm executes an order on behalf of its client. It therefore may apply in situations where an investment firm is executing an order OTC or when it deals with its client directly. However, Article 24(1) states that investment firms do not need to comply with the obligations under Articles 19, 21 and 22(1) when bringing about or entering into transactions (including dealing on own account) with eligible counterparties. It is therefore expected that most, if not all, 'market professionals' will not owe one another the duty of best execution because they are classified as eligible counterparties under Article 24(2). 3. Article 21 obliges investment firms to execute orders on terms most favourable to the client. The article does not exclude any types of orders or financial instruments from the scope of its application. Recital 70 of the MiFID implementing directive explicitly states that the best execution obligation applies to all types of financial instruments when an order is being executed on behalf of a client. CESR will be publishing guidance on the application of best execution obligation to complex intruments and OTC derivatives. See http://tinyurl.com/2bj2oq, Securities financing transactions (SFTs) should therefore fall under the obligation of best execution whenever a client of an investment firm issues an order and expects the investment firm to act on her behalf.

Is it under consideration to expand the application of the MiFID to insurance undertakings with regard to unit-linked life assurances?	There are no current plans to expand the application to life assurance products (that are not 'financial instruments' within MiFID) in the way suggested. However, the issue of substitutable products generally will be the subject of an expected report on the joint working program of the 3 Level 3 committees, with the Committee of European Securities Regulators (CESR) and the Committee of European Insurance and Occupational Pensions Supervisors (CEIOPS) in the lead. As well, the Commission is engaged in two studies which have relevance to the issue: 1. Long-term savings study The European Commission, DG Internal Market & Services, is, through a consultant, carrying out a study on the EU market for consumer long-term savings vehicles. This study is to provide a comparative analysis of products, market structure, costs, distribution systems and consumer saving patterns. The objective of this study is to gain a clear understanding of the market for long-term savings vehicles for consumers within the EU. The study should contribute to an understanding of which products are competing for consumer attention, the manner in which they are sold to consumers and the conditions under which they are offered to consumers. 2. Information requirements As announced in the White Paper on Financial Services Policy (2005-2010), the Commission plans to launch in the course of 2008 an external study on information requirements in EU financial services legislation. The current variety and accumulation of information to be provided to financial services users may be confusing to both users and service providers. The results of the study should be a clear description of the information (and possibly marketing and distribution) requirements in financial legislation at EU and Member State level and a thorough analysis of how the requirements set out in the various pieces of legislation can, and do, interact, including the consequences of any gaps, overlaps or inconsistencies identified.
MiFID states that Best Execution has to be assured for all financial instruments covered by MiFID. There is also some detail on what Best Execution would be in regulated markets. Is there any hint or information what Best Execution would look like for OTC products? Is there a Best Execution policy necessary? Would it be possible to only have expressive client orders for OTC business and therefore not dispose of any Best Execution policy for OTC?	Best execution applies to all financial instruments. This means that investment firms will need to have an execution policy in relation to all instruments for which they provide execution. However, it is not expected that best execution obligations will be applied in the same manner in relation to different instruments. Recital 70 of the MiFID implementing Directive clarifies that by stating that, for example, transactions involving customised OTC financial instruments may not be comparable for best execution purposes with transactions involving shares traded on centralised execution venues. Article 21(3) of MiFID as well as Recital 66 of the MiFID implementing Directive provide some guidance on how an execution policy should be established. However, there are specifics concerning the OTC transactions. CESR will provide further guidance on the application of best execution obligations to OTC products at its webpage (http://tinyurl.com/2bj2oq).
Must a firm obtain the prior express consent of clients to its execution policy when dealing with units in a collective investment undertaking and placing the orders directly with the fund manager / UCITS firm? (and therefore trading outside the systems of a regulated market or MTF)?	Yes. The third subparagraph of Article 21(3) of MiFID states clearly that investment firms must obtain the prior express consent of their clients before proceeding to execute their orders outside of a regulated market or an MTF. This consent may be obtained either in the form of a general agreement or in respect of individual transactions. However, on a purposive reading of the express consent requirement, an investment firm does not have to obtain express consent from its clients where the relevant instruments are not admitted to trading on a regulated market or MTF. The same conclusion can be reached in those circumstances when amongst the venues that the investment firm is obliged to included in its execution policy in accordance with article 21 there is no RM or MTF. CESR is expected to publish questions and answers on Best Execution at the end of May 2007 (see http://tinyurl.com/26qzn9).
Can you tell our technicians what they need to know to put into practice 'Level 3'?	Level 3 measures refer to those guidance and recommendations issued by the Committee of European Securities Regulators (CESR) to ensure convergent application of the Level 1 and Level 2 measures. Please refer to the following third party web page: http://www.cesr.eu/index.php?page=groups&mac=0&id=53.
Are Unregulated Collective Investment Schemes as an instrument type in scope and subject to MiFID requirements? If a firm entity is an unregulated legal entity at the firm level by the home regulator – its principal business activities are property-related and comprise unregulated collective investment schemes, although it also has some regulated collective investment schemes which exist under a related firm entity within a Group of companies for regulatory purposes only – is the unregulated firm therefore subject to MiFID requirements?	All units or shares in collective investment undertakings are financial instruments for the purposes of MiFID, irrespective of whether they are regulated at European level (UCITS funds) or at the national level, or whether they are unregulated. However, the fact that MiFID considers participations in collective investment undertakings as financial instruments does not mean that those undertakings are necessarily subject to MiFID authorisation or operating requirements. In fact, collective investment undertakings are exempt from the application of MiFID in relation to their operations as such (Article 2(1)(h)). For further details, see answer to question 21.2.
How widely should the exemption for 'collective investment undertakings and pension funds whether coordinated at Community level or not and the depositaries and managers of such undertakings' be understood?	This exemption is limited to the activities of collective investment undertakings or pension funds in their operations as such. In general terms, the scope of the exemption should be understood as limited to the following functions, with respect to the funds managed by the collective investment undertaking or pension fund, which are listed in Annex II to the UCITS Directive (1985/611/EEC/) (see http://tinyurl.com/2xecvp). — Investment management. — Administration: (a) legal and fund management accounting services; (b) customer inquiries; (c) valuation and pricing (including tax returns); (d) regulatory compliance monitoring; (e) maintenance of unit-holder register; (f) distribution of income; (g) unit issues and redemptions; (h) contract settlements (including certificate dispatch); (i) record keeping. — Marketing. Even activities which would otherwise fall within MiFID and that are carried out as part of of the operation of a collective investment undertaking or a pension fund are covered by the exemption.

	By contrast other activities, such as investment advice, or individual portfolio management for particular clients, are not covered by the exemption. Such activities require an authorisation under MiFID unless they fall within another relevant exemption, such as the exemption in Article 2(1)(j) for persons providing investment advice in the course of providing another professional activity not covered by the Directive provided that the provision of such advice is not specifically remunerated. See also our answe to question 121 on Article 2(1)(b). Additionally, for UCITS management companies, special provisions in Article 5(3) and 5(4) of the UCITS Directive (85/611/EEC) must be considered. These have the effect of applying some provisions of MiFID to individual portfolio management, investment advice and safekeeping and administration in relation to units of collective investment undertakings, without the need for authorisation under MiFID. See also our answers to question 37 on Article 66 of MiFID and question 70 on Article 2(1)(h) of MiFID.
Does what MiFID requires in terms of 'transparency' also concern what are called 'trailer fees'? Is MiFID sufficiently explicit in that field?	Article 26 of Directive 2006/73/EC sets out a comprehensive regime covering payments and other benefits paid or provided to or by investment firms. 'Trailer fees' paid to an investment firm by a product provider in relation to the selling of investment products would normally be a 'fee or commission paid in relation to the provision of an investment or ancillary service to the client'. Therefore the tests in Article 26 of Directive 2006/73/EC would need to be applied in order to determine whether the trailer fees are permitted. See also Recital 39 of the same Directive.
Given the provisions of Article 25 and 32(7), and the discretion granted by Directive 2004/39/EC for competent authorities in Member States to adopt rules that are super-equivalent to MiFID requirements in the transposition process, is it sufficient for an investment firm with multiple branches in Member States to fulfil their transaction reporting obligations by reporting only to their home regulator according to home regulator rules, or does a multi-branch investment firm need to transaction report to all of the regulators in member states in which they operate according to each competent authority's transposition of MiFID transaction reporting requirements? If it is the latter, is there a single consolidated source of each competent authority's transaction reporting rules?	If a branch of a firm provides services within the territory of the Member State in which it is located, transactions executed through that branch in the provision of such services should be reported to the competent authority of the Member State where the branch is located in the format required by that competent authority. At this stage, there is no single source of applicable requirements. However, CESR has issued Guidelines and Recommendations on transaction reporting at its web-page at http://tinyurl.com/2bj2oq.
This question is raised in follow up to the EU Commission response to a previously raised question (question number 5). The response to this question states: 'After the application data of MiFID (1 November 2007) we will start drawing up the list as provided in Article 47 MiFID'. If the list of EEA Regulated Markets is not available prior to 1st November 2007, will the list of financial instruments (as required by Article 11 of Regulation (EC) 1287/2006) therefore only be limited to the instruments admitted to trading on the current list of RMs as published by the EU Commission on the 22nd February 2007? Our assumption had been that the list of financial instruments (admitted to trading on a RM) would be dependent on the availability of a list of Regulated Markets. As an example, will commodity derivatives admitted to trading on the LME (which is not a RM today but is likely to be after the MiFID application date) not be reportable on 1st November 2007, as the LME will not be recognised by the EU Commission as a RM until after the MiFID application date (1st November 2007)?	1. The list of regulated markets published by the Commission does not have constitutive effect for the qualification of a trading platform as a regulated market. Essential for this is the authorisation as such granted by the national competent authority. Therefore, once a regulated market is licensed in one Member State it is recognised as such throughout the EEA and no consequent action is necessary. 2. The list of financial instruments provided for in Article 11 of Regulation 1287/2006 does not depend on the availability of the list of regulated markets published by the Commission. The list of financial instruments has to be drawn up by the relevant competent authority. In doing so it will take into consideration financial instruments which are admitted to trading on a regulated market authorised as such by its home competent authority at that time. Furthermore, this list has to be made available for the first time in June 2007 (hence, well in advance of the start of MiFID application) and has to be kept updated by the relevant competent authority.
1. 'Main business' is to be understood generically as in Art. 2(1)(i). Does the Commission agree? 2. Is it possible for a company comprised by the exemption (k) to provide other kinds of investment services than trading on own account, if the provision of such investment services is ancillary to the main business being trading on own account?	1. Questions with respect to the scope of exemption are currently under the scrutiny of CESR on the basis of a request forwarded to it by the Commission (http://ec.europa.eu/internal_market/securities/docs/isd/cesr-mandate_en.pdf), 2. No. If a commodity dealer exempted under 2.1.(k) decides to provide other investment services (of those included under Section A of Annex 1) on a professional basis he has to apply for a MiFID authorisation unless he falls under another applicable exemption.

Is dealing on own account or providing investment service in commodity derivatives mentioned in Annex 1, Section C (5), (6) and (7) included in this exemption, or does the exemption relate only to commodity derivatives or derivative contracts included in Annex 1, Section C (10) that is included? How should the words 'main business' be understood? In our opinion a company can have as its main business the production and sale of energy as a generic concept, i.e. it shall not be limited to the one product that is its main product (e.g. electricity) if it also produces or sells other energy products (e.g. gas, coal, oil etc.). This means that it in our opinion can provide investment services with derivatives of all the energy products it produces or sells. Does the Commission agree? If the main business is the production or sale of energy, can the company then sell emission allowances and freight rate derivatives to its clients, based on the argument that the price of emission allowances or freight rates are of importance or naturally related to the price of the energy? Does 'when considered on a group basis' mean that there are no limitations on the activities of the actual person who provides investment services, as long as the group as such does not have as its main business the provision of investment services? In other words, may one company within a group provide investment services with respect to commodity derivatives as its main business, as long as the main business of the group is not the provision of investment services?	The exemption under Article 2(1)(i) refers to: a) dealing on own account in 'all' financial instruments (those included under Section C of Annex 1); b) provision of other investment services (than dealing on own account) in financial instruments of the type included under Section C (5), (6), (7) and (10) of Annex 1. Certain questions with respect to the scope of the exemption are currently under the scrutiny of CESR on the basis of a request forwarded to it by the Commission (http://ec.europa.eu/internal_market/securities/docs/isd/cesr-mandate_en.pdf). However we would like to recall that the exemption incorporates two conditions: the first is that the provision of investment services is not the main business of the firm; and the second that those investment services have to be ancillary to the main business. In this respect we consider that the fact that the price of the derivative is 'related' to the price of the products delivered through the main business of the firm is not a 'per se' indication of the fact that the derivative is ancillary to the main business. The same argument is valid for your last question, the activity of the subsidiary that provides investment services has to be shown to be actually ancillary to the main business of the group. The fact that it is different in kind does not constitute a sufficient indication that it should be covered by the exemption in Article 2(1)(i).
Whether MiFID is applicable to OTC foreign exchange agreements only under Annex I, Section B, paragraph 4 (foreign exchange services where these are connected to the provision of investment services), or OTC foreign exchange agreements are considered to be financial instruments under Annex I, Section C, paragraph 4?	Derivatives on currencies listed in Section C(4) of Annex I of MiFID are financial instrumets. An entity providing investment services to its clients in relation to these instruments will therefore have to comply with MiFID's authorisation and operational requirements. Spot market foreign exchange agreements are not considered to be financial instruments for the purposes of MiFID. Section B(4) of Annex I lists the provision of foreign exchange services as an ancillary service which applies only to those cases where those services are connected to the provision of investment services. The scope of the ancillary service is therefore restricted only to operations which are related to transactions which form part of an investment service. For example, when an investment firm is given an order to purchase foreign shares and those shares can only be purchased in a currency the client does not own, the firm may engage in foreign exchange operations in order to be able to execute the order.
Is there a precise definition of share, for example does 'share' include Exchange Traded Funds (ETF's)?	The term 'share' is undefined in MiFID and its implementing measures. This leaves a margin for discretion by Member States on the set of instruments covered by the transparency provisions (Article 27-30 and 44-45 of Directive 2004/39/EC and the related implementing measures). The approaches followed by the various Member States are, for instruments equivalent to shares, reflected in the CESR MiFID database that contains a list of shares admitted to trading on a regulated market. Moreover, Recital 46 of Directive 2004/39/EC allows Member States to extend the application of transparency provisions. Furthermore, the concept of 'transaction' for the purposes of the transaction reporting and market transparency provisions of MiFID is defined in Article 5 of Directive 2006/73/EC so as to exclude 'securities financing transactions'. This term is defined in Article 2(10) of Regulation (EC) 1287/2006. So a securities financing transaction in a share would not be a transaction for these purposes.
Where a non-EEA branch of an EEA firm trades with a non-EEA client and uses the balance sheet of an EEA legal entity, is this within scope of the trade reporting requirements?	Yes, when the non-EEA branch is not a separate legal entity from the EEA investment firm, where the transaction is executed by the EEA investment firm, as would be evidenced by the appearance of that transaction on its balance sheet, this investment firm will have to publish the transactions concluded in shares admitted to trading on a regulated market even when these transactions have been carried out with non-EEA clients.
I have heard that active fund management companies are affected by MiFID while common fund management companies are not. Is this information right? How and where can I find information about this issue?	The exemption for management companies does not depend on whether a management company engages in active fund management or not. All collective investment undertakings and pension funds whether coordinated at Community level or not are exempt from the application of MiFID in relation to their operations as such (Article 2(1)(h)). Further details on the application of this exemption can be found in the answers to question 21 and 21.2.
Would the management of non-coordinated funds by a company be considered as providing the service of portfolio management as defined by the MiFID and thus covered by this Directive?	In contrast to individual portfolio management (as defined in Article 4(1)(9) MiFID), the management of collective funds (whether coordinated or non-coordinated) by a management company is not an investment service and is therefore not covered by the MiFID. Such management companies as well as the collective funds are therefore exempt from the scope of MiFID (Article 2(1)(h) MiFID) as far as their operations as collective investment undertakings is concerned (see answers to questions 21 and 21.2). (This applies where the management company is acting as the legal representative of the investment fund and not as a management company that has only been delegated by the fund's management company to perform some management functions.) However, where management companies provide other activities, such as investment advice, or individual portfolio management for particular clients, this is not covered by the aforementioned exemption. Such activities require an authorisation under MiFID unless they fall within another relevant exemption, such as the exemption in Article 2(1)(j) for persons providing investment advice in the course of providing another professional activity not covered by the Directive provided that the provision of such advice is not specifically

	remunerated. Additionally, for UCITS management companies, special provisions in Article 5(3) and 5(4) of the UCITS Directive (85/611/EEC) must be considered. These have the effect of applying some provisions of MiFID to individual portfolio management, investment advice and safekeeping and administration in relation to units of collective investment undertakings, without the need for authorisation under MiFID. See answer to question 37 on Article 66 of MiFID. See also the answer to question 70 on Article 2(1)(h) and Annex I, Section A(4) of Directive 2004/39/EC.
Does the MiFID replace the Directive 2001/34/EC (Official Listing Directive)?	MiFID does not replace the Official Listing Directive. Member States have to provide for the possibility for markets to have an official listing regime in accordance with this Directive if they wish to do so.
What does ‘dealing on own account’ mean for the purposes of the exemption in Article 2(d) MiFID?	This provision excludes persons who do not provide any investment services or activities other than dealing on own account by providing a system accessible to third parties in order to engage in dealings with them (unless such persons are market makers or deal on own account outside a regulated market or an MTF on an organised, frequent and systematic basis). This exemption should be regarded as a very restricted one. Its purpose is to leave outside of the scope of the MiFID natural or legal persons and/or charity organisations that undertake transactions in securities on their own behalf and for their own account. It does not include market makers (a notion which per se is quite broad) and other firms that deal on own account in an organised, frequent and systematic manner.
Can a management company of a non-coordinated fund (i.e. which is not covered by Directive 85/611/EEC) apply for a MiFID authorisation?	Yes. If a management company of a non-coordinated investment fund only provides activities of a collective investment undertaking, it need not apply for MiFID authorisation because of the exemption in Article 2(1)(h) of MiFID. However, it can and must seek authorisation under the MiFID if it wishes to provide investment services covered by the MiFID that go beyond the collective portfolio management, such as individual portfolio management or investment advice. See also the answer to question 70 on Article 2(1)(h) and Annex I, Section A(4) of Directive 2004/39/EC.
Directive 2004/39/EC describes at number (3) Section B from Annex I the ‘advice to undertakings on capital structure, industrial strategy and related matters and advice and services relating to mergers and the purchase of undertakings’ as an ancillary service that can be performed by investment firms. Having in mind the above- mentioned definition we would like to ask your opinion whether an investment firm can intermediate the acquisition of shares issued by companies which are not admitted to trading on a regulated market/traded on a multilateral trading facility?	Yes. Intermediating in the acquisition of shares of entities not admitting to trading on a Regulated Market or not traded in an MTF would constitute the provision of an investment service as long as those shares are financial instruments. In order to be financial instruments. Those shares have to be transferable securities within the meaning of Article 4(1)(18) of MiFID and in particular be ‘negotiable on the capital market’. Those terms have to be understood in a broad manner in the sense that only under limited circumstances will a share that is negotiated not fall under the definition of financial instrument. It is important to appreciate that investment firms are not limited to conducting MiFID activities. Intermediating in the sale of non-financial instruments (such as shares that are not negotiable on the capital market) is not regulated by MiFID. Equally, such activities are not covered by the MiFID passport.
Is it necessary to adopt specific provisions (other than interpretative guidance) in order to transpose certain MiFID requirements, where these requirements are already in line with the general principles of civil, administrative etc. law?	It is essential that the MiFID requirements are transposed into national legislation. It is not important whether this is done through specific ad hoc rules or by means of civil, administrative or other law. If certain requirements are already included in other pieces of national law (e.g. civil, administrative, etc) then further transposition may not needed.
Can a UCITS management company provide the investment service of investment advice without an additional MiFID licence?	Pursuant to Article 5 (3) of the UCITS Directive (85/611/EEC) Member States may, by way of derogation from Article 5(2), authorise UCITS management companies to provide individual portfolio management, investment advice, and safekeeping of clients' assets in relation to UCITS without the need to obtain a MiFID licence, if they additionally manage a collective investment fund. Therefore UCITS management companies situated in a Member State which made use of the aforementioned derogation can provide the service of investment advice without any MiFID authorisation. However, such UCITS management companies when providing investment services (i.e. investment advice) will have to comply with certain specified provisions of MiFID (see Article 5(4) UCITS Directive) (e.g. the conduct of business rules – Article 19 MiFID).
Article 21(3) of 2004/39/EC requires investment firms to obtain the prior express consent of their clients before proceeding to execute their orders outside a regulated market or an MTF. Article 44(1) of 2006/73/EC states that ‘execution venue’ means a regulated market, an MTF, a systematic internaliser, or a market maker or other liquidity provider. It is unclear from this what is the execution venue where an investment firm crosses client orders. CESR technical advice in 2005 (written before Directive 2006/73/EC was created) stated that when an investment firm crosses client orders, the firm itself is the execution venue. If this view were accepted by the Commission (notwithstanding Article 44(1)), prior express consent from the client would appear to be required. If, however, the investment firm crossing the client orders is a market maker on a	When an investment firm 'crosses' its clients' orders it will be an execution venue for the purposes of MiFID (Article 44(1)). What matters for the purposes of determining whether an order was executed on a regulated market or an MTF is whether a particular transaction is concluded in the system and/or under the rules of the regulated market or an MTF and not the status of an investment firm as a member or market maker of a given trading venue.

regulated market, and is therefore subject to the rules of that market when dealing with the crossing, should the order be regarded as executed on the regulated market?
If so, would the situation be any different when a member firm of a regulated market which is not a market maker (but which is nevertheless subject to the rules of that market) crosses client orders?

I am trying to find the most comprehensive source for reading and learning about MiFID requirements (regulations). I continue to search the web which is flooded with MiFID information but it's difficult to locate THE document I need to understand to best serve my customers when the time comes. Your help would be most greatly appreciated.	There is no single authoritative source of information but you may wish to start with the following documents: - Background Notes to the MiFID Implementing Regulation and Implementing Directives: available at http://ec.europa.eu/internal_market/securities/docs/isd/dir-2004-39-implement/dir-backgroundnote_en.pdf http://tinyurl.com/hsqx6 and http://tinyurl.com/ypcc6s. - Frequently asked questions – available at http://tinyurl.com/ywx6qj Note that both the above documents refer to draft legislation and have not been updated to take account of the final texts. The DG Internal Market MiFID pages (http://ec.europa.eu/internal_market/securities/isd/index_en.htm) and CESR's MiFID page (http://www.cesr.eu/index.php?page=groups&mac=0&id=53) contain more useful information.
No text in English	The requirement for authorisation under Article 5(1) MIFID does not apply to third country firms. Such entities may provide investment services in the EU market under the respective law of each Member State, provided that national provisions do not result in treatment more favourable than that accorded to investment firms from other Member States. This analysis applies both where a third country firm provides services in a Member State from outside the EU, and where it provides them through a branch in the Member State. However, such a third country firm will not have a passport under MiFID, and must therefore comply with the national law of each Member State in which it carries on investment services or activities. (1) Object and legal basis of MiFID As is clear from recital 1 of MIFID, the Directive aims at harmonising the initial authorisation by a home Member State in order to allow authorised investment firms to conduct business throughout the EU without any further restrictions (creating a 'European passport' for investment firms established in the EU). As a Directive adopted under Article 47(2) EC Treaty (in conjunction with Article 55 EC Treaty), it is designed to foster the freedom to provide services within the Community. Those Treaty Articles are not the appropriate legal basis for a measure regulating activities of third country entities. If MIFID also had the purpose of regulating activities of third country investment firms in the EU market, Article 57(2) EC – which provides for the adoption of measures on the movement of capital to or from third countries involving direct investment, establishment, the provision of financial services or the admission of securities to capital markets – would need to be cited as an additional legal basis. (2) Recital 28 – Treatment of third country branches Recital 28 of MiFID states that 'the procedures of the authorisation, within the Community, of branches of investment firms authorised in third countries should continue to apply'. This formulation mirrors Recital 13 of the predecessor Directive 93/22/EEC (Investment Services Directive –'ISD'). Article 5 of the ISD states expressly that Member States should not treat third country investment firms more favourably than Community firms. Consequently, it is clear that under the ISD the granting of access to third country firms was left to the Member States, subject to a Community obligation that the national regime for third country firms should not create a competitive disadvantage for Community firms. Recital 28 MIFID indicates an intention to carry on this system; by implication, there was no intention to create a new Community authorisation requirement for third country firms. (3) No authorisation mechanism for third country firms Article 5(1) MiFID provides that authorisation should be granted by the competent authority of the home Member State. Article 4(1)(20) MiFID defines the home Member State – for legal persons – as the one where the registered office or head office is situated. The definition does not indicate the home Member State of a third country entity (this contrasts, for example, with the Prospectus and Transparency Directives, which define the home Member State of third country, as well as EU, issuers), and there is no provision determining which Member State would be responsible for granting the authorisation for third contry legal persons whose registered office (or head office) is not situated in the EU. This suggests that third country investment firms, lacking a 'Home Member State', are not intended to be subject to the authorisation requirement. (4) Absence of provision on supervision of third country firms The need to provide for a uniform supervisory system at EU level may vary according to the nature of the service in question. The nature of the services and activities regulated under MiFID do not warrant a requirement that third country providers should be established in the EU, as a necessary condition for effective supervision by Member States. If such need had been identified, one would expect the legislator to have included operational provisions on such important subject matter. However, such provision is entirely absent from MiFID. Only Article 15 MiFID deals expressly with third countries by containing a mechanism to foster market access for Community firms there. Article 15(2) MiFID mentions a situation where 'effective market access granted by the Community to investment firms from third country' could not be mirrored in a third country. If the authorisation requirement under Article 5(1) MiFID was intended to apply to third country firms, Article 15 MiFID would have mentioned that requirement and used it as a yardstick for comparable treatment of Community firms in third countries. (5) Application of MiFID to third country firms inconsistent with GATS Article 5(1) MiFID must also be interpreted in a way that is consistent with the Community's existing commitments under the GATS. The European Court of Justice has established that Community law must be construed as far as possible in a way that is consistent with international agreements binding on the Community. See ECJ, Case C-61/94, COM vs. Germany, ECR 1996,1-4006, para. 52 (International Dairy Agreement). According to Section B.3 of the Understanding on Commitments in Financial Services (OJ 1993, L 141, p. 27 as amended), the Community granted financial suppliers of other WTO members the right to cross-border trade of certain financial services. Under Section B.5 of that Understanding, the Community accorded 'the right to establish or expand within its territory (...) a commercial presence'. According to Section D.2 of that Understanding, commercial presence means an enterprise within a Member's territory for the supply of financial services, including branches. As this right is not subject to a general restriction, the requirement of prior authorisation of third country investment firms under MIFID would contravene this commitment. This is because, in order to be authorised, third country firms would have to move their registered office to the EU, since there is no mechanism for the authorisation of a firm that does not have a home Member State, as defined in Article 4(1)(20) MiFID. In order to avoid such inconsistency with the Community's commitments, Article 5(1) MiFID must be interpreted as not

	covering cross-border services from third country investment firms or services provided by their branches situated in the EU.
Can you provide some examples of activities to which the exemption for other advisory services applies?	This provision exempts persons who provide investment advice in the course of carrying out another professional activity provided that such advice is not specifically remunerated. Tax advisers and lawyers can be given as examples of professions that could fall under this exemption.
Is it possible to obtain a MiFID authorisation only for the provision of ancillary services? Is it possible to add further conditions for the authorisation of ancillary services?	The MiFID does not provide for the possibility to grant a MiFID authorisation exclusively for the provision of ancillary services (Article 6(1) last sentence MiFID); ancillary services should be covered by an authorisation for the provision of one or more core investment services.
Under what conditions can Member States make use of the optional exemptions included in Article 3 MiFID?	Member States can make use of the option not to apply MiFID provisions to some persons only if those persons are regulated at national level (Article 3(1) last sub-paragraph). The way of regulating such entities at national level can vary for example from a registration regime to imposing some (instead of all) MiFID requirements or requirements similar to the ones included in MiFID. However, even if requirements similar to MiFID apply to those persons they will not benefit from the MiFID passport.
Can UCITS management companies obtain a licence to operate an MTF (as defined in Article 4(1)(15) MiFID?	UCITS management companies cannot obtain a licence to operate a MTF. The UCITS Directive limits the types of services that a management company can provide (collective management only and, by way of exception, the investment services of individual portfolio management and investment advice as well as the ancillary service of safekeeping – Article 5 Directive 85/611/EEC). Nevertheless, nothing prevents a UCITS management company from establishing a subsidiary in order to operate an MTF, provided that this subsidiary is authorised under the MiFID to provide that service.
Is a Member State allowed to require firms to report to their clients on investment advice?	Investment firms have to report on all services they have provided. The Level 2 provisions (Directive 2006/73/EC and Regulation (EC) No 1287/2006) in no way limit the general obligation set out in Article 19(8) MiFID to report on all services provided to its clients.
Is it possible for remote members of a regulated market to designate the system for settlement of a transaction, which is located in their home country?	Remote members of a regulated market may designate whatever systems they choose for the settlement of transactions executed under the rules of that regulated market. In this context, remote members located in a Member State A of a regulated market located in Member States B are free to choose a settlement system located in Member State A. The regulated market will have to ensure the effectiveness of that choice subject to compliance with the requirements of Article 34(2) points (a) and (b).
Is MiFID applicable or to what extent are the rules applicable for an investment firm which provides services solely to entities within the same Group?	No. Such firms are exempt from the requirements of MiFID under Article 2(1)(b).
Do MiFID rules apply to customers who are not resident in the EEA?	Yes. MiFID does not distinguish the obligations of firms to their clients according to the location of the client.
I refer to the Italian version of the Directive, where the word ‘course’ is translated into ‘ciclo’ (i.e. ‘cycle’). Should it be assumed that a ‘ciclo’ is made at least by a couple of opposite dealings (i.e. a purchase and a sale) of the relevant instrument or instruments? Otherwise, under which circumstances should a series of dealings be considered a ‘course of dealings’?	A course of dealings refers to more than one dealing, i.e. more than one purchase or sale by the client concerned. However, the phrase is not specific as to the precise number of dealings, more than one, that need to be shown. In most circumstances, two dealings would be sufficient to establish a course of dealings for these purposes.
While a number of articles in both Level 1 and Level 2 Directive refer to ‘product’ or ‘products’, no clear definition of such concept is provided within the same Directives. Is there, within the EU legislation, a definition of ‘(financial) product’ that should be referred to for the purposes of MiFID?	No. There is no particular definition of ‘financial product’ that is relevant. A financial product is, broadly speaking, capable of being any category of investment.
Is there a complete list with stock exchanges in Europe and for each stock exchange the companies that are listed there in a regulated market? Can you provide us with such list?	The list of regulated markets is published by the Commission on its MiFID webpage (http://tinyurl.com/yyulyz) as well as once a year in the Official Journal. From July 2007, the Committee of European Securities Regulators will be required to publish a consolidated list of all shares admitted to trading on a regulated market under Article 34(5) of the MiFID implementing Regulation. The Federation of European Stock Exchanges also publishes some consolidated information concerning European stock exchanges.

1. Does the threshold requirement of Article 42 apply to the investment portfolio as a whole (clearly the position taken by the French regulator in its proposal for amendments of the AMF Regulation (see art. 314-108 and 314-115) or only to uncovered positions in contingent liability transactions (seems to be the position of the FSA : see item 17.3.5 of the Conduct of Business Sourcebook (MiFID Transposition) – 2007/3)? 2. What should one understand by the concept of 'operating an account' (Dutch translation 'beheren' could lead to divergent interpretations as it refers to the management of an account)? Does it refer to a securities custody relationship instead of a managed client portfolio? The Belgian draft Royal Decree is unclear in that respect. 3. Does the obligation of Art. 42 only apply in a portfolio management relationship? This seems to be the reading of the FSA: see item 17.3.5 of the Conduct of Business Sourcebook (MiFID Transposition) – 2007/3). 4. Is there an obligation to agree on a threshold with the retail client or not? In other words, does the threshold obligation only apply insofar as a threshold has been predetermined and is there a contractual freedom to provide or not to provide in such a threshold (irrespective the relationship, i.e. portfolio management or execution/custody)? 5. What should one understand by uncovered positions? Must the contingent liability position be fully collateralized in order to qualify as a covered position? Would the granting of a credit facility/loan/transaction capping the exposure qualify as 'coverage'?	1. The obligation to report to the retail client any losses exceeding any predetermined threshold arises when 1) an investment firm provides portfolio management transactions for a retail client; or 2) where an investment firm operates retail client accounts that include an uncovered open position in a contingent liability transaction. 2. The words 'operate retails client accounts' in Article 42 is capable of referring to the operation of any account in the context of the provision of investment services to a retail client, whether representing funds, financial instruments, credit or custody arrangements or a margin account. It does not refer to portfolio management which is dealt with by the other limb of the Article. 3. Article 42 refers to two types of situations where losses exceeding a predetermined threshold may arise affecting retail clients: 1) portfolio management transactions and 2) operating retail client accounts other than in the context of portfolio management transactions. 4. Article 42 refers to 'any pre-determined threshold'. However, there is no express obligation in Article 42 to fix such a threshold. 5. The rationale of Article 42 is to ensure retail investors are informed about losses in which go beyond what he/she was prepared to incur. Therefore the wording 'uncovered open position' should be read broadly. This means that in order to be 'covered' a contingent liability position has to be fully hedged.
On the basis that collective investments and assurance contracts are not covered under the Directive 2004/39/EC, would a company that offers advice on assurance contracts, and the selection of collective investments linked to such contracts, be obliged to become registered under a local law issuing from the Directive?	If the company which offers advice on assurance products also recommends particular financial instruments to its clients, it should obtain an authorisation under MiFID.
We are receiving enquiries from regulators to provide free real-time and delayed pre- and post-trade data to allow them to cross-reference best execution between intermediaries and their clients. Does an MTF, or any other trading venue (RM, SI or OTC) have this obligation to provide any data for free or trading venues empowered by MiFID to charge on 'reasonable commercial terms' and on a non-discretionary basis. This is a political as well as a regulatory issue, so trading venues or data vendors may not have any option but to comply with their request.	MiFID includes no specific provisions which would require regulated markets and MTFs to provide real-time pre- and post-trade transparency data to competent authorities free of charge.
1. Does 'type of order' always refer to 'limit order', 'market order' or other? Or is this only the case when the status of an order is transmitted (confirmation of the order). 2. In particular: Does the transaction statement of a purchase of securities have to mention that the order was placed with a limit, ie cheapest?	1. Article 40(4) of the implementing Directive lists the information which has to be included in the notice to a retail client following the execution of an order (as required by Article 40(1)(b)). This includes –where applicable- a reference to the type of order (Article 40(4)(e)). Recital 64 of the implementing Directive states that in the context of reporting to clients a reference to the type of order refers to its status as a limit order, market order, or other specific type of order. A limit order is defined in the Level 1 Directive as 'an order to buy or sell a financial instrument at its specified price limit or better and for a specified size' (Article 4(1)(16) MiFID). 2. Yes. It follows from the answer in 1. above that, the notice to the retail client confirming execution of the order has to specify whether the order was a limit order, market order or other specific type of order. The other terms of the order which must be reported to the client are as set out in Article 40(4).
What is the expected standard to evidence despatch to the client of any notice of client classification, especially if it is anticipated that this notice will be sent by post and not e-mail?	There is no provision in MiFID or the implementing Directive covering the standard of evidence of communication or dispatch with respect to notices to clients. This is a matter to be determined in accordance with the national law of each Member State.

Scenario: A portfolio manager decides (using their discretion) to buy or sell units in a regulated collective investment scheme (e.g. a UCITS fund) on behalf of and for the benefit of their retail client. They send the purchase or redemption request to the UCITS firm for them to action. The UCITS firm will action this request and will in due course provide confirmation of the trade to the portfolio manager. In this instance is the portfolio manager considered to be 'receiving and transmitting' orders and the UCITS firm 'executing' them?	In this case the portfolio manager will be 'executing a decision to deal' in line with paragraph 45(7) of the MiFID implementing Directive which obliges portfolio managers to comply with the best execution obligations under Article 21 of MiFID. This activity should be considered as part of the portfolio management service and should not require additional authorisation for order-execution or reception/transmission of orders. In your example, the UCITS firm will not be executing an order but act as a liquidity provider and therefore an execution venue for the purposes of Article 44(1) of the MiFID implementing Directive. Before executing the decision to deal the portfolio manager may have to consider whether there are any other execution venues (e.g. regulated markets or MTFs) that could offer better terms for the client than the terms obtained when executing directly with a UCITS management company.
From an answer to a previous question, the Commission appears to believe that passing an order for a unit in a collective investment scheme to a UCITS management company or fund manager for execution would require the firm passing on the order to obtain the prior express consent of the client. However, in practice, it is the UCITS management company or fund manager who controls execution in these circumstances as the price and terms on which the units are issued will be determined by the management company/fund manager in accordance with the relevant collective investment scheme's documentation. Can the Commission confirm that its previous answer on this topic (in respect of the best execution requirement and 'prior express consent' for orders in respect of units in collective investment schemes) does not rule out the possibility that a firm in these circumstances merely receives and transmits the order in question, and so may not be required to obtain the prior express consent of the client for its policy depending on the circumstances? This seems to be a sensible approach given that it is not usually possible for a firm to go elsewhere other than the UCITS management company/fund manager in respect of the order in question.	According to Article 21(3) before an investment firm executes its client orders outside a regulated market or an MTF, it must obtain the prior express consent of its client to do so. Whenever a firm transacts directly with an execution venue, it should be considered to provide the investment service of order-execution. UCITS management companies should be considered execution venues (liquidity providers) for the purposes of Article 44(1) of the MiFID implementing Directive. UCITS management companies or fund managers cannot be providing the investment service of order-execution. They are engaged in the finalisation of the transaction which comprises the subscription or redemption of the units and other administrative tasks, but those activities are not subject to MiFID.
Please explain, in respect of each of the services and activities listed in Sections A and B of Annex 1, which circumstances shall be taken into account in determining whether or not such service or activity has been provided/performed in the territory of a Member State (e.g. location of the client, home Member State of the regulated market, etc.)?	For a detailed legal analysis of the terms 'within the territory' (used in Articles 31 and 32 of Directive 2004/39/EC) see the Commission services' paper on the supervision of branches: http://ec.europa.eu/internal_market/securities/docs/isd/mifid-branches_en.pdf.
1. Do the electronic trading screens of regulated markets registered in other jurisdictions fall within the scope of MiFID, namely the concept of multilateral trading system? 2. Should the establishment of the electronic trading screens (network, server and other technical equipment) of regulated markets registered in a foreign country be considered as the provision of investment services?	1. Please see our answer to Question 41.2 on third country firms. Broadly, trading screens from other jurisdictions (in the sense of non-EEA jurisdictions) will not be required to be registered under MiFID, so long as they are subject to treatment no more favourable than is extended to firms from other EEA states. In other words, at the least they must be subject to equivalent prudential and conduct of business regulation in their home jurisdiction as they would receive were they established in an EEA State. As well, they will not benefit from the MiFID passport. 2. The mere establishment of technology and facilities in a Member State does not constitute the provision of investment services. It is the provision of services by means of the technology or facilities that is the important factor. However, again, see our answer to Question 41.2 with respect to the scope of MiFID.
1. Should a tied agent who is a natural person have a programme of operation? 2. Could the address of the tied agent be his home residence? 3. Who will be the person responsible for the management in case the tied agent-natural personal as he is assimilated to the branch?	A tied agent, irrespective of whether he is a natural or a legal person is, for the purposes of the MiFID passport assimilated to a branch and therefore has to comply with the requirements established in Article 32 of the MiFID. With respect to your specific questions: 1) Yes, an investment firm that wishes to operate on a cross border basis through a tied agent has to present a programme of operations covering its activities through the tied agent; 2) Yes. It is possible that the address of the tied agent is his home residence as long as it is acceptable under national law; 3) In this case the tied agent will be the person responsible for the management.
Art. 35 states that when a client refuses to provide any information, the investment advice service may not be provided. What about the portfolio management service? May the investment firm provide portfolio management service if the client refuses to give any information? If yes, which risk profile must be followed (e.g. low risk)?	If at the beginning of a relationship the client refuses to give her portfolio manager the information requested by the manager which is relevant for the suitability assessment, the manager may not provide her with the service, even on the most prudent basis. This is because Article 19(4) of MiFID states that the manager must obtain adequate information prior to the commencement of the investment service. If there is an ongoing relationship and a client requests a change of mandate to the portfolio manager, the manager must obtain adequate information to be able to effect that change in line with the suitability regime (Article 35(5) of MiFID implementing Directive).

When transacting on our own account, i.e. buying or selling directly with a counterparty, is this a service and hence the counterparty needs to be classified as client or, as no service is provided, does the counterparty not have to be classified and notified of their classification ahead of the transaction?	Dealing on own account may be the provision of a service or the carrying on of an activity. This much is implicit in Recital 69 of Directive 2006/73/EC. MiFID does not lay down criteria for distinguishing between these two situations. In many cases of dealing on own account with a counterparty, the client will be an eligible counterparty. Nevertheless, notice of client classification should be given in those cases, in accordance with Article 28 of Directive 2006/73/EC.
Can the Commission explain what is meant by 'exclusively the administration of employee-participation schemes'? Does this include the transactions which a share plan administrator must undertake through a member firm as broker on the regulated market to purchase shares and/or providing scheme participants with a facility to sell shares either immediately on maturity or at a later date?	1) Transactions which a share plan administrator undertakes through a broker as member of a regulated market: In this scenario, the MiFID does not apply to the share plan administrator since the acquisition of shares for the purposes of a scheme is part of the administration of the scheme. However, it will apply to the broker. Thus when the broker executes transactions on behalf of the share plan administrator, the broker will be subject to MiFID (including the best execution obligations). 2) Providing share scheme participants with a facility to sell shares: Again, the share plan administrator will not normally be subject to MiFID since in most cases the provision to scheme participants of a facility to sell the shares acquired through the scheme will be an integral aspect of the administration of that scheme. However, if the facility to sell is provided through a bank, the bank will be subject to MiFID (including the best execution obligations). If the administration of the share scheme is being provided by a bank, then that bank will also be subject to MiFID since it will not be engaged 'exclusively in the administration of employee-participation schemes.'
What is the difference between an 'investment service' and an 'investment activity'? Which criteria must be used to determine this difference? Which purpose does this difference serve? The difference between an investment service and an investment activity is relevant in the context of Article 19(1) Directive 2004/39/EC. Under this Article, the investment firm must comply with rules of conduct when providing investment services, and not investment activities. Please clarify how the difference between an investment service and an investment activity is related to Article 19 (1) Directive 2004/39/EC. Has the Commission clarified its position regarding the above in an official and published document?	See the Commission's advice on scope questions annexed to the CESR Questions and Answers on best execution (especially paragraphs 1 to 5) at http://www.cesr.eu/index.php?docid=4606.
Where a MiFID investment firm, which provides portfolio management to professional clients, outsources some of that portfolio management to a third country investment firm, does that MiFID investment firm need to establish arrangements which require the third party to comply with MiFID for the provision of those services? In particular how does this affect the MiFID investment firm's best execution obligations and transaction reporting obligations?	MiFID explicitly states that where investment firms outsource critical or important operational functions or any investment services or activities, the firms remain fully responsible for discharging all of their responsibility under MiFID. In particular, outsourcing arrangements must not result in the delegation by senior management of its responsibility, and must not alter the relationship and obligations of the firm towards its clients (see Article 14(1) of Directive 2006/73/EC ('Directive 2006/73/EC')). In other words, the fact that part of an investment service is outsourced to a third country firm does not alleviate the investment firm of its MiFID responsibilities, whether under best execution, transaction reporting or otherwise. The firm to which the service is outsourced, if it is based in a third country, will not be subject to MiFID. MiFID does not require that firm to be made subject to MiFID obligations by way of the outsourcing agreement. However, the outsourcing arrangement must not result in the MiFID investment firm breaching its MiFID obligations. The contents of the outsourcing agreement must also conform with Article 14(2) of Directive 2006/73/EC, which is based on Articles 13(2) and 13(5) of the Level 1 Directive.
Imagine an independent mediation agent approaching a client with a special offer. After the sales talk however, a transaction about a different asset (e.g. a share in a fund) is concluded and the independent agent receives commission from the issuer. 1. How has this initiative to be considered? Is the initial offer abortive and the sold product viewed as requested by the consumer so that the execution-only principle would be applicable in this case? 2. Do the provisions of consumer protection (Art. 19(6) MiFID) apply to the issuer of sold fund, as the contact was initiated from the sell-side, but indeed from an independent broker?	1. The MiFID differentiates between execution-only and non execution-only services. Execution-only services must be provided at the initiative of the client. In order for the service to be considered provided at the initiative of the client the MiFID, in Recital 30, sets the general principle that there should not be any type of 'personal' contact with respect to the product between the client and the firm. The client's use of an e-brokerage facility to conclude a transaction would normally fulfil this condition. Where there is a clear personal contact between the client and the agent it would be difficult to argue that the service is provided at the initiative of the client, especially because there is a previous approach (albeit for other products) by the agent. However, this does not mean that in every case the agent will be providing a non-execution-only service. There may well be cases where there is a continuous firm-client relationship, but the service would still be at the initiative of the client. If the agent can prove that although the client was personally approached for another product the client finally bought the other shares etc without any intervention on the part of the agent the service could be considered as execution-only. 2. Consumer protection rules (Article 19 of the MiFID) will apply in any case as we are dealing with an investment service. When the service being provided is execution only, neither the suitability test (Article 19(4)) nor the appropriateness test (Article 19(5)) applies. However it is also useful to point out that Member States have the capacity to exempt certain independent intermediary brokers or agents (Article 3 of the MiFID) from the MiFID scope. In case that a Member State makes use of this exemption then the MiFID (including consumer protection rules) will not apply to them.

What is the position of a bank with regard to existing clients where such clients hold existing products and as of 1 November 2007 these products are no longer adequate with respect to the client profile: (1) Does the date of creation of the product take precedence over the date of application of the Directive? (2) Does the bank have to close/redeem the products of such clients? (3) Must all new orders relating to these products (which –pre-date MiFID) be in accordance with MiFID from 1 November 2007?	Article 19(5) requires an investment firm when providing investment services (other than advice or portfolio management) to ask a client or potential client for information to assess whether the investment service or product envisaged is appropriate for that client and to warn the client if this is not the case. There is no obligation for an investment firm to warn existing clients with respect to the appropriateness of products already held by these clients as Article 19(5) applies at the moment when the acquisition or provision of service are envisaged. (1) Yes, in the sense that Article 19(5) only applies in the process of providing a (new) investment service or product as of 1 November 2007. This is supported by Recital 59 of the implementing Directive which states that a client who has engaged in a course of dealings involving a specific type of product or service before 1 November 2007 should be presumed to have the necessary experience and knowledge to understand the risks involved in relation to that product or service.. (2) No. There is no requirement to close or re-deem products already held by existing clients. (3) No. Recital 59 states that when a client already holds an instrument before November 2007 there is a presumption that that instrument is appropriate for him and consequently the firm automatically complies with its article 19(5) obligation whithout the need to make any further assessment. However, MiFID's other client protection obligations will apply. This includes the obligation under Article 19(1) that an investment firm act honestly, fairly and in the best interest of its clients as well as the obligations under Article 21 relating to best execution.
If we obtain a license to sell securities/futures in the Netherlands, could we then use this licence as a passport to make sales in other countries such as Germany, Switzerland and England?	Yes. The MiFID passport means that the provision of investment services in other Member States does not require further authorisation. The provision of services on a cross-border basis is also subject only to the rules applicable in the home state; the host Member State cannot add further conditions that would hamper functionning of the passport granted by the home Member State either. In order to make use of the passport, you would need to notify the Netherlands authority of your intention to provide investment services in other member states in accordance with Article 31(2) of the MiFID. Please note that as Switzerland is not a member of the European Economic Area, you will need to contact the Swiss authority directly to find out whether you must seek authorisation in Switzerland to provide investment services there.
MiFID Level 1 Directive, Article 1(2)(first indent) extends only some of the provisions of MiFID to credit institutions. In that light, can a credit institution the only investment activity of which is dealing on own account (not being market making or systematic-internalising) avail itself of the exemption in Article 2(1)(d)?	Yes. Credit Institutions (CI) should not be subject to Mifid requirements when the only investment service or activity that they provide/perform is the one considered under 2.1.d). Article 1.2 should be understood as specifying the Mifid provisions that apply to CI when providing investment services that would be subject to the Mifid were these CIs Investment Firms. This is, when exemptions under article 2.1 do not apply.
On reading Article 7 of Directive 2006/73/EC, it appears that - all investment firms, irrespective of size and the extent of their operations are bound to establish and maintain a risk management function; and - an investment firm may establish and maintain a risk management function that operates independently where appropriate in view of the nature, scale and complexity of the investment firm's business. Accordingly, we understand that an investment firm must establish a risk management function in all cases but this function need only be exercised independently where the circumstances of the investment firm so warrant. Hence there is no derogation from the establishment of this function per se and the only option which exists is as to whether the operation of such function needs to be carried out independently.	No. All investment firms are required to establish risk management policies and procedures and to comply with the other provisions of Article 7(1) of the Directive. However, it is only where justified in view of the nature, scale and complexity of the business that a firm is required to establish and maintain 'a risk management function that operates independently' by Article 7(2). So for very small or non-complex firms, they might have risk management policies and procedures which are not operated by a separate risk management function (but which, for example, are directly supervised by the Board, Audit Committee, or CFO, or which are operated by the compliance function or internal audit function.) This answer is consistent with the diagram in section 3.4 of the Background Note to the draft level 2 Directive (see http://tinyurl.com/yscsgd).
Article 24(1) states that firms can exclude eligible counterparties from the application of Art. 19, 21 and 22 (2004/39/CE) in case of execution of orders on behalf of clients, dealing on own account, and reception and transmission of orders. The article does not mention portfolio management and investment advice services. In this case it could seem that a firm can never be classified as an eligible counterparty for the portfolio management or investment advice services. Is this true?	Yes. The eligible counterparty category only applies in relation to the services identified in Article 24(1), i.e. reception and transmission of orders, dealing as agent and dealing on own account. It does not apply in a situation of investment advice or portfolio management.
Is sport spread betting included in the scope of the Directive?	No. Contracts related to sports results are not considered to be financial instruments as defined in Anne I Section C of MiFID. However, they may be considered to be financial instruments under national law. (See also answer to question 7)

1. When an investment manager is appointed as the manager of a UCITS fund / sub-fund, is it conducting the MiFID activity of portfolio management, and should the investment manager treat the UCITS fund/sub-fund as its client? 2. If so, does the investment manager owe the sub-fund best execution and other related protections?	1. The answer to this question depends on the nature of the service the 'investment manager' is providing. If the 'investment manager' is a management company within the meaning of Article 1a(2) of the UCITS directive or comparable national rules for non-coordinated collective investment funds, responsible for the activities mentioned in Annex II of the UCITS directive (investment management, administration and marketing), then the investment manager is not required to comply with MiFID, because it is exempted from MiFID by Article 2(1)(h). However, if such management company does not perform all of these functions itself, but delegates the asset management functions to an 'investment manager', this delegated party will be providing the service of individual portfolio management to the management company. In case of a UCITS management company, the delegation is subject to the conditions laid down in Article 5g of the UCITS Directive. A UCITS management company is notably only permitted to delegate all or parts of its investment management activities to an entity which is authorised or registered for the purposes of 'asset management'. (i) If the delegated party is an authorised management company pursuant to Article 5(3) of the UCITS directive, Articles 2, 12, 13 and 19 of MiFID will be applicable to its operation (see Article 5(4) of the UCITS Directive). (ii) If the delegated party is a MiFID investment firm authorised for the purposes of individual portfolio management, the whole range of MiFID provisions applicable to portfolio managers is applicable. 2. Yes. Both in cases i) and ii) above, the asset manager will owe best execution or analogous obligations based on Article 21 or 19 of MiFID (see in particular Article 45 of Directive 2006/73/EC). See also our answers to questions 26, 38 and 121.
Question 1 What is the difference between notions investment research and financial analysis in 2004/39/EC Annex I Section B paragraph 5 in the meaning of MiFID? Art 24(1) of 2006/73/EC defines investment research which does not mention financial analysis and MiFID nor its implementing measures do not define financial analysis. Thus, are investment research and financial analysis synonyms or does financial analysis refer to a different type of information? Question 2 Should a macroeconomic overview that gives a general overview of the market(s) situation (does not recommend or suggest any particular financial instruments, merely shows trends on the market, indexes etc.) be considered as an investement research and therefore, should the specific investment research provisions apply? If an overview of the market is not considered as an investment research should only the general information requirements (fair, clear and not misleading) apply? Question 3 According to Art 27(4)(b) of 2006/73/EC the information containing an indication of past performance of a financial index must cover 5 years. Should this condition be applied in case of a macroeconomic overview which shows a different types of financial indexes? Sub-question - what are the reasons behind financial index requirement in Art 27 of 2006/73/EC due to the fact that it is not shown and explained in the draft of the implementing directive nor in any proposals or FAQs?	Question 1: It is true that financial analysis is not defined in MiFID (2004/39/EC) or in its implementing directive (2006/73/EC) or regulation (1287/2006). Nevertheless, the notions of financial analysis and investment research are closely linked and the legislative texts did not intend to make a distinction between the two. Question 2: Article 24 of Directive 2006/73/EC defines "investment research as research or other information recommending or suggesting an investment strategy, explicitly or implicitly, concerning one or several financial instruments or the issuers of financial instruments". The definition is therefore very broad and only a purely factual and descriptive macro economic overview that would completely exclude any kind of direct or indirect, specific or general investment recommendation or suggestion would be unlikely to be considered investment research. Nevertheless, article 19 of MiFID states "that all information, including marketing communications, addressed by the investment firm to clients or potential clients, shall be fair, clear and not misleading" and would apply to it. Question 3: The obligation defined in article 27(4)(b) refers to the case where the information contains an indication of past performance of a financial instrument, a financial index or an investment service. As soon as indices that are part of a macro economic overview can be considered financial indices the obligation defined in article 27(4)(b) applies.
What are the Commission's expectations regarding the compliance function for small investment firms? In particular, what are the criteria which such firms will need to satisfy to qualify for the derogation from the general requirement that the compliance function should be independent from the investment services function of the firm (Art. 6(2) of Directive 2006/73/EC)?	There is no derogation from the requirement that the compliance function should 'operate independently' as required by Article 6(2). However, there is a derogation available from the additional level of more detailed requirements as to segregation of functions and remuneration set out in each of Articles 6(3)(c) and (d). This derogation is available where the firm is able to demonstrate (to its regulator or, where relevant, to a Court of justice) that in view of the nature, scale and complexity of its business, and the nature and range of investment services and activities, the requirement under that point is not proportionate and that its compliance function continues to be effective. What this means in a particular case will be a matter for judgment in the circumstances of each firm. In very small firms with limited staff complete separation of functions may be unrealistic.
An investment firm wants to sell units in UCITS collective investment schemes to its clients to whom it provides investment advice. The firm will be handling the application process – on behalf of his clients – (i.e. it will fill in the application form and submit this to the UCITS Manager/ Administrator, make arrangements for the transfer of the clients' money to the Manager/ Administrator of the UCITS etc.) for its clients to subscribe for units in open ended UCITS Schemes. In turn, the firm will be compensated by the investment manager of the UCITS – whereby it will receive part or all	With respect to the factual scenario submitted, the service provided to the client by the investment firm normally constitutes the provision of the services of reception and transmission of orders as per Annex I, Section A(1) of the MiFID. In this scenario, which involves the sale of units in an open-ended collective investment scheme where shares are continually being issued to satisfy the demand by new investors, the investment firm does not provide the service of underwriting and/or placing issues in respect of the issuer.

of the initial fees/ commission relating to the UCITS disclosed in the UCITS' Prospectus. In this scenario, does the service provided by the investment firm fall under (a) Annex I, Section A para (1) – Reception and transmission of orders in relation to one or more financial instruments; or does it also, with respect to the service provided to the issuer, fall under (b) Annex I, Section A para (6) – Underwriting of financial instruments and/or placing of financial instruments on a firm commitment basis Our view that only (1) is relevant because in the context of an open ended investment fund units are continually issued to satisfy investor demand and are not, therefore, being underwritten or placed.	
Must the customer sign the 'best execution policy' if the financial institution has opted for 'execution only policy'?	Execution-only is a concept that relates to whether the appropriateness test applies (see Article 19(6) of Directive 2004/39/EC) and has nothing to do with best execution. A customer must give 'prior consent' to the best execution policy (see Article 21(3)). The legal provisions of the relevant Member State relating to the giving of consent must be satisfied.
With regards to client classification according to MiFID, the Directive describes criteria for classifying professionals on request. One of these criteria is : 10 significant transactions per quarter over the previous quarter. Can a foreign exchange transaction be considered as a significant transaction ?	The overarching requirement for classifying a client as a professional on request is that 'an adequate assessment of the expertise, experience and knowledge of the client undertaken by the investment firm gives reasonable assurance, in light of the nature of the transactions or services envisaged, that the client is capable of making his own investment decisions and understanding the risks involved. The requirements are quite strict and require 2 of 3 tests to be fulfilled. One of those three tests is that 'the client has carried out transactions, in significant size, on the relevant market at an average frequency of 10 per quarter over the previous four quarters'. So if the client is to be undertaking FX transactions then previous significant FX transactions are relevant. The relevant market is a market for the same or similar or related instruments. Size is to be judged relative to the overall market not the investment firm's own business. However, if the nature of the instruments to be traded is quite different then FX trading experience may not be relevant.
The Takeover Directive expressly refers to the Investment Services Directive in respect of the definition of 'regulated market' (Art. 1(1)). Should this term as from 1 November 2007 be construed on the basis of MiFID, and if yes, will this be enacted in an amendment to the Takeover Directive?	Yes. Article 69 of the MiFID, as amended, repeals the Investment Services Directive, or ISD as of 1 November 2007 and provides that references to terms defined in the ISD are to be construed as references to equivalent terms defined in the MiFID. Therefore, no amendment of the Takeover Directive is required and the MiFID definitions will apply automatically as of 1 November 2007.
· We seek a clarification with respect to the term 'undertakings' as referred to in Article 2(1)(h) of the Directive 2004/39/EC. · Article 2(1)(h) prescribes that the Directive shall not apply to collective investment undertakings and pension funds whether coordinated at Community level or not and the depositaries and managers of such undertakings. Since pension funds are exempted from the regulation it would be consistent if the exemption would also be applicable to investment undertakings of pension funds. · More specifically, a confirmation would be appreciated stating that the exemption is valid irrespective of the amount of collective investment undertakings and/or pension funds for which depository or managerial services are provided. This would imply that all three investment companies as mentioned below would qualify as 'undertaking' as defined in article 2 (h): · an investment company that solely provides investment services to one collective investment undertaking and/or pension fund; · an investment company that provides investment services to a limited collection of collective investment undertakings and/or pension funds; · an investment company that provides investment services solely to collective investment undertakings and/or pension funds, irrespective the amount of undertakings and funds for which such services are provided.	The term 'managers of such undertakings' in Article 2(1)(h) should be understood to also cover investment managers which are appointed by an institution for occupational retirement provision to manage the portfolio of a pension fund. However, the term 'managers' cannot be interpreted broadly as to also include entities which manage the assets of the pension fund only by way of delegation. In case of a delegation only the manager of the pension fund, but not the delegated party, is covered by the exemption under Article 2(1)(h) of MiFID, as the delegated party is not providing collective portfolio management to the end-investors, but individual portfolio management to the manager of the pension fund. See also our answer to question no. 70.

Do the following investment companies qualify as undertakings in the sense of Article 2(1)(h) of the Directive 2004/39/EC: - an investment company that solely provides investment services to one collective investment undertaking and/or pension fund; - an investment company that provides investment services to a limited collection of collective investment undertakings and/or pension funds; - an investment company that provides investment services solely to collective investment undertakings and/or pension funds, irrespective the amount of undertakings and funds for which such services are provided?	See our answer to question 82.1. The number of funds to which services are provided is not relevant to whether the service falls within MiFID or whether the exemption in MiFID Article 2(1)(h) applies.
In particular, we are unsure on how the category of 'regional governments' (No. 3, Part I, Annex II, MiFID) should be interpreted. This is a topic that in our opinion is being a bit overlooked, as many other more 'evident' topics are being considered at the moment by the Commission and CESR, but it is indeed important for many of our clients (we are working on the MiFID compliance for many banks) which provide services for public debt management/ government finance business and it may deserve some specific attention as well. We have studied the topic a bit and we found that in Italy a division is emerging between: (i) those who read the category broadly to include Italian Regions (or 'regioni', i.e. Lombardia, Piedmont, etc.) and/or any equivalent regional body in the relevant jurisdiction, which appears sound from a literal approach but also implies that 'governments' be read as public administrations at large (which the translations in Italian – governi -, French – gouvernments – and Spanish – gobiernos – do not seem to support entirely); (ii) those who read it strictly as being limited to higher level authorities than local (albeit regional – therefore, in turn, higher than municipalities or other minor local bodies) authorities. In particular, German Laenders would be the real target, maybe along with Scottish/Welsh bodies and/or Comunidad Autonomas in Spain etc. In our view, whichever approach is to be preferred, it should also take into account other 'public' client sub-categories (i.e., national and regional government, public bodies managing public debt as well as other public sector bodies as mentioned in Annex II, Part 2) so that a consistent and systematic reading is achieved.	The provisions of Annex II Part 1 determine which categories of clients should be treated as professional clients. Categorisation as professional client limits the amount of protection that will be afforded to these clients under MiFID. Therefore it is in the interest of investor protection that the categories be interpreted narrowly. The wording of Annex II Part 1 (3) indicates that it is aimed at comprising major public entities with considerable exposure to and experience in the financial markets. It follows that the reference to regional governments does not extend to public administrations at large and does not include eg local governments or municipalities or their respective administrations. This is supported by the fact that other financial services directives, such as the Prospectus Directive expressly refer to regional or local authorities, thus drawing a distinction between the two. Public sector bodies which are not regional governments and do not manage public debt may be treated as professional clients on request if the conditions in Annex I, Part II are met.
Which concepts have to be considered to obtain total consideration? Is it the total cost? Does it include liquidity commissions? Margins?	Article 44(3) of Directive 2006/73/EC 2006/73/EC specifies that the total consideration includes 'the price of the financial instrument and the costs related to execution' as well as the 'firm's own commissions and costs'. This means that the total consideration is equivalent to the total amount paid by the client to the firm for having its order executed. See also Recitals 71 and 72 of the same Directive which are important in understanding these provisions.
We are market-maker on several platforms for bonds (MTS, Senaf, Bloomberg, RTFI, TradeWeb). We are quoting in real time in all these trading venues but with different spreads (different prices). When we are going to close a trade on Trading Venue 1 with a worse price that we quote on Trading Venue 2, are we complying with MiFID or not?	Article 21 (best execution) does not apply to transactions done under the rules governing an MTF between its participants: see Article 14(3). Not all trading platforms will qualify as MTFs. In particular, single-dealer platforms are not MTFs for MiFID purposes: see Recital (6) of Directive 2004/39/EC. Transactions done by a market maker with a client who is not a participant of a multilateral trading facility may give rise to best execution obligations, but in the wholesale bond markets this is unlikely. For more details see the Commission's advice on scope questions annexed to the CESR Questions and Answers on best execution at http://www.cesr.eu/index.php?docid=4606.

Can we focus for retail clients under portfolio management on the aspect of global understanding of the risk linked to the investment strategy rather than an assessment for each individual product contained in the portfolio?	Article 35(1)(c) of Directive 2006/73/EC provides that investment firms assess that with respect to an 'specific transaction to be recommended or entered into in the course of providing a portfolio management service' the client has the 'necessary experience and knowledge in order to understand the risks involved in the transaction or in the management of the portfolio'. On the basis of the above, the investment firm should assess not only the understanding of the risks involved in the general strategy that will be applied by the portfolio manager but also the specific risks linked to the particular products that are going to be used in order to implement that strategy and the effects in terms of risks of the interaction between the different products that will be included in the portfolio.
Article 19(6) of the Directive states that the Commission will publish a list of third countries with 'equivalent' status. Has that list been produced or when will it be produced? I have it in the back of my mind that it should be produced this year.	The list has not yet been produced. Commission services will shortly commence the analysis of the status of third country markets. At this stage the publication date has not been decided.
What is the exact definition of 'investment banking'? Which activities are meant by the term 'investment banking'? Is there an exhaustive list?	The term 'investment banking' is used in Recital 36 of Directive 2006/73/EC. In accordance with common practice, terms used only in Recitals are not defined in the legislative act. Therefore, the term carries its ordinary meaning, which can be understood by consulting financial dictionaries or financial glossaries. In broad terms, 'investment banking' refers to the activity of banks in arranging for their clients' capital-raising (including IPOs) or mergers and acquisitions. Depending on context, it may also refer to proprietary investment on the part of banks in or alongside such clients.
If the Commission's conclusion in the answer to Question 56 is correct – that passing an order regarding fund units to a UCITS management company is 'execution of orders' – then what are companies working under the exemption in Article 3 (1) third indent, point iv, allowed to do?	Article 3 of MiFID provides for a tailored exemption from the MiFID regime for entities or persons that cannot accept money or instruments from clients. The article is clear in what these persons are allowed to do. Apart from not being able to accept any funds or instruments, the Article 3 exempt persons have a restricted number of entities to which they may transmit orders. For the above reasons, one cannot properly speak of order execution as that would require Article 3 entities to have access to regulated markets, MTFs or other similar third-country entities. Question 56 refers to those persons who are authorised to execute client orders.
To what extent does MiFID apply to non-EEA branches of EEA investment firms?	MiFID does not apply to non-EEA branches of EEA investment firms. Where such a branch, however, provides a service to an EEA client, competent authorities can be expected to ensure that such arrangements are not entered into for the sole or dominant purpose of avoiding MiFID's conduct of business or organisational requirements.
An investment firm wants to sell units in UCITS collective investment schemes to its clients to whom it provides investment advice. The firm will be handling the application process – on behalf of his clients – i.e. it will fill in the application form and submit this to the UCITS Manager/ Administrator, make arrangements for the transfer of the clients' money to the Manager/ Administrator of the UCITS etc. for its clients to subscribe for units in open ended UCITS Schemes. In turn, the firm will be compensated by the investment manager of the UCITS – whereby it will receive part or all of the initial fees/ commission relating to the UCITS disclosed in the UCITS' Prospectus. In this scenario, does the service provided by the investment firm fall under (a) Annex I, Section A para (1) – Reception and transmission of orders in relation to one or more financial instruments; or does it also, with respect to the service provided to the issuer, fall under (b) Annex I, Section A para (6) – Underwriting of financial instruments and/or placing of financial instruments on a firm commitment basis Our view that only (1) is relevant because in the context of an open ended investment fund units are continually issued to satisfy investor demand and are not, therefore, being underwritten or placed.	With respect to the factual scenario submitted, the service provided to the client by the investment firm normally constitutes the provision of the services of reception and transmission or execution of orders as per Annex I, Section A para (1) of the MiFID. In this scenario, which involves the sale of units in an open-ended collective investment scheme where shares are continually being issued to satisfy the demand by new investors, the investment firm does not provide the service of underwriting and/or placing issues in respect of the issuer.
Is a convertible bond, under the directive, a complex product?	Yes. Convertible bonds are not mentioned expressly in the first indent of Article 19(6) of MiFID as non-complex products. Accordingly, it is necessary to apply the criteria in Article 38 of the implementing Directive (2006/73/EC). Point (a) provides that financial instruments can only be considered as non-complex if they do not fall within Article 4(1)(18)(c) of MiFID. Convertible bonds that give the right to acquire transferable securities do fall within that provision and are therefore complex products.

Was it intended that the exclusions contained in Article 2(1) of MIFID do not apply to credit institutions? If a credit institution's only investment services or activities fall within one of the exclusions in Article 2(1), does that credit institution have to comply with the requirements of MIFID? Does a credit institution that provides no investment services but only carries out the activities of dealing on own account and falls within the paragraph at Article 2(1)(d) of Directive 2004/39/EC still have to report those transactions to the relevant competent authority under Article 25?	The correct reading of the Level 1 Directive allows that credit institutions should be able to benefit from the exemptions in Article 2(1) in the same way as other types of entity.
The Commission has given very clear guidance as to how one can distinguish firms that receive and transmit orders (RTOs) from firms that execute client orders (Best Execution Q&A and CESR/2007-050b, EC Working Document ESC 07-2007). When a broker receives an order through an RTO, will the broker then be considered to render an investment service directly to the client, i.e. have a contractual relationship with the client?	This depends on with whom does the client have a contractual relationship (with the RTO or with both the RTO and the executing firm). Generally speaking in those case when the client only has a contractual relationship with the RTO the executing broker does not have any specific obligation towards the initial client.
Annex II, Section 1 lists the entities which are considered to be professional clients when dealing with an investment firm. Nevertheless, such entities are given the possibility to request non professional treatment by the investment firm. It appears, however, that the investment firm has discretion as to whether to accept such a request or not. In fact Annex II, Section 1 states, 'investment firms may agree to provide a higher level of protection.' In this regard, we would be grateful if further guidance is provided as to the instances when and the manner in which the investment firm may exercise such discretion.	Annex II, Section I makes it clear that entities that are automatically treated as professional clients ('per se' professional clients') can, in spite of this automatic categorisation, request the additional regulatory protections afforded to retail clients in relation to particular services, types of product or transactions. Annex II is clear that the per se professional client is responsible for making this request, and there is no obligation on the investment firm to assess whether a per se professional client should be afforded a higher level of protection Annex II does not oblige firms to comply with a request for non-professional treatment. It is left entirely to the discretion of the firm, and there are no circumstances in which a firm must exercise that discretion in a particular way and accept the request. If the firm refuses the request, the practical remedy for the per se professional client is to use another investment firm that is willing to comply with a request for non-professional treatment.
I would like confirmation as to whether best execution applies in the case of client orders for the subscription or redemption of UCITS.	If the person executing the order is a MiFID investment firm best execution will apply when executing orders for the subscription or redemption of UCITS.
Are electronic money institutions within the scope of Directive 2004/39/EC?	Our understanding of the E-Money Directive (2000/46/EC) is that e-money institutions cannot provide other services than those included under articles 1.3.b) and 1.5. None of those activities includes investment services so it would appear to be impossible that the MiFID could apply to electronic money institutions.
Scenario: An investment firm or a person falling under any of the MiFiD exemptions for authorisation as an investment firm (henceforth 'the exempt person'), acts on behalf of a client in a fiduciary capacity and receives a request from such client to subscribe to financial instruments on that client's behalf. These instruments will be registered in the name of the investment firm or of the exempt person as 'nominee investor' and hence, the title to such financial instruments, once acquired will not be held directly by the client. Question: In the above scenario, where the investment firm or the exempt person uses the services of another investment firm to execute the transactions for the acquisition of the financial instrument in question, should the executing, (market facing) investment firm consider as its client the intermediate investment firm or exempt person (which is in turn is acting on behalf if its client) or must the executing 'market facing' investment firm consider the ultimate investor (beneficial owner of the financial instruments) as its client and therefore require the client facing investment firm or exempt person to disclose the client details to the market-facing firm?	The client of the market facing investment firm would be, in this case, the exempt person, and the obligation of best execution would exist in relation to this exempt person, not to its client. In this situation there is no obligation for the exempt person to disclose data about its client.

The [Member State X] regulator has just informed us that they would require [our exchange] to do the reporting of all transactions subject to reporting in [Member State X]. They clearly said that they interpret article 25.5 of MiFID as allowing Member States to impose an obligation on the regulated markets to do the reporting of all transactions done by investment firms, wherever completed (i.e. on the regulated market, but also on an MTF, within a systematic internaliser's systems, or OTC).	We do not share this interpretation of Article 25.5, which does not imply any obligation for regulated markets to report all transactions (this being even further emphasized by the provisions establishing a possible 'waiver'). On the contrary, Article 25.5 implies an obligation for Member States to allow reporting through the three possible channels listed in the Directive i.e. investment firms/authorised third parties/regulated markets or MTFs where the transaction was completed. The interpretation of the [regulator] would suppress any possible competition between these three means of reporting allowed by MiFID.
The authorities [of Member State Y] want to require regulated markets that operate an MTF to be authorized also as ' investment firms', and will therefore require a 'double license' for regulated markets operating an MTF, which will generate a double ongoing supervision by the regulator (behaviour/conduct) and the Central Bank (i.e. prudential and some business aspects). This will also potentially imply that regulated markets operating MTFs could in practice be submitted to all MiFID rules applying to investment firms, as they will have to require to be authorized as such.	This approach is contrary to the provisions of Article 5(2) of MIFID which is expressly stated to be 'by way of derogation from paragraph 1'. Paragraph 1 sets out the general requirement for prior authorisation as an investment firm for a person that wishes to perform investment services or activities as a regular occupation or business on a professional basis. The provision goes on to say that Member States shall allow any market operator to operate an MTF subject to the prior verification of their compliance with the provisions of this Chapter, excluding Articles 11 and 15. Clearly, authorisation as an investment firm is not a necessary incident of permission to operate an MTF for a market operator.
Is a bank obliged to report transactions, when the counterparty is another bank (considered as an eligible counterparty) and other parameters of transaction indicate that it is reportable transaction?	Yes. There is no exception to the obligation to make transaction reports set out in Article 25 of MiFID for transactions (as defined in Article 4 of Regulation (EC) 1287/2006) in financial instruments which are admitted to trading on regulated markets.
Is it necessary to obtain prior express consent where the execution policy is concerned exclusively with investments for which there is no regulated market?	See answer to question No. 19 on this Article.
As an intermediary, we provide investment advice to our clients. We also assist clients by the reception and transmission of client orders for the purchase of units in UCITS. Please indicate whether the reception and transmission activity amounts to a best execution activity under the MiFID rules since they are listed as two separate investment services in Annex I to the Directive.	This is a separate investment service from execution of orders on behalf of clients. Obligations analogous to best execution obligations apply to the reception and transmission of orders in according with Article 45 of Directive 2006/73/EC.
If I access indirectly to an execution venue (i.e. by broker), but I see the book of the market and I choose the 'timing', am I executing client order (so art. 44 and 46 applies) or am I transmitting the order to another entity for execution (so art. 45 applies)?	Assuming there is an 'order' in existence, this would appear to be a case of reception and transmission of orders rather than of execution of orders on behalf of clients. Therefore, Article 45 of Directive 2006/73/EC would apply. Article 45 would also apply if the firm were placing orders for execution that resulted from its own decisions to deal (as opposed to client orders). Where a client chooses to use a direct market access (DMA) system provided by a broker, he himself may select the parameters of the trade (such as the price, the counterparty, the venue, the timing and the size of trade). In such a case the broker, while acting on his client's behalf in providing the DMA service, will be treated as having satisfied its duty of best execution to the extent that the client has given specific instructions by means of the DMA system.
UCITS are out of scope of MiFID (Art. 2.1.h)). But, from the investment firms point of view, they are classified as eligible counterparties as soon as the investment firm 'brings about or enters transactions' with them (e.g. : executing or transmitting orders). What becomes this classification if on top of these transactions the investment firms manage the UCITS ? Can now the UCITS be classified as professional or do they keep their 'eligible counterparty' status on the argument that the management of such undertakings is out of scope ? In other words, can the investment firms only use one criteria to classify or not a UCITS: do the investment firms 'brings about or enter transactions' with the UCITS? If yes, the UCITS is an eligible counterparty, if no, the UCITS is out of scope, whatever the other services rendered to the UCITS (being a depositary and / or managing the undertakings). At that point it is supposed that the distinction between managing collective or	The classification of a UCITS by an investment firm depends upon the nature of the service it is rendering to the UCITS. If the investment firm is executing or transmitting orders on behalf of the UCITS, it may treat the UCITS as an eligible counterparty pursuant to Article 24 (2) of MiFID unless the UCITS expressly requests to be treated as a retail client. In those cases when the UCITS' management company delegated the management of a UCITS to an investment firm pursuant to Article 5g of the UCITS Directive, the investment firm is not rendering a service to the UCITS, but is rendering the service of individual portfolio management to the UCITS' management company (See answers to questions 38 and 70). Article 24 of MiFID which exclusively deals with eligible counterparties does not cover the service of individual portfolio management; this implies that the UCITS' management company cannot be considered as an eligible counterparty with regard to that service. Instead the investment firm, when providing the service of individual portfolio management to at UCITS' management company, has to treat it as a professional client unless it requests to be treated as a retail client.

individual portfolios for the UCITS is not relevant for the appropriate classification.	
When a portfolio manager places orders with a 'full service' broker, the commission charged by the broker will comprise a payment for both order execution and research. It will however be a bundled charge, and there will be not necessarily be any specification as to how much relates to each element. Where that particular broker does not also offer an 'execution only' service, it will be impossible to directly determine from that how the commission charges should be split. When complying with Article 45(4), the portfolio manager should take into account, inter alia, the costs relating to the execution of the order (and not the costs relating to research). To do so, it presumably has to determine for itself how it would be appropriate to split the commission charged by the broker. Having done so, it will be then be able to determine whether the broker provides an execution service which enables the portfolio manager to meet the requirements of Article 45(4). Having done so, the portfolio manager will then presumably have to consider whether the charge being made by the broker for research is reasonable, and meets the requirements of Article 45(1). If so, it may place orders with that entity. If not, it may have to look elsewhere, even if that might mean choosing a broker whose execution costs are higher (but whose research costs are more reasonable). In the end a balance has to be struck by the portfolio manager between execution quality, and a 'value for money' assessment of the research. Is this a correct analysis, or should some other procedure be adopted to comply with Article 45?	The portfolio manager must obtain sufficient information from the broker in order to justify its allocation of cost. It cannot simply allocate an arbitrary value to the two activities. Having done so, it is able to compare the result that would be achieved by using an 'execution-only' broker. There is no explicit need under the Directive to determine if the charge for research is reasonable for best execution purposes. However, a portfolio manager paying an 'unreasonable' charge for research is unlikely to comply with his duty to act in the best interests of his client. Also it would undermine the credibility of the cost allocation process. In addition, the rules on inducements (Article 26 of Directive 2006/73/EC) must be considered. Research received by the portfolio manager in connection with execution is a non-monetary benefit and as such must be disclosed to the portfolio manager's client and its receipt must be designed to enhance the quality of the service to the client and must not impair the discharge of the firm's obligation to act in the client's best interests.
Do the principalities of Andorra and San Marin intend to apply the MiFID in whole or in part ?	There is no obligation for either Andorra and San Marino to apply MiFID. The customs unions between both States and the EU only relate to manufactured goods, and do not extend to financial services. We therefore have no information as to whether either State intends to apply the MiFID, and suggest that you contact the relevant national administrations.
Do 'the costs related to execution' include the costs incurred by the client but not related to the investment firm requirements?	The 'costs related to execution' include all expenses incurred by the client which are directly related to the execution of the order.
Can 'the best possible result' for a retail client be determined by other references than 'the total consideration' or is 'the total consideration' the only reference acceptable in regard of the best execution duties?	For retail clients, total consideration is primary but other factors may be taken into account only insofar as they are instrumental in delivering the best possible result for the client in terms of the total consideration: see Recital (67) of Directive 2006/73/EC and Question 11 of CESR's Q&A on best execution at http://www.cesr.eu/index.php?docid=4606.
Since investment firms should consider all the venues, what venue's price shall be deemed the reference price for the stocks and shares listed on a Regulated Market: the price of the share on that regulated market? The price on an MTF or the price of a systematic internaliser?	The concept of a reference price is not used in the MiFID. The firm must consider all the venues listed in its execution policy when choosing which venue to direct a particular order to. The choice must be made in accordance with the firm's execution policy and the factors listed in Article 21(1) of Directive 2004/39/EC and Article 44(3) of Directive 2006/73/EC (where applicable).
· Would interests in limited partnerships and limited liability partnerships fall within the definition of transferable securities particularly if:- · they are a basket of contractual rights arising from a partnership agreement; · they are not traded on a securities market; and · they are subject to transfer restrictions within the partnership agreement such that they are not freely transferable.	The essence of the definition of transferable securities is Article 4(18) MiFID is that, as a class, they are negotiable on the capital markets. The classes of securities mentioned in points (a) to (c) of the definition are non-exhaustive examples of securities that fall within the definition. The fact that shares in partnerships are mentioned in point (a) is not conclusive. That reference is intended to cover partnership shares that are equivalent to shares in companies. Interests in partnership shares that are not 'negotiable on the capital markets' are not equivalent to negotiable shares. The key determinant, therefore, is whether such interests in partnerships and LLPs are negotiable on the capital markets. If the securities in question are of a kind that is capable of being traded on a regulated market or MTF, this will be a conclusive indication that they are transferable securities, even if the individual securities in question are not in fact traded. Conversely, if they are not capable of being traded in such multilateral systems this may indicate that they are not transferable securities, but this is not conclusive. The reference to the 'capital markets' is not defined but, as indicated in the answer to Q2, the concept is broad and is meant to include all contexts where buying and selling interest in securities meet. The concept of negotiability contains the notion that the instrument is tradable. If restrictions on transfer prevent an instrument from being tradable in such contexts, it is not a transferable security.

I am trying to find a definition of how a leveraged portfolio is defined in MiFD, see text below 'where the agreement between an investment firm and a retail client for a portfolio management service authorises a leveraged portfolio, the periodic statement must be provided at least once a month.'	'Leveraged portfolio' is a term that can designate two situations. The first one is the case where the portfolio manager has borrowed in order to finance investment. The term is also used for portofolios containing derivatives or structures products that create investment which is leveraged.
Will we be correct in our transposition of the term 'market operator', if in our law we define it to be a legal person or if we define it to be a company, since article 4 of MiFID states that a 'market operator' means 'a person or persons'?	The term 'person or persons' is broader than a company and includes a natural person, a corporate legal person or a partnership or other collective entity.
If an investment firm has not provided some of the services that it received a licence for, within one year of the granting of the licence, or, if it has not provided some of the services that it has a licence for, for a period of six months, can we say that according to Article 8(a) of MiFID, its licence has partially lapsed in respect of those services it has not provided?	Article 8(a) of MiFID allows competent authorities to withdraw authorisations only when no investment service and no activity has taken place during the specified timeframe. It does not provide for automatic withdrawal of authorisation. However, our view is that the MiFID is consistent with a Member State's legislation providing that an authorisation may lapse partially for those services not provided in the given timeframe.
Do the following products fall under MiFID: 1. Term Deposits (in FX); 2. Term Deposit with embedded optionality; 3. Embedded options (eg swaps) on corporate loan; 4. mortgages offered to euro based customers that are denominated in FX; 5. Life insurance products (e.g. unit-linked) offered through bank branch?	A deposit is not a financial instrument as defined in MiFID, irrespective of the term or the currency in which it is denominated. This answer is based on the assumption that the question refers to a deposit per se, and not to a tradeable instrument such as a certificate of deposit and on the correct qualification of the contract in question as a deposit (i. e., an alleged deposit according to which the initial capital may be lost is not a deposit for the purposes of this answer). In general, an option embedded in a deposit (such as an interest rate structure) does not does change its classification as a deposit. An interest rate on a deposit may have features typical of a derivative without turning the deposit into a MiFID financial instrument. For instance, a floating rate of interest does not turn the deposit into a derivative contract. Equally, a deposit with an embedded derivative that has the potential of reducing the initial capital invested is a financial instrument under MiFID. The way the instrument is structured and documented is relevant. A fixed rate deposit coupled with a separate interest rate swap may in economic terms act in the same way as a floating rate deposit. However the separately documented interest rate swap in this example is still potentially a MiFID financial instrument while the floating rate deposit is not. - The same approach applies to embedded options on corporate loans. An embedded option such as a facility to switch the method of calculating interest rates or to switch the currency of borrowings built into a loan that is not itself a security is not a financial instrument for the purposes of MiFID. - Mortgages are not financial instruments as defined in MiFID, irrespective of the currency in which they are denominated. - Life insurance products are not financial instruments as defined in MiFID. The fact they are distributed through entities that may be subject to MiFID does not affect this status.
Recital 59 of Directive 2006/73/EC states that a client who has engaged in a course of dealings involving a specific type of product or service beginning before the date of application of Directive 2004/39/EC should be presumed to have the necessary experience and knowledge in order to understand the risks involved in relation to that product or investment service. Is it possible to presume the previous knowledge and experience if the client has dealt with complex instruments in another financial institution? Is it necessary for the client to provide some kind of proof?	Yes: the presumption of necessary knowledge and experience for the purposes of Article 19(5) can be based on a previous course of dealings involving a different firm, and it is not generally necessary to require proof from the client unless the client's statement is manifestly inaccurate. Article 19(5) of MiFID, together with Article 36 of Directive 2006/73/EC, require the investment firm to assess whether the client has the necessary experience and knowledge to understand the risks in relation to a product or investment service. Recital (59) of the implementing directive explains that a firm may presume that the client has that necessary experience and knowledge if he has engaged in a course of dealings before 1st November 2007 involving the type of product or service in question. The presumed knowledge and experience is that of the client, and it does not depend on a specific financial institution having been involved. An investment firm should therefore be entitled to rely on the presumption of knowledge and experience in cases where the client's dealings involved another institution. Article 37(3) of Directive 2006/73/EC makes it clear that an investment firm can rely on information provided by its clients unless it is aware, or ought to be aware, that the information is manifestly inaccurate. Accordingly, the firm can rely on a client's statement about previous dealings, and no further proof is necessary, unless the firm knows that the statement is false or inaccurate or, in the circumstances, it should be aware that the statement is false or inaccurate. However, if the client's statement is obviously implausible, so that the firm cannot be satisfied that the client has the presumed knowledge and experience, then it would be appropriate to ask for proof.
Are foreign exchange (FX) forwards under MiFID regulation or are they out of scope?	Even if FX forwards are qualified as a financial instrument in section C of Annex I to MiFID, their intermediation will be subject to MiFID requirements only in the case there is an investment service or activity performed in the sense of MiFID. In this respect, Annex I section B(4) of MiFID lists "foreign exchange services where connected to the provision of investment services" as an ancillary service, not as an investment service. Thus, FX forward transactions not connected to the provision of an investment service, i.e. commercial FX forward transactions, are not covered by MiFID. The qualification of FX forwards as a financial instrument is not important if there is no investment service or activity performed in the sense of MiFID. The fact that FX forwards are considered as an ancillary service also ensures that there should not be a problem with the functioning of the MiFID passport for investment firms. According to MiFID provisions on cross-border provision of services and establishment of branches, it is not possible to provide an ancillary service cross-border, using the MiFID passport, on a stand-alone basis. This means that only when that service is provided together with an investment service and/or activity it will be covered by the MiFID passport. In this respect, credit institutions have already a broad passport for foreign exchange activities under paragraph 7(b) of Annex I to the 2006/48/EC on the taking up and pursuit of the business of credit institutions. Moreover, some of the exemptions included in Article 2 of MiFID would exempt most corporations operating FX

	forwards from the application of MiFID provisions. However, those Member States who would like to see commercial FX forwards covered by MiFID-alike provisions, could apply them through their national law, as it is the case in some Member States.
Financial instruments like investment funds or structured deposits do not have a specific execution venue. Is it necessary to include these kinds of financial instrument in the execution policy?	Yes. In accordance with our answer to Question 55 in the case of UCITS, the UCITS firm itself to which orders are directed for subscription or redemption of units will be an execution venue. For non-UCITS funds, the entity carrying out the equivalent function will be the execution venue. In the case of structured products, the party that executes orders for subscription or redemption of the products will be the execution venue.
Is a firm which provides services (of asset management for example) for an investment firm (with authorisation for asset management services) in a group as its subsidiary (that is for her account and for the account of this investment firm's customers) also exempt from the requirements of MiFID?	The exemption in Article 2(1)(b) of MiFID applies only to the provision of investment services by a parent or a subsidiary to other undertakings within the same group. It does not extend to the provision of services to clients of such affiliated undertakings. Accordingly, in the scenario set out in the question, firm B (a subsidiary of firm A) can provide investment services (such as portfolio management) to firm A without needing itself to be authorised under MiFID. This is the case, irrespective of whether firm A is authorised under MiFID. However, firm B cannot provide investment services to firm A's clients under the exemption in Article 2(1)(b). Please also refer to our answer to question 70 on Article 2(1)(h).
One issue concerns the licensing and the supervision of the investment service of the operation of Multilateral Trading Facilities: In [Member State X], the banking and investment services provided by banks are licensed and supervised by the Central Bank of [Member State X]. The [Member State X securities regulator] is responsible for the licensing and the supervision of firms, other than banks, when providing investment services. Under the MiFID, one of the investment services is the operation of Multilateral Trading Facilities. We wish to clarify whether the licensing and the supervision of the investment service of the operation of Multilateral Trading Facilities by all banks operating in [Member State X], could be the responsibility of the [Member State X securities regulator] and the licensing while the supervision of the banking and of the remaining investment services offered by banks operating in [Member State X] to be the responsibility of the Central Bank of [Member State X]. If this dual licensing/supervision is possible, banks, when providing the investment service of the operation of Multilateral Trading Facilities, will receive one authorisation from the, and another authorisation from the Central Bank of [Member State X] with respect to the remaining investment services and their banking operations, each supervisory authority being responsible for the supervision of the service(s) it licensed.	We believe such a system would be consistent with the MiFID. The distribution and allocation of tasks between competent authorities of a Member State is a matter for that Member State.
Does a US based securities corporation with a branch in Europe need to comply with any reporting duties as to executing or placing transactions that have been conducted entirely outside the European Economic Area?	US based securities corporations are not 'investment firms' within the meaning of MiFID, even if they have branches in the EEA, and therefore are not subject to MiFID's reporting obligations (see answer to question no. 41.2). Reporting obligations and other legislation which the branch has to comply with is a matter for the Member State in which the branch is situated. However, a subsidiary of a US-based securities corporation that are established in the EEA is an EEA company and will be an investment firm if it conducts such business on a professional basis. In that instance, it will be subject to MiFID if the transaction is conducted through a branch of the firm in the EEA. A firm should not book a transaction through a branch located in a third country for the sole or dominant purpose of avoiding the transaction reporting and other obligations of the MiFID.
I am an investor as a trustee of a family trust. My stockbroker has sent me a form to enquire as to my degree of experience as an investor and indicated this to be required by MiFID. I presume similar forms will be sent to my two co-trustees. I understand MiFID requires my stockbroker to vary the advice he gives the trustees and asset classes he recommends to them having regard to the investment knowledge held by the trustees. Two of the trustees are experienced investors, but the third has no knowledge of investments. In view of this can the broker properly recommend investments two trustees only can understand, but the third trustee cannot understand or is the trust's investment universe reduced to those assets which can reasonably be explained to the trustee who has no investment knowledge please?	The aim of MiFID is to protect the client and to make sure the investment firm provides him with a suitable recommendation, especially concerning investment advice or portfolio management. In the case of the described trust, the answer may be subject to the applicable national law as well as the terms of the trust governing the powers and duties of trustees. As regards the application of Article 19(4) and (5) MiFID to a firm providing investment services to trustees, the firm should be entitled to rely on trustees discharging their obligations to each other (including the obligation to share knowledge, if relevant) unless they have actually noticed that this is not the case.

Can Investment Firms located outside the European Economic Area (EEA) qualify as a systematic internaliser? If so, which would be the competent authority?	No. An investment firm must have its head or registered office in the EEA in order to qualify as an investment firm. A systematic internaliser is, by definition, an investment firm. See also answer to question 41.2 on Article 5.
In the UK during recent years a number of banks have issued bonds whereby customers paid a lump sum deposit in exchange for a minimum return after a set period, being the amount invested. Any additional return to the customer is calculated by reference to the performance of an equity index such as the FTSE 100, using an averaging period. When these product where being developed there was a concern that they could be considered to be contracts for differences rather than deposits even though they do behave more like a deposit than a contract for differences due to the capital guarantee imbedded in the product. This issue has be avoided in the UK due to Article 85(2) of the UK Financial Services and Markets Act 2000 (Regulated Activities Order) 2001 (the RAO) which specifically excludes from the UK definition of a contract for differences, rights under a contract under which money is received by way of a deposit on terms that any interest or other return to be paid on the sum deposited will be calculated by reference to fluctuations in an index or other factor. These UK products were therefore designed to fall within the exemption and give the banks the necessary comfort. Given that financial contracts for differences are financial instruments for the purposes of MiFID (see Annex I Section C(9)) and MiFID does not contain a carve out along similar lines to Article 85(2) of the RAO, is it possible that these products, while ostensibly deposit contracts, could be within the scope of MiFID as financial contracts for differences?.	Rights under a contract under which money is received by way of deposit on terms that any interest or other similar income return to be paid on those sums will be calculated by reference to fluctuations in an index or other fact should not be treated as contracts for differences. However, where a credit institution or investment firm issues a bond which embeds a derivative, that will clearly be a transferable security and therefore a financial instrument within the scope of MiFID.
The last sentence of Article 21 requires investment firms to execute orders in accordance with any specific instruction received from clients. Is there any restriction on investment firms agreeing with clients e.g. in terms and conditions of a wrapper product, client agreements etc to limit the ability of customers to give specific order instructions e.g. as regards timing of an order, the maximum or minimum price of an order, the maximum or minimum of securities to be purchased or sold?	Any such agreements should not be to the detriment of the firms' primary obligation to achieve the best possible result for the client, consistent both with Article 21 and with its obligation to act in the client's best interests under Article 19(1). Nor can a firm induce the client to give instructions to it that would result in something less than the best result, based on reasonable expectations (Recital 68, Level 2 Directive).
Article 14, paragraph 2 of Directive 2006/73/EC requires that service providers must have an authorisation required by law to perform the outsourced functions, services. What kind of authorization is meant by that (authorisation that is otherwise required for investment firm to perform investment services, authorisation as a tied agent, any other authorisation required by national legislation,…?). Can investment firms outsource critical or important investment services (ex. portfolio management) to a service provider which is the investment firm's holding company that is not a subject of any authorization or registration by a national law, if the national legislation does not require authorisation of service providers to perform the outsourced services for investment firm?	Article 14(2) of Directive 2006/73/EC requires providers of outsourced services to have 'any' national authorisation applicable. Strictly speaking, if the host country of the service provider does not require authorisation or registration by law, outsourcing of functions to the service provider is still possible. However, as per Article 14(1), the firm remains fully responsible for discharging all of its obligations under MiFID, including the conditions and procedures for authorisation (Level 1 Directive, Title II, Chapter 1). Article 10(2) of the Level 1 Directive prohibits a competent authority from granting authorisation if, in such a case, the third country laws, regulations or administrative provisions prevent it from being able to exercise its supervisory functions. When the outsourced activity concerns retail portfolio management, both requirements in Article 15(1) of the Level 1 have to be met: i.e. authorisation in the host country and a valid cooperation agreement between the relevant competent authorities. In the absence of such requirements, investment firms should give notice of the outsourcing to their competent authority, which has the opportunity to object. Competent authorities are to publish guidelines on when they will allow outsourcing of retail portfolio management to service providers in third countries without the necessary laws and mutual supervisory cooperation agreements itemised in Article 15(1).

Art. 26(b) states that a firm must disclose the 'existence, nature and amount of the [inducement]... in a manner that is comprehensive, accurate and understandable'. The final paragraph of Art. 26 then allows Member States to allow firms to disclose just the 'essential terms' of the inducement provided that it will make available the full details upon request. In the CESR Paper 'Inducements under MiFID – Recommendations' (May 2007), Recommendation 6(b) states that a generic disclosure which explains merely that a firm will or may receive or pay an inducement is not sufficient to enable a client to make an informed decision and therefore will not be considered as providing the 'essential terms of the arrangements' referred to in Art.26. In the scenario of an asset manager and distributor operating a revenue sharing agreement where the charges are shared between the two, can you explain what MiFID envisages to be the difference between the content when making the full disclosure under Art. 26(b)(i) compared to the level of detail expected if just the 'essential terms' were to be provided at the outset, given the CESR Recommendation?	Under the second paragraph of Article 26, the firm may disclose the 'essential terms of the arrangements relating to the fee, commission or non-monetary benefit in summary form, provided that it undertakes to disclosure further details at the request of the client and provided that it honours that undertaking'. At the least, the essential details of the existence, nature and amount of the inducement or, where the amount cannot be ascertained, should be provided. The goal of the summary disclosure is to enable the client to understand readily how the firm is incentivised to act. The disclosure should be fit for that purpose. As CESR states, a mere disclosure of the fact that an inducement might be payable is not an adequate disclosure.
A transaction outside a regulated market or MTF requires prior explicit consent (in practice this means in case of systemic internalisation). In MiFID the definition of a regulated market is: 'a regulated market within the EU.' From this the question arises if for transactions on a regulated market outside the EU (and regulated on the basis of MiFID) 'prior express consent' is necessary?	Yes. Prior express consent is required in such cases, however consistent with our answer to question 19 on this Article, on a purposive reading of the express consent requirement, an investment firm does not have to obtain express consent from its clients where the relevant instruments are not admitted to trading on a regulated market or MTF.
A European bank requires its customers to fill in the below questionnaire, claiming that it is 'a legal requirement under the European MiFID Directive'. Questions: 1) Is this really compulsory? 2) Is the questionnaire legal? 3) Is this bank manipulating the Directive for purely commercial reasons? 4) If a customer does not intend to invest, is (s)he still required to fill in this questionnaire? 5) Don't you find the questions too personal? -------------------------------------MESSAGE FROM THE BANK--------------------------------- Determine your investor profile – now compulsory! For several weeks, we have been asking you to fill in a questionnaire so as to determine your investor profile and thus better assess your future investments. Please fill it in now so as to be able to make transactions. N.B. This is a legal requirement under the European MiFID Directive linked to customer protection. Questionnaire: ============= 1) How do you look at your investments? - Above all, an investment must guarantee a certain degree of security, even it means foregoing the possibility of high returns. - Although security is my main concern, I am prepared to take limited risks to improve returns. - In order to obtain good returns, I am prepared to include riskier investments in my portfolio. - I primarily look for the highest yielding investments, even if it means taking significant risks. 2) If, some time after your investment, the price had declined significantly and the economic climate had not changed, what would you do? - Sell so as to avoid further problems and try something else. - Do nothing and wait patiently. - Increase my holding. It was already a good investment and it is now good value. 3) What is your investment objective?	Questions 1 – 3 & 5 Article 19(4) of Directive 2004/39/EC and Article 35 of Directive 2006/73/EC require a firm, when providing the services of investment advice or individual portfolio management, to collect such information as is necessary for the firm to understand the essential facts about the client and to have a reasonable basis for believing, giving due consideration to the nature and extent of the service provided, that the specific transaction to be recommended, or entered into in the course of providing a portfolio management service, satisfies the following criteria: (a) it meets the investment objectives of the client in question; (b) it is such that the client is able financially to bear any related investment risks consistent with his investment objectives; (c) it is such that the client has the necessary experience and knowledge in order to understand the risks involved in the transaction or in the management of his portfolio. If the client fails to provide the information requested, in most circumstances advice or portfolio management services cannot be provided – see answer to Question 65 on Article 19(4) of Directive 2004/39/EC and Article 35(5) of Directive 2006/73/EC. For other investment services, including execution of orders on behalf of clients and reception and transmission of orders, the firm need only determine that (c) is fulfilled, pursuant to Article 19(5) of the Directive and Article 36 of Directive 2006/73/EC. Under certain conditions, firms are permitted to provide limited services even when (c) has not been fulfilled, as set out in Articles 19(5) and (6) of the Directive. This includes cases where clients elect not to provide the information requested. Where a firm classifies a client as a professional client in relation to particular financial instruments, it is entitled to assume that (c) is fulfilled. For certain ('per se') professional clients, in the case of investment advice the firm is also entitled to assume that (b) is fulfilled. Without commenting in detail on the questionnaire you have submitted, it is a matter of judgement in particular cases whether a firm's procedures are adequate to fulfil the requirements of the Directive. There is nothing to prevent a firm from asking for more information, though of course it should not claim that this is a legal requirement and a client is free to seek another intermediary who asks for less information. Question 4 Not usually. The firm is required to assess suitability and appropriateness when an investment service is to be provided. In certain circumstances, a firm may need to re-assess suitability or appropriateness in the case of a continuing client relationship, for example where the client continues to hold assets that the firm advised on or where the client continues to hold assets in a portfolio managed by the firm. In the absence of a continuing client relationship, there is no such requirement.

- My current income is sufficient, so I am concentrating on increasing my capital.
- While my main objective is to increase my capital, it must also supplement my income.
- I want to preserve my capital and receive some additional income.
- I need the returns on my investment to contribute to covering my current outgoings.

4) Leaving aside your reserves, and bearing in mind that longer-term investments make higher returns more achievable, when do you think you will need the money that you invest?
- I might need all or part of my capital in the next 3 years.
- I might need all or part of my capital between 3 and 5 years from now.
- I might need all or part of my capital between 6 and 10 years from now.
- I will not need my capital in the next 10 years.

5) What would you do in the event of an urgent or unexpected expense (new car, home improvements, etc.)?
- I can deal with such situations without touching my investments.
- If this happens, I will cash in some of my investments, even at a loss.
- So that I don't have to sell at a loss, part of my capital must be available at all times.

6) How would you describe your current financial prospects (work-related, miscellaneous income, etc.)?
- I have excellent prospects.
- My situation is sound.
- My situation is acceptable.
- My financial prospects could deteriorate.

7) Which of these phrases best describes how you manage your assets?
- I prefer to stay on familiar ground.
- I am prepared to consider new investment strategies or opportunities.
- I don't hesitate to tr new things, even if they are risky.

8) What types of investment do you have or have you had? (you may choose more than one answer)
- deposits, fixed-term or fixed-rate accounts
- bonds or pension scheme/life assurance products
- mixed SICAVs (sociétés d'investissement à capital variable – investment companies with variable capital)
- share-based SICAVs

9) How would you describe your knowledge of financial products and concepts?
- I have in-depth knowledge of the processes involved.
- I am relatively knowledgeable about the financial markets.
- I have some relatively vague ideas.
- I am not familiar with financial language.

Scenario- a firm subject to MiFID requirements receives a client order and trades it acting as principal on a regulated market. The firm then allocates the trade to the client at the same time and price as the 'on exchange' trade. Here the firm is acting as 'riskless principal' and in accordance with article 27 of the Regulation 1287/2006, 'two matching trades entered at the same time and price with a single party interposed shall be considered as a single transaction'. The single transaction has satisfied the post-trade transparency requirement as the on exchange client trade is automatically published (and the client allocation does not require trade reporting). Does it also follow that the client allocation does not require 'prior express consent' as a trade conducted 'outside a regulated market' as it is considered to be part of the single transaction?	No. The Article stipulates that two matching trades entered at the same time and price with a single party interposed shall be considered as a single transaction – but only for the purposes of ensuring that the transaction is made public as a single transaction. In other words, this deeming provision has nothing directly to do with the best execution rules. With regards to the requirement to seek prior express consent in Article 21(3) of Directive 2004/39/EC, it is notable that investment firms may obtain this consent either in the form of a general agreement or in respect of individual transactions.

Article 15(1) of Directive 2006/73/EC imposes conditions on outsourcing of retail portfolio management to third country service providers. Article 15(2) imposes conditions on the outsourcing of investment services to third countries where the conditions in 15(1) are not or cannot be complied with. Is it correct to assume that the wording of Article 15(2) can be read as: '....may outsource investment services, other than the service of portfolio management provided to retail clients, to a service provider located in a third country...'	No. Article 15 of Directive 2006/73/EC only applies to the outsourcing of the investment service of portfolio management provided to retail clients. Article 15(2) is subsidiary to Article 15 and does not have an independent operation.
Who will supervise a firm offering services in another member state when it does not open a branch in that particular member state? Is the responsibility in respect of conduct of business solely of the home regulator or does the host state have any power? If breaches are detected by the host state after a compliant by a customer can it take steps directly or does it have to refer to the home regulator?	MiFID opts for the principle of Home State supervision in the context of free provision of services (Article 31 of Directive 2004/39/EC). Host Member States may not impose additional requirements. However, they can take certain precautionary measures under Article 62 of MiFID after having informed the competent authority of the Home Member State in the narrow circumstances described by Article 62(1).
Imagine a retail client who has a banking relationship with a bank located in one EU Member State (the 'Bank'). The said client decides to mandate an Independent Asset Manager located in a Non-EEA country in order to manage the portfolio/monies which are under the custody of the Bank. Hence, the monies are under the custody of the Bank (a MiFID investment firm) but the portfolio management is provided by a non-MiFID investment firm, because the retail client has decided to mandate such a non-MiFID investment firm. Does the Bank have to comply with the MiFID suitability and/or appropriateness test in such scheme where this is the retail client himself who decided to outsource the portfolio management to a non-MiFID investment firm located in a non-EEA country?	Yes, the Bank has to comply with the provisions of MiFID and its implementing texts, in particular Articles 14 and 15 of Directive 2006/73/EC. Article 14 requires, among other conditions for outsourcing, a written agreement between the investment firm and the service provider (§3). Article 15 imposes further conditions on the outsourcing of retail portfolio management. It is the responsibility of the Bank to ensure the above conditions are met when it out sources. Note that the above analysis applies where there is no direct client relationship between the portfolio manager and the client.
Article 40(4) requires firms to provide clients with information in accordance with Table 1 of Annex 1 to Regulation 1287/2006, some of which is in the form of codes. Article 40(5) says that the information referred to in Article 40(4) may be provided using standard codes if an explanation is also provided. Article 40(4) seems to require the code whereas Article 40(5) seems to imply that the code is optional. Can you please confirm the relationship between the two provisions.	Article 40(5) enables a firm to use codes where not required by Article 40(4) (for example, in relation to points 40(4)(m), (n) and (o)) where an explanation of those codes is given. It also requires an explanation of the codes used in accordance with those items of Article 40(4) that require codes to be used. The explanation of a code may be as simple as a column heading in appropriate cases.
I just would like to ensure that only Romania, the United Kingdom and Ireland have yet transposed the MIF Directive. Is this still true ?	For the latest state of play of MiFID transposition please consult our website: http://ec.europa.eu/internal_market/securities/isd/mifid_implementation_en.htm.
If client orders are internalised on a non-systematic basis (e.g. ad-hoc internalisation depending on the various market conditions), would the investment firm still be subject to the obligation of Article 27?	The obligations of Article 27 of Directive 2004/39/EC apply with respect to systematic internalisers in respect of shares for which they are systematic internalisers and for which there is a liquid market. Article 21(3) of Regulation (EC) No 1287/2006 gives more details on actity which shall not be treated as performed on an organised, frequent and systematic basis. Such activity is not subject to the Article 27 obligations.
The optional Article 3 exemption (specifically at the third indent sub-point (iv)) suggests that firms (e.g. investment intermediaries), that would otherwise be exempt from MiFID requirements, would however become subject to MiFID should they 'transmit' orders directly to unregulated or non-EEA authorised collective investment undertakings – e.g. unregulated property partnerships, where such schemes cannot be marketed to the general public and are otherwise restricted in their promotion to such individuals.	Firms that can avail themselves of the exemption in Article 3 of Directive 2004/39/EC (assuming it has been implemented by the Member State concerned) may not transmit orders relating to financial instruments directly to unregulated collective investment schemes. However, firms which transmit orders in relation to these schemes to other permitted persons listed in Article 3 for onward transmission to such schemes may still fall within the Article 3 exemption.

On the basis of this restriction, it is our understanding that a firm may no longer be able to transact – in other words 'arrange' for a client – such business if they wish to remain exempt from MiFID under the Article 3 exemption. Is our understanding correct?	
Do best execution and fee transparency requirements apply to securities lending activities and to ancillary services?	Best execution requirements pursuant to Article 21 of Directive 2004/39/EC and Article 44 of Directive 2006/73/EC apply to firms that execute orders and, specifically, where there is an agreement to buy or sell one or more financial instruments on behalf of clients (Article 4(1)(5) of Directive 2004/39/EC). Analogous obligations also apply pursuant to Article 19(1) of Directive 2004/39/EC and Article 45 of Directive 2006/73/EC to firms that receive and transmit orders in relation to one or more financial instruments, or that place orders for execution in the course of providing the service of portfolio management (as defined in Article 4(1)(9) of Directive 2004/39/EC). Securities lending activities involve the temporary exchange of securities, generally for cash or other securities of at least an equivalent value, with an obligation to redeliver a like quantity of the same securities on a future date. Securities lending activities will normally involve the provision of the investment services of execution of orders on behalf of clients, reception and transmission of orders and portfolio management. Consequently, they will fall within the scope of the best execution rules. The best execution rules apply to all financial instruments (see question 17). The criteria in order to determine best execution are set in Article 21 of Directive 2004/39/EC and Article 45 of Directive 2006/73/EC. The precise application of the best execution rules to various types of securities lending activity needs to be considered in accordance with Recital (70) of Directive 2006/73/EC. For further clarification on best execution, please see working document ESC-07-2007 on http://ec.europa.eu/internal_market/securities/docs/isd/letter-cesr-best-execution_en.pdf. As for information about costs and charges, firms providing services to retail and professional clients will be subject to the relevant requirements under Article 19(3) of Directive 2004/39/EC and, in the case of retail clients, to Article 33 of Directive 2006/73/EC as well. The mentioned requirements apply both to investment services and to ancillary services. Moreover, Article 19(1) of Directive 2004/39/EC provides that when providing investment services and/or, where appropriate, ancillary services to clients, an investment firm must act honestly, fairly and professionally in accordance with the best interests of its clients. Article 26 of Directive 2006/73/EC on inducements, sets further requirements in relation to the receipt or payment by an investment firm of a fee, commission or non-monetary benefit that could, in certain circumstances, place the firm in a situation where it would not be acting in compliance with the principle stated in MiFID Article 19(1). Article 26 also applies to ancillary services. Further information can be found in CESR's recommendation on inducements (see http://www.cesr.eu/index.php?docid=4606).
Professional clients must meet strict criteria on balance sheet total, net turnover and own funds. What is the accounting definition of 'own funds'?	The term should be understood as equivalent to the term 'capital and reserves' (in French, 'capitaux propres', in Dutch 'eigen vermogen') as used in the Fourth Accounting Directive 78/660/EEC. This answer replaces our answer published on 22.10.07.
We are a portfolio management company (AMF approved). We manage real estate investment trusts [société civile de placement immobilier – SCPIs] and will soon also manage collective real estate investment undertakings [organisme de placement collectif immobilier – OPCIs]. We are currently working on the application of the MiFID Directive to the products that we manage. Could you please clarify for us whether the SCPI and the OPCI are considered as complex or non-complex products, as this is crucial for determining whether or not the tests of appropriateness apply.	If the SCPI and OPCI (as units in non-harmonised collective investment undertakings) are provided to investors, Article 19 of MiFID applies. When they are the object of investment advice or portfolio management, the suitability test in Article 19(4) has to be carried out. For all other investment services (as referred to in Annex I Section A) an appropriate test pursuant to Art. 19(5) has to be undertaken. However, when the investment service of execution and/or transmission of orders is provided, an appropriateness test is not required if the conditions in 19(6) are fulfilled: (i) One of these conditions is that the respective financial instrument is a so-called non-complex product pursuant to Art. 19 (6) first indent. With regard to SPCIs this is the case, if the shares of the SPCI are admitted to trading on a regulated market (see Art. 4 (1)(14)) or in an equivalent third country market. Units in non-harmonised collective investment undertaking, by contrast to UCITS, are not expressly mentioned in Art. 19(6) first indent. They can, however, be so-called other non-complex financial instruments, provided that the four criteria set up in Art. 38 of the MiFID Level 2 Directive 2006/73/EC are met (whether units in non-harmonised collective investment undertaking meet these criteria needs to be checked in each individual case): (ii) the service must be provided at the initiative of the client (on the meaning of this expression, see Recital (30) of the Level 1 Directive 2004/39/EC); (iii) and he/she has been clearly informed that, in the provision of this service, the investment firm is not required to assess the suitability of the instrument. For eligible counterparties and professional clients, classified as such for the services or products in question, the appropriateness test need not apply: see Article 24(1) of Directive 2004/39/EC.
We consider that a Host Member State cannot impose its own requirements relating to the ancillary service of safekeeping and administration of financial instruments for the account of clients (as per Annex I Section B para (1) of MiFID) on an other European Investment Firm providing this service on its territory by virtue of its rights to provide services in other Member States in terms of Article 31 MiFID – on the basis of the fact that: - the holding of clients' financial instruments is specifically regulated by MiFID and that - firms providing services in other Member States in terms of Article 31 MiFID are only subject to the rules of their Home State We would be grateful if you confirm to us that our understanding is correct.	Yes. Firms exercising the freedom to operate cross-border are subject solely to authorisation based on the requirements of the home Member State. Provided that, besides the ancillary service, the firm also provides investment services as defined in Annex I Section A (Level 1 Article 6), it is covered by the MiFID authorisation and passport (Level 1 Article 31).

Is the simple presentation of the test applied to managers and directors of entities licensed under Directives in the financial field enough to classify a client as professional or it is necessary that 2 of the 3 criteria referred to in the Annex must be satisfied in any case? If not, what kind of test (if it is required) must be presented to a client different from which satisfies the test applied to managers and directors (see above), to assess the expertise and knowledge? Must the entity create a further specific test (related to expertise and knowledge) that have to be completed by the client?	The test is sufficient, provided that the manager or director of a financial entity was already classified as professional in accordance with similar parameters and procedures Article 71(6) of the Level 1 Directive permits investment firms to continue considering existing professional clients as such when this is the case. If the request is new, two of the three criteria listed in Annex II, Section II should be satisfied. See also our answers to questions 80 and 104.
We are unsure whether a person providing a service, such as investment advice, in relation to shares which are not listed or traded on any exchange or other 'market' such as an MTF (and which may remain so), would fall under MiFiD. Our difficulty is whether the phrase 'negotiable on the capital market' would capture also shares in private companies which are not listed or traded on any market. In this regard, we have also referred to the MiFiD Q&A website hosted by the Commission, in particular to Question 2 which requested further guidance as to the meaning of, inter alia, the term 'capital market'. In its reply to this question, the Commission stated that the notion of a 'capital market' is a broad one and is meant to include all contexts where buying and selling interest in securities are met. In considering this issue, we have referred to the service of 'Placing of financial instruments without a firm commitment basis' (paragraph 7 of Section A of Annex I), which is ordinarily provided in the context of newly issued securities which may or may not eventually be listed and traded on an exchange or other market. For this service to be captured under MiFiD, it would need to be provided in relation to 'transferable securities'. Hence one can argue that the term transferable securities would also cover unlisted shares. In the light of the above, we are minded to take a very wide interpretation of the phrase 'negotiable on the capital market' to include shares which are also unlisted and not traded on any exchange or MTF, but which are still transferable in accordance with certain rules (which usually relate to private companies). However, we would appreciate your views and/or guidance on this approach.	Please refer to our answers to questions 3.2 and 61.
How many MTF's are there in Europe now and who are they?	The Committee of European Securities Regulators publishes the list of MTFs via the CESR MIFID database at http://mifiddatabase.cesr.eu/. Choose 'multilateral trading facilities' then 'view all' to see the list. The number of MTFs varies from time to time.
(a) If a credit institution performs an investment service together with an ancillary service, for example receipt and transmission of orders and custody, is it subject to the MiFID rules in respect of the custody service, even though Article 1(2) makes no reference to ancillary services? (b) Even if the answer to (a) is that the credit institution is subject to MiFID for ancillary services provided in conjunction with investment services the question then arises as to the position of credit institutions who provide custody services, in particular the point at which a service linked to custody becomes an investment service and the consequences of that.	(a) The firm is providing investment services/activities in such a case, so the precondition in Article 1(2) is satisfied. Once this precondition is satisfied there is nothing in Article 1(2) that provides that the relevant requirements should only apply "in relation to the provision of investment services or activities". In other words, the listed provisions only apply when the credit institution is providing investment services or activities, but when it is, those provisions should apply in full - including in relation to any connected ancillary services. (b) Once it is accepted that the MiFID requirements for credit institutions performing investment services/activities cover the ancillary services performed with those investment services or activities, there appears to be no basis in the directive for taking a different approach depending on whether the ancillary service or the investment service performs the dominant aspect of the service provision.

Credit institutions who are custodians handle corporate events for their clients. In some cases the client may ask the custodian to sell his entitlements arising under the corporate event. If the credit institution instructs a broker to do this and makes no charge to the client for this aspect of his service, is such a limited activity the 'receipt and transmission of orders'? If so, depending on the answer to Question 147.1, the custody business itself may be subject to MiFID requirements.	The answer to this question depends whether the 'entitlements' arising amount to financial instruments within MiFID. Assuming that this is the case, this would appear to be a case of the reception and transmission of orders or indeed of the execution of orders on behalf of clients. It may not be such a case if the broker were merely introducing his client to other brokers or interested parties without more.
Article 14 of Directive 2006/73/EC indicates the conditions that must be met for the externalisation of operational tasks (including a written contract, etc.). Do these conditions apply in the event of the systematic delegation of orders by an asset manager within the meaning of Article 45? In particular, when a European investment company systematically delegates the execution of orders to its Swiss-based parent company (non-EU Member State), must the formal conditions of Article 14 be met? Under what circumstances may there be a systematic delegation of this type, in particular with regard to the compliance of the Swiss-based parent company with the principles of the MiFID (procedures in place within the Swiss company to guarantee the 'best execution', the absence of conflicts of interest, etc.)?	1.Yes. The transmission of orders constitutes a critical and important function and therefore Article 14 of Directive 2006/73/EC applies. 2.Yes. The fact that the firms are part of the same group can nonetheless be taken into account in the application of various requirements in Article 14 (Article 14(4) Level 2) and its obligation to act in the best interests of its client and to take all reasonable steps to obtain the best possible for their client (Article 45 Level 2). 3. The relevant articles in MiFID establishing the overarching parameters for the outsourcing of critical and important functions of this type are Article 13(5) of the Level 1 Directive and Articles 13, 14 and 15 of Directive 2006/73/EC. These provisions should be taken fully into account in the design of any outsourcing arrangement. However, MiFID is not intended to require a duplication of effort as to best execution for firms falling under Article 45 Level 2 (Recital 75 Level 2). Furthermore, outsourcing of functions to non-MiFID (non-EEA) entities is possible, as long as firms ensure that the execution arrangements of such an entity allow them to comply with their own overarching best execution obligations. Where the firm cannot satisfy itself that this is the case, it should not use such entities. See also CESR's Q&A on best execution under MiFID at http://www.cesr-eu.org/data/document/07_320.pdf.
If a given stock is trading on multiple exchanges subject to MiFID (say Nokia Corp A; ISIN:F10009000681 which trades on the Frankfurt Stock Exchange, Stuttgart Stock Exchange, VIRT-X, XETRA, Euronext Netherlands and the OMX; and settles in EUR, and SEK) and: 1) that stock is economically identical on all exchanges although it may trade in different currencies and is subject to different clearing, settlement and depository arrangements; and 2) the broker is a member of each of the exchanges, does best execution imply that broker effect the transaction at the exchange with the best price even if that requires a foreign exchange transaction to translate currencies and a transference across depositories following settlement? Also, what requirement does MiFID have, if any, with respect to the broker considering different margin requirements imposed by exchanges carrying a like security? Does margin have to be taken into account as a cost? If a broker purchases a stock at one exchange on behalf of a client and transfers to the depository of another, which exchange's margin requirement would be applied if different.	1) No. MiFID requires the broker, in choosing where to execute a particular order from among the trading venues to which the broker has access and which are mentioned in the broker's execution policy, to seek the best possible result, according to a list of factors mentioned in Article 44 of Directive 2006/73/EC. Where an investment firm executes an order on behalf of a retail client, the best possible result shall be determined in terms of the total consideration, representing the price of the financial instrument and the costs related to execution, which shall include all expenses incurred by the client which are directly related to the execution of the order, including execution venue fees, clearing and settlement fees and any other fees paid to third parties involved in the execution of the order. For the purposes of ensuring that an investment firm obtains the best possible result for the client when executing a retail client order in the absence of specific client instructions, the firm should take into consideration all factors that will allow it to deliver the best possible result in terms of the total consideration, representing the price of the financial instrument and the costs related to execution. Speed, likelihood of execution and settlement, the size and nature of the order, market impact and any other implicit transaction costs may be given precedence over the immediate price and cost consideration only insofar as they are instrumental in delivering the best possible result in terms of the total consideration to the retail client. For professional clients, factors other than price, such as speed of execution, may be more important. 2) According to the above, margin would normally be a cost 'directly related to the execution of the order' and therefore need to be taken into account. The question of which exchange's margin requirements would be applied would be determined by reference to the applicable rules of the exchanges.
Could a company which is incorporated in a Member State but is not an authorised investment firm provide exclusively ancillary services in that Member State? In other words, would a MiFiD authorization (entailing the provisions of at least one investment service or activity) necessarily be required to enable such company to provide exclusively ancillary services?	A company providing ancillary services, but not investment services as defined in Annex I of the Level 1 Directive, can continue to do business without an authorisation as an investment firm under MiFID under national law. The passport (Art 31 Level 1) would not apply.
Section II of Annex II to the MiFID provides that retail clients which are treated as professionals (after fulfilment of the relevant criteria and procedure) should not be presumed to possess market knowledge and experience comparable to that of the categories listed in section I of Annex II. What are the practical consequences of this difference in market knowledge and experience? How do investment firms have to take this difference into account when applying the rules of conduct? Is there only a difference with respect to the	The only rule that makes a 'hard' distinction between these categories of client is Article 35(2) of Directive 2006/73/EC. However, a number of principles and provisions govern the protection to be afforded to clients and refer to the characteristics or nature of the client as an element to be taken into account: e.g. Articles 22(4), 37(1) and 44(1)(a) of Directive 2006/73/EC. In this sense, a 'soft' distinction is made, since normally the nature or characteristics of an opted-up profssional client will be different than those of a per se professional client.

suitability assessment (Article 35 (2), second paragraph of the MiFID Implementing Directive provides for a presumption of suitability for per se professional clients only) or are there other differences in treatment between per se professional clients and retail clients which have requested professional treatment?	
1. Is it necessary that an instrument be admitted to trading on a regulated market or on a MTF in order to be qualified as a financial instrument according to Section C of Annex I of MiFID? 2. If an investment firm provides its client services regarding an instrument not traded on a regulated market or on a MTF should MiFID apply? 3. If an investment firm provides its client services regarding non MiFID instruments should MiFID apply? 4. Should MiFID apply to financial instruments traded OTC and not admitted to trading on a regulated market or on a MTF?	1. No, other instruments negotiable on capital markets, e.g. placed without a firm commitment basis also qualify. See also our answers to questions 2, 3.2, 61 and 146. 2. Yes 3. No. The definition of investment service covers MiFID instruments only. Activities with regards to non-MiFID instruments fall outside the scope of what constitutes an investment service. 4. Not necessarily. Financial instruments traded OTC are covered by a number of MiFID provisions (e.g. best execution) but not by others (e.g. pre- and post-trade transparency, transaction reporting)
Should clients of the corporate finance department be classified (issuer, companies planning for IPO etc)? Do the classification rules only apply when firms are providing 'investment services and activities', (not for 'ancillary services')?	1. Yes. 2. No. As many operating conditions laid down by MiFID apply to the provision of ancillary services, recipients of ancillary services should also be classified.
MiFID requires an investment firm to inform the retail clients in portfolio management about the risks in investment in financial instruments before entering into an agreement for provision of services: Is it necessary to include the information about the risk level of the financial instruments in the Client statement / report provided to him, if the client argues that he does not understand to which type of risk the financial instrument (bought by the investment firm) correspond to?	If a client does not understand the risks involved in the transactions entered into by the investment firm in the course of the management of his portfolio, the firm cannot have a reasonable basis to conclude that the service provided is suitable for him under Article 19(4) of Directive 2004/39/EC and Article 35(1)(c) of Directive 2006/73/EC. While MiFID does not require an explanation of the level of risk to be carried over into the periodic statement to be provided under Article 41 of Directive 2006/73/EC, it does require the firm to take all reasonable steps to ensure the suitability of any given service inter alia by explaining in sufficient detail the nature and risks of the financial instruments concerned in accordance with Article 31 of Directive 2006/73/EC. This applies regardless of the level of discretion involved in the management of the portfolio.
My broker has changed my client classification from a 'private client' to that of a MiFID 'retail client'. Under the old classification I had the right to refer disputes for consumer arbitration. Under the MiFID directive it appears that I will lose that right. In this event what protection do I have?	The move to the MiFID client classification regime has no impact on your access to arbitration or to other out-of-court dispute resolution mechanisms. You should query your broker's explanation and, if necessary, speak with your broker's supervisory authority. Moreover, Article 53 of Directive 2004/39/EC provides that Member States have to encourage the seeting-up of out-of-court settlement of consumer disputes concerning the provision of investment and ancillary services provided by investment firms. No distinction is made in relation to the type of client.
Is a personal recommendation that is made to a person in his capacity as an investor or potential investor to invest in discretionary portfolio management, i.e. not a specific financial instrument, considered as investment advice?	According to Article 4(1)(4) of Directive 2004/39/EC, investment advice means the provision of personal recommendations to a client in respect of one or more transactions relating to financial instruments. Article 52 of Directive 2006/73/EC, further develops the concept by establishing that that personal recommendation must constitute a recommendation to take one of the following sets of steps: (a) to buy, sell, subscribe for, exchange, redeem, hold or underwrite a particular financial instrument; or (b) to exercise or not to exercise any right conferred by a particular financial instrument to buy, sell, subscribe for, exchange, or redeem a financial instrument. Therefore, the recommendation of the services of portfolio management is not to be considered as investment advice, because it is not related to a particular financial instrument.
How will the Swiss Stock Exchange SWX be affected by MiFID?	The Swiss Stock Exchange is outside the scope of MiFID in the sense that it is not a regulated market and not an MTF for MiFID purposes. However, it could qualify as an execution venue for best execution purposes: see the definition of 'execution venue' in Article 44(1) of the Level 2 Directive 2006/73/EC. It could also be a trading venue for the purposes of the Level 2 Regulation (EC) 1287/2007: see the definition in Article 2(8) thereof.
Since introduction of MiFID rules my finance provider needed to cut important information related to the investment funds I am engaged in, i.e. 6-months view, performance change on a daily base! My provider said, it is due to the new MiFID-rules. So, seeing my information bases for investment decisions disappearing, I ask myself as a consumer and private investor, what are the targets of these rules?	Article 41 of the Level 2 Directive 2006/73/EC sets out minimum requirements for reporting to clients in the case of portfolio management. In the case of retail clients, those reports must be at least every six months; however, the Directive also requires investment firms to inform their clients they have the right to reports every three months: Article 41(3)(a). Also, if the mandate authorises a leveraged portfolio, your firm (assuming you are a retail client) must report monthly: Article 41(3)(c). Furthermore, you have the right to receipt reports of transactions executed on an order-by-order basis or periodically, at your election (Article 41(4)). There is nothing in MiFID that prevents a firm from reporting more often than the stipulated times.

I would like to know if MTFs include ATS and ECN.	Yes, these terms are generally synonymous, although of course in each case the legal definition of 'MTF' must be applied. For there to be an MTF, the buying and selling of MiFID financial instruments in these systems must be governed by non-discretionary rules in a way that results in contracts. As the rules must be non-discretionary, once orders and quotes are received within the system an MTF operator must have no discretion in determining how they interact. The MTF operator instead must establish rules governing how the system operates and the characteristics of the quotes and orders (for example, their price and time of receipt in the system) that determine the resulting trades. The list of MTFs is published by CESR at http://mifiddatabase.cesr.eu/.
My broker will pool investments and he has warned me, that in the event of his default, I as a nominee account holder may not be fully compensated. Why is he allowed to pool client assets when it may be, that when trading for his own account his risk profile is greater than the ordinary 'execution only' investor? Can I challenge my client re-classification?	Under Article 13(7) of Directive 2004/39/EC and Article 16(2), 17 and 19 of Directive 2006/73/EC, your broker is required to ensure that financial instruments he is holding for you are kept safe and separately identifiable and that he does not use them for his own account (for example, in securities lending) without your express consent. There are other rules relating to the aggregation of own account orders with client orders in Article 48 and 49 of Directive 2006/73/EC. Such aggregation is not permitted unless overall it will not work to your disadvantage. You should ask for a full explanation from your broker and if not satisfied discuss with the broker's supervisory authority.
Does a bank need to log and file the results of checks of suitability testing. If yes, for what period?	Investment firms must keep a record of all services provided to clients, which are necessary in order for the competent authority to be able to assess compliance by the firm with MiFID. The assessment of suitability is an important part of the firm's obligation toward the client when providing the service of investment advice or portfolio management, and as such is included in the scope of record-keeping. Adequate records should be kept of the client's profile for example as regards his investment objectives, knowledge and experience and risk appetite, including any changes thereto. The records must be kept for at least five years or the duration of the relationship with the client, or in exceptional circumstances, any longer period of time set by the firm's home competent authority. Please also refer to the list of minimum records to be kept by investment firms which the competent authority is to draw up under Article 51(3) of Directive 2006/73/EC and CESR's recommendations on the subject: www.cesr.eu/index.php?docid=4226
Can a client initially classified as a retail client be reclassified as a professional client on the basis of its ultimate parent classification for the purpose of conducting eligible counterparty business? Our client does not meet the qualitative criteria, and hence is initially classified as a retail client. Is there a possibility to re-classify the client as a professional client on the basis of its parent classification, knowledge and experience? What evidence do we need to gather in order to prove that all decisions are made at the parent level?	A retail client can only be classified as a professional client, and thus treated as an eligible counterparty under Article 50 of Directive 2006/73/EC for the relevant services and transactions envisaged, if it meets the criteria in Annex II, Section II.1 of Directive 2004/39/EC, if permitted by national law, and upon completion of the procedure in Annex II, Section II.2 including obtaining express confirmation from the client that it agrees to be treated as an eligible counterparty (Article 24.3 of Directive 2004/39/EC). Such reclassification cannot happen based on the classification of the parent company. This is because the investment firm may treat the undertaking that is reclassified in this way as an eligible counterparty only in respect of the services or transactions for which the firm itself, and not its parent, could be treated as a professional client.
Does the Directive somehow provide an example of suitability and appropriateness questionnaire that banks are required to use or is everything left to the initiative of individual European banks.	Directive 2004/39/EC (MiFID) and its implementing texts don't provide examples of the suitability and appropriateness questionnaire that firms are to use in order to comply with Article 19(4) and (5) of MiFID and its implementing provisions. However, MiFID indicates the aims for which banks need to gather information. In order to appreciate suitability, an investment firm should appreciate the knowledge and experience in the investment field relevant to the specific type of product or service, the financial situation and the investment objectives of the investor. In order to appreciate appropriateness, the intermediary only needs to consider, in the investment field relevant to the specific type of product or service, the knowledge and experience of the client. The implementing directive provides details on the contents of the information that is needed to appreciate suitability (Article 35 of Directive 2006/73/EC). Indeed, the information concerning the financial situation of the client should include, where relevant, his regular income, his assets, including liquid assets, investment and real property and his regular financial commitments (Article 35(3) of Directive 2006/73/EC). The information on the investment objectives should include, where relevant, the length of time for which the investor is to hold the investment, his preferences regarding risk taking, his risk profile, and the purposes of the investment (Article 35(4) of Directive 2006/73/EC). The implementing directive also provides details on the information that a firm needs to gather in order to appreciate the knowledge and experience of the client. This information includes, to the extent appropriate to the nature of the client, the types of services, transaction and financial instrument the client's familiar with; the nature, volume, frequency and period of the clients transactions, his level of education and relevant professional experience (Article 37(1) of Directive 2006/73/EC). All these indications are to be used by firms when drafting questionnaires in order to comply with Article 19(4) and (5) of MiFID and its implementing provisions.
An example of a tolling agreement is where a contract buyer reserves the right to take the output of an underlying electricity generation asset by paying a predetermined premium to the asset owner. Would the reservation of this right be defined as financial instrument under MiFID?	If the contract giving the right to acquire the physical electricity output is traded on a regulated market or multilateral trading facility, it will be a financial instrument under Section C(6) of Annex I of Directive 2004/39/EC. If it is not traded but agreed bilaterally between the seller and the buyer, it will be a financial instrument under Section C(7) of the same Annex if it satisfies the conditions in Article 38 of Regulation EC 1287/2006. Namely, it will be a financial instrument if it is not a spot contract according to Article 38(2) and it is either traded on a regulated market or MTF outside the EEA, expressly stated to be traded on a regulated market or MTF in the EEA or outside it, or expressly stated to be equivalent to such a contract, and it is cleared or subject to margining and its specifications are standardised by reference to regularly published prices, standard lots or standard delivery dates.

I. Article 19(4) of Directive 2004/39/EC and Article 35 of the implementing Directive 2006/73/EC require under the provision of Article 35(1) and 35(3) of the implementing Directive investment firms to obtain information regarding the financial situation of the client and potential client, including, where relevant, information on the source and extent of his regular income, his assets, including liquid assets, investments and real property, and his regular financial commitments. Do investment firms always have to ask for all this information from their clients regardless of the financial instruments recommended or asked for? What is the exact meaning of the words 'where relevant' used in Article 35(3) of Directive 2006/73/EC? Does this phrase give investment firms the possibility to assess for themselves whether, in each occasion, they should ask for all or some information categories depending on the services provided? Or should firms always ask for information concerning all information categories included in Article 35(3) of Directive 2006/73/EC?	No. When applying the suitability test in Article 19(4) of Directive 2004/39/EC, investment firms do not always have to ask for all the information regarding the client's financial situation. They should ask for 'such information as is necessary for the firm to understand the essential facts about the client and to have a reasonable basis for believing, giving due consideration to the nature and extent of the service provided, that the specific transaction to be recommended, or entered into in the course of providing a portfolio management service' satisfies the investment objectives of the client, and doesn't expose the client to risk of a kind he/she is not able to bear financially or understand (Article 35(1) Level 2 Directive).
Does a Financial Institution have to categorise customers whose business is restricted to Deposits, Foreign Exchange Transactions and current accounts only?	Whenever an investment service is provided to a client, the client should be classified in order to determine the appropriate level of investor protection. Where the financial product concerned is not a financial instrument within the scope of MiFID, then the MiFID does not apply; the provision of services in such products is not considered as an investment service under the MiFID. . As to whether deposits are within the scope of MiFID, see the answer to question 118 when it is published. Current accounts will not come within the scope of MiFID. In some circumstances, ancillary services specified in Part B of Annex I to Directive 2004/39/EC will require clients to be classified. One example of an ancillary service is the provision of foreign exchange services where these are connected to the provision of investment services. A firm that conducts only ancillary services is not an investment firm and is therefore not subject to MiFID. Where a firm is subject to MiFID, some conduct of business provisions which do not apply to professional clients or eligible counterparties (for example, Article 33 of Directive 2006/73/EC on costs and charges) apply to the firm's ancillary services as well as to its investment services. The application of MiFID to foreign exchange transactions is also addressed in question 120.2.
Are contracts for differences (CFDs) financial instruments under MiFID?	Financial contracts for differences are covered under Annex I, Section C(9) of Directive 2004/39/EC. A 'financial' contract for differences is a contract for differences in relation to MiFID instruments, currencies, interest rates or other financial indices. A contract for differences in the form of a credit derivative contract would also be covered. CFDs on commodities are covered by Section C(5) and CFDs in relation to other underlyings such as climatic variables, freight rates, emission allowances or inflation rates are covered by Section C(10). A sports, political or similar CFD, which depended on the results of a match, election or other variable not mentioned in Section C(10), and which does not otherwise fall under Section C(9) or C(5), would not be covered.
Must a CFD be considered as complex product?	Yes. Article 38(a) of Directive 2006/73/EC provides that derivative instruments under points (4) to (10) of Section C of Annex I of Directive 2004/39/EC are to be qualified as complex products. See also our response to Question 182.2 on Article 19(6) of Directive 2004/39/EC.
What are the obligations for an investment firm relating to 'best execution' for their clients trading in CFDs?	Whether the best execution provisions apply will depend on whether the CFD is a MiFID financial instrument, the categorisation of the client and whether the firm is acting on behalf of the client. As to whether the CFD is a MiFID instrument, see the answer to Q 180.1 on Annex I, Section C(9) of Directive 2004/39/EC. Best execution is owed to retail and professional clients but not to eligible counterparties: see Article 24 of Directive 2004/39/EC. Where the order is placed with an execution venue other than the firm itself so that the firm is acting as the client's agent, the firm will be acting on behalf of the client and best execution will apply (assuming the case of a CFD which is a MiFID instrument and a client other than an eligible counterparty). When the firm is acting on its own account, the application of the requirement will depend on the facts and circumstance of the case as set out in pages 21 and 22 of the CESR Q&A on best execution at www.cesr.eu/index.php?docid=4606.
Could you clarify how 'contrary to current recommendations' should be interpreted in Article 25(2)(b), i.e. personal transactions must not be taken that are in conflict with other recommendations that are stated in the Article 25(2)(a) or, a financial analysts must not make a personal transaction that would be in conflict with his/her current investment recommendation for a financial instrument.	The 'recommendations' referred to are those contained within the investment research mentioned in paragraph 25(1). However, they are not limited to the recommendations of the financial analyst or relevant person concerned and would normally cover other recommendations issued by other financial analysts or relevant persons of the firm concerned. The reference to 'current' recommendations implies that the recommendations have not been withdrawn or superceded.

Should hedge funds (fund of funds) from the British Virgin Islands and Cayman Islands, with their own legal status (Ltd, LP or limited), be subject to categorisation and MIFID obligations?	Hedge funds and their managers benefit from the exemption under Article 2(1)(h) of Directive 2004/39/EC which exempts 'collective investment undertakings and pension funds whether coordinated at Community level or not and the depositaries and managers of such undertakings'. Further details about the application of this exemption are given in the answer to question 26. Concerning the categorisation of hedge funds as clients, yes, they are subject to client categorisation. In general MiFID regards hedge funds as professional clients per se. Professional clients may however request to be treated as retail clients in order to obtain a higher level of protection. For certain types of services (execution of orders on behalf of the clients and/or to deal on own account and/or to receive and transmit orders) financial institutions authorised or regulated under national law of a Member State are however considered to be eligible counterparties (Article 24 of Directive 2004/39/EC). Concerning the application of MiFID to British Virgin Islands and Cayman Islands, annex II of the EC Treaty lists them under "overseas countries and territories" to which the provisions of part four of the EC Treaty apply. Under part four of the EC Treaty, Art. 183 EC provides that "in relations between Member States and the countries and territories the right of establishment of nationals and companies or firms shall be regulated in accordance with the provisions and procedures laid down in the Chapter relating to the right of establishment and on a non-discriminatory basis. Therefore, MiFiD provisions are applicable.
(a) It is possible under Article 25(5) to rely on third parties to report on your behalf? If the counterparty reports to their competent authority, is a portfolio manager's duty to report discharged? (b) Is the answer different if the competent authorities of the counterparties in scenario (a) (above) are different?	Yes, it is possible to rely on third parties to report on the behalf of an investment firm, as stated in Article 25(5) of Directive 2004/39/EC. However, bear in mind the outsourcing provisions stated in Article 13 and 14 of Directive 2006/73/EC. These imply that transaction reporting is regarded as critical or important and therefore a series of conditions for the outsourcing arrangement must be satisfied. A portfolio manager's duty to report is not discharged if the counterparty reports to the relevant competent authority, unless the counterparty is specifically appointed to report on behalf of the portfolio manager.
Are the money transfer sector and the foreign currency exchange sector included within the framework of the MiFID?	The money transfer/remittance sector is not included in MiFID. As a payment service, it is covered by the Payment Services Directive (2007/64/EC). The text of the PSD is available at http://ec.europa.eu/internal_market/payments/framework/psd_en.htm. Bureaux de change are not included in MiFID.
Do you consider share warrants and rights as complex products?	A warrant is a financial instrument falling under Article 4(1)(18)(c) of Directive 2004/39/EC, and as such must be considered a complex product according to the test in Article 38 of Directive 2006/73/EC.
In the response to question 67, in relation to Article 2(1)(e), it is stated by the Commission that 'if the administration of the share scheme is being provided by a bank, then that bank will also be subject to MiFID since it will not be engaged 'exclusively in the administration of employee-participation schemes.' Does this mean that a credit institution cannot avail itself of the exemption in Article 2(1)(e)? Furthermore, does this mean that a credit institution cannot avail of the exemption provided for in Article 2(1)(b) as it can not be 'exclusively' providing services for same group companies?	According to Article 4 of Directive 2006/48/EC, a 'credit institution' is an undertaking whose business is to receive deposits or other repayable funds from the public and to grant credits for its own account. If a credit institution provides one or more investment services to third parties and/or performs one or more investment activities on a professional basis, in the sense of the services and activities listed in Annex I of Directive 2004/39/EC, MiFID applies. A credit institution could fall under the exemption of Article 2(1)(e) of Directive 2004/39/EC if the investment services provided consisted 'exclusively' in the administration of employee-participation schemes. In the same way, a credit institution could fall under the exemption of Article 2(1)(b) of Directive 2004/39/EC if the investment services provided were 'exclusively' for their parent undertakings, for their subsidiaries or for other subsidiaries of their parent undertakings.
Are investment firms bound by Article 28 when transactions in financial instruments arranged by them do not lead to a real change of ownership (or beneficial ownership)? For example a natural person sells shares admitted to trading on a regulated market to his fully owned company or to an insurance-policy, where the policy-holder, according to the terms of the insurance agreement, controls the holdings on the account. In these situations, is an investment firm, for the purpose of article 28 in MiFID, considered to "conclude" the transaction and hence obliged to publish it or does this amount to the dissemination of misleading information in opposition to the prohibiton against market manipulation in Article 4(c) of Directive 2003/124/EC implementing the Market Abuse Directive?	An investment firm concluding a transaction in shares admitted to trading on a regulated market on behalf of a client is always bound by Article 28 of Directive 2004/39/EC and its implementing measures. This obligation to publish the details of the transaction applies even when there is no change in beneficial ownership of the shares, and even when the market may move significantly as a result. Indeed, Article 4(c) of Directive 2003/124/EC is intended to draw the attention of regulators and market operators to this type of trading for the purposes of detecting possible market manipulation. If an investment firm suspects such transactions being concluded via its system to constitute market manipulation, it shall inform the competent authority without delay (Article 6(9) of Directive 2003/6/EC).
Does a firm that only provides investment services to same-group companies require an authorisation if that firm deals on its own account in any financial instruments (falling within Article 2(1)(d))? Does a firm that only provides services in the administration of employee participation schemes require an authorisation if that firm deals on its own account in any financial instruments (falling within Article 2(1)(d))?	The meaning of 'investment service' as used in the relevant exemptions quoted does not include a reference to any activity which is covered by another exemption. Therefore, if the person/firm qualifies under one exemption, MiFID will not apply to it notwithstanding that it carries out other activity which qualifies it for another exemption.

If a firm provides investment services for which it requires an authorisation under the directive, are services provided to same group companies subject to the provisions of MiFID?	The exemptions provided by Article 2(1) of Directive 2004/39/EC have to be regarded in a restrictive way. The exemption set out in Article 2(1)(b) of Directive 2004/39/EC provides that the exemption applies to firms providing investment services "exclusively" for their parent undertakings or their subsidiaries. Therefore, if the firm provides other investment services, it is covered by MiFID and MiFID should apply to all its activities.
Article 40(1) of the Directive 2006/73/EC states: (a) the investment firm must promptly provide the client, in a durable medium, with the essential information concerning the execution of that order; (b) in the case of a retail client, the investment firm must send the client a notice in a durable medium confirming execution of the order as soon as possible and no later than the first business day following execution or, if the confirmation is received by the investment firm from a third party, no later than the first business day following receipt of the confirmation from the third party. Case to be examined: It has been expressed that according to article 40(1) of Directive 2006/73/EC, a retail client shall receive in a durable medium two notices, 1) the one stated in point (a), i.e. promptly after the execution of the order, containing the essential information concerning the execution of that order, and 2) the one stated in point (b), i.e. a contract note or confirmation notice, including the information specified in paragraph 4 of article 40, as soon as possible and no later than the first business day following execution. Does the above mentioned opinion seem to interpret correctly article 40(1), given that: 1) Both the Commission, when consulting on the above mentioned Directive and CESR when consulting on its Advice, were of the opinion that retail clients should ONLY be sent the notice stated in point (b), as point (b) defines the obligation of point (a) as far as retail clients are concerned, and 2) as we have been informed, in other European countries (for example, Ireland), it is only required to send retail clients the point (b) notice, since the provision of essential information is considered suitable only for professional clients. 3) if an investment firm, being entitled to do so, chooses to send on paper and by mail the point (a) notice – considering that the durable medium mainly refers to on paper conditions – in the best of circumstances and ignoring all practical problems that might arise in doing so, the retail client will receive the notice the following day, obviously together with the point (b) notice, which presumably will have been sent later on the day of the execution of the order. What's the point of duplicating documents?	We would agree with your perspective. In other words, the notice in Art. 40(1)(b) is the same information (for retail clients) that is referred to in Art. 40(1)(a). For non-retail clients, the less precise obligation in Art. 40(1)(a) only is applicable.
In the case where a firm falling, within the exemption of Article 3 of Directive 2004/39/EC, provides its clients with the service of reception and transmission of orders, while an investment firm executes the orders, this firm is responsible for charging its clients with overall fees and commissions while the investment firm charges the excempt firm directly and solely for executing the orders of the excempt firm's clients. Is this approach correct?	MiFID does not regulate how entities which are exempt by way of Article 3 of Directive 2004/39/EC charge their clients for their services. This would be a matter of national competence.
Our bank is located in the EU, the majority of our orders are routed as we are delegating the execution (RTO) outside the EEA. For such orders are we submitted to the reporting to our local regulator?	If the investment firm is executing transactions involving instruments covered by MiFID it is obliged to report the transaction to the relevant authority. However, if the investment firm is only receiving and transmitting orders the treatment will be as stated in 'CESR Level 3 Guidelines on MiFID Transaction reporting' (CESR/07~301). If the delegation involves an outsourcing bear in mind the outsourcing provisions stated in Article 13 and 14 of Directive 2006/73/EC.

I am considering taking a multicurrency mortgage with a Spanish bank. When discussing the FX rates they apply to convert the initial notional and the subsequent monthly amortisations they refer me to the FX conversion rates published by the bank on a given day. When comparing these rates to the market, these are completely disconnected to reality, in some cases by more than 6 figures. -Can I, under Mifid, request best execution? In this case I see the purchase of currency as an order from the retail investor to the bank. If they apply their published FX conversion rate, they are clearly not delivering the best possible result.	MiFID does not apply in this case. Mortgages are not financial instruments under MiFID. Therefore the currency exchange connected with the mortgage is also outside its scope. Finally, for best execution to apply there would have to be a contractual or agency relationship between a client and a firm, whereby the latter acts on behalf of the client when executing an order in one or more financial instruments. A mortgage does not involve the execution of an order in the MiFID sense.
Article 27(4)(b) stipulates that past performance received or likely to be received by retail or potential retail clients must in every case be shown based on complete 12-month periods This has led some firms to take the strict approach to only show full year performance. However, is it still possible to show additional information such as the last 5 full years followed by last 6 months, 3 months, 1 month on top of the above required information, (i.e. last 5 years or the whole period for which the financial instrument has been offered). Is it still possible to show since launch performance in addition to the above required full year performance Can we show any actual performance when the fund is less than 1 year old (i.e. can we show a 1 and 3 month performance for a fund launched 4 months ago).	Concerning the conditions that the information to clients must satisfy with regards to the reference period of the performance information, article 27(4)(b) of Directive 2006/73/EC refers to performance information based on "complete 12-month periods". Therefore, full year performance should be shown. The same requirement applies when a fund is less than 1 year old. Therefore, actual performance may be shown only when the 12-month period would have elapsed.
An investment firm (licensed to provide the service of “reception and transmission of orders” and of “execution of orders on behalf of clients”) intends to enter into an agreement for the outsourcing of the investment service of “reception and transmission of orders” with a bank belonging in the same group as the investment firm. Under the agreement, the bank through its branches, will receive orders from clients of the investment firm and relay them to the latter (ie. it will act in the name and on behalf of the investment firm without entering into an agreement with the investor - the bank being essentially an agent of the investment firm). Question: Is it possible under MiFID for an investment firm to outsource certain investment services (in our case the “reception and transmission of orders”), to a third party (in our case the bank) without such third party necessarily becoming a “tied agent” as provided in article 23 of Directive 2004/39/EC?	Yes, it is possible for an investment firm to outsource activities without the entity to which the activities are outsourced being considered a tied agent. In fact the appointment of tied agents must fulfill the criteria established in Article 4(1)(25) and Article 23 of Directive 2004/39/EC (i.e. operating under the full and unconditional responsibility of only one investment firm); note also that Article 23 of Directive 2004/39/EC provides that it is optional for Member States to allow investment firms to appoint tied agents, and to impose further restrictions or requirements on the use of tied agents. In any case conditions for outsourcing critical or important operational functions or investment services or activities established under Article 14 of Directive 2006/73/EC should be fulfilled.
Which countries have exercised the option under Article 3 of Directive 2004/39/EC?	CESR has published a list of national options and discretions at http://www.cesr.eu/index.php?docid=4820.
Article 25(2)(e) of Directive 2006/73/EC states that issuers, relevant persons other than financial analysts, and any other persons may only review drafts of investment research, prepared by an investment firm for the purpose of verifying compliance of such investment firm with its legal obligations. In this regard, we would appreciate the Commission’s clarifications as to what ‘legal obligations’ of the investment firm this Article is referring to.	The legal obligations referred to are all the legal obligations that the firm is under both national and EU law, including regulatory obligations such as are imposed by MiFID. Without limiting the generality of this statement, some aspects of particular relevance include obligations relating to the Market Abuse Directive 2003/6/EC, in particular the provisions of Commission Directive 2003/125/EC on the fair presentation of investment recommendations and the disclosure of conflicts of interest.

Under Article 6(1) of the Directive 2004/39/EC, the home member State shall ensure that the authorisation specifies the investment services or activities which the investment firm is authorised to provide. Does the Directive enable the local regulator to restrict the investment services or activities specified in the relevant authorisation which the investment firm may provide only to 'some' financial instruments (e.g. financial instruments based on FX and interest rates)?	Yes, such an approach by the competent authority is consistent with MiFID. However, an investment firm is not restricted exclusively to the investment services and activities in the relevant financial instruments covered in its authorisation, as long as such activities are not carried out on a regular basis (Recital 19 of Directive 2004/39/EC).
Do pension funds need to perform an appropriateness test on their clients?	According to the exemption in Article 2(1)(h) of Directive 2004/39/EC, MiFID does not apply to pension funds. Therefore they are not subject to performing the appropriateness test provided in Article 19(5) of Directive 2004/39/EC and its implementing provisions (Article 36 of Directive 2006/73/EC).
When investment firms provide investment services to professional clients, it is only necessary for them to obtain information about the client's investment objectives. In the case of retail clients, information on client's investment objectives, client's knowledge and experience in the investment field relevant to the specific type of product or service and client's financial situation should be obtained. When a professional client does investments on behalf of a client who is not a professional, who should be subject to the suitability test performed by the investment firm?	Article 19(4) of Directive 2004/39/EC requires investment firms providing the services of investment advice or portfolio management to obtain the necessary information regarding the client's knowledge and experience, his financial situation and his investment objectives. Article 35(2) of Directive 2006/73/EC allows firms to assume that a professional client has the necessary level of experience and knowledge in relation to the products, transactions and services for which he is so classified. In addition, only for the provision of investment advice and only for certain professional clients (Annex II, section I of Directive 2004/39/EC – 'per se professional client') investment firms are entitled to assume that they are able to bear any risks consistent with the investment objectives of that client (see also answer to question 152.2). When an investment firm A provides investment advice to a retail client C and the client decides to purchase, for example, a listed share, firm A may then send the order to another investment firm B for execution. It is assumed that firm A is categorised as a professional client by firm B. In these circumstances, three different investment services are provided: - Firm A will be subject to the MiFID suitability requirements for the provision of investment advice to client C - Firm A will be subject to the MiFID requirements for selection of the execution services of firm B - Firm B will be subject to the MiFID requirements for best execution Firm B may rely on the instruction sent by firm A. firm B may rely on any investment advice provided to client C by firm A.
An independent firm specialised in mergers and acquisition falls under Section B Annex 1 (3) (ancillary services). Does it also fall under the definition of Investment Advice?	Article 4(1)(4) of Directive 2004/39/EC defines 'Investment advice' as the provision of personal recommendations to a client, either upon its request or at the initiative of the investment firm, in respect of one or more transactions relating to financial instruments. However, "advice and services relating to mergers and the purchase of undertakings" is considered an ancillary service in accordance to Section B Annex 1 (3) of Directive 2004/39/EC. Corporate finance business includes the provision of advice to corporate clients in relation to, inter alia, capital structure, such as the issuing of new shares or debt to finance the acquisition of an asset. Regarding the particular scenario described above, the provision of the above service to a corporate entity would not constitute the provision of 'investment advice' as defined in Article 4(1)(4) of MiFID. The firm would instead be performing the activities described in ancillary service (3) of MiFID Annex I, section B: 'advice to undertakings on capital structure, industrial strategy and related matters and advice and services relating to mergers and the purchase of undertakings'. This is not to say that a firm specialised in mergers and acquisitions may not provide the service of investment advice as defined in Article 4(1)(4) of Directive 2004/39/EC. There may be activities carried out by a corporate finance firm during an M&A transaction which constitute the provision of investment advice under MiFID.
My bank refuses to agree a loss threshold. Can I demand to have a loss threshold determined for my discretionary portfolio, even though no contingent liability transactions are allowed?	The details of the agreement between the investment firm and the client, including any loss threshold, are decided between the parties. MiFID obliges the portfolio manager to inform the client of the types of financial instruments that may be included in the client portfolio and the types of transactions, including any contingent liability transactions that may be carried out in such instruments. However, MiFID does not impose the obligation to agree on a loss threshold. As regards the applicability of the obligation to report to the retail client any losses exceeding any predetermined threshold, Commission services refer to the interpretation given in the first answer to question 49 on Article 19(8) of Directive 2004/39/EC and Article 42 of Directive 2006/73/EC.
What are the obligations of a credit institution relating to clients orders for subscription or redemption of the UCITS units? Please indicate whether the subscription or redemption of the UCITS units is considered an investment service under MiFID. Are the conduct of business and reception of orders obligations applicable to a credit institution that is not providing any investment services and activities (except the subscription or redemption of the UCITS units) on the capital market?	Article 1(2) of Directive 2004/39/EC determines which are the relevant provisions of Directive 2004/39/EC which apply to credit institutions when providing investment services and/or performing investment activities. This includes Chapter II of Title II of Directive 2004/39/EC concerning "operating conditions for investment firms", which cover amongst others the conduct of business rules. Moreover, orders for subscription or redemption of the UCITS units through an intermediary are covered by the investment services included in Annex I, section A of Directive 2004/39/EC. Also, "units in collective investment undertakings" are listed in Annex I, section C as financial instruments. Therefore, credit institutions dealing with clients orders for subscription or redemption of the UCITS units will have to apply the relevant MiFID provisions. (See also answer to question 94).

Is the phrase, 'that recommendation must be presented as suitable' at the start of the 2nd paragraph of Article 52, part of the definition of what a personal recommendation might be, or does it simply restate the obligation contained in Article 19(4) of Directive 2004/39/EC? If it is part of the definition, then a recommendation that is not distributed through distribution channels, or to the public, and which is given to a client without any regard to its suitability or to the circumstances of the client, will not amount to 'investment advice' under MiFID.	It is part of the definition. However, we are not convinced that such a communication would be possible, in light of the fiduciary obligations that firms are subject to.
Can the offer of one hybrid financial product (leasing + derivative) by a credit entity to an experienced client be considered as investment advice? The product will not be issued to the public	According to Article 52 of Directive 2006/73/EC, investment advice is a personal recommendation that is made to a person in his capacity as an investor or potential investor, or in his capacity as an agent for an investor or potential investor. A recommendation is not a personal recommendation if it is issued exclusively through distribution channels or to the public. Therefore, in order to consider a recommendation as 'investment advice', it is to be presented expressly as suitable for that person and tailored to that person.
Please inform me what is the specific of the 'protection' offered by each classification (eligible, professional, retail clients)	The general obligations of investment firms to their clients are itemised in Title II, Chapter II, Section 2 of Directive 2004/39/EC and Chapter III of the implementing Directive 2006/73/EC. The general provisions for retail and professional clients are in Articles 27 to 49 of Directive 2006/73/EC; many of these provisions apply only to retail clients. For eligible counterparties you must consult Article 24 of Directive 2004/39/EC and Article 52 of Directive 2006/73/EC. The Commission has not drawn up an exhaustive list of the specific levels of investor protection that will apply to each classification of client. .
Since I'm currently conducting a research on MiFID and its possible impacts on non-EU markets, I would like to ask you which provisions and requirements of this Directive (e.g. passport, authorisation, conduct of business obligations) are likely to affect the financial markets of Turkey, being a negotiating country within EU. Thanks in advance for your kind help.	The Istanbul Stock Exchange is outside the scope of MiFID in the sense that it is not a regulated market and not an MTF for MiFID purposes. However, it could qualify as an execution venue for best execution purposes: see the definition of 'execution venue' in Article 44(1) of the Level 2 Directive 2006/73/EC. It could also be a trading venue for the purposes of the Level 2 Regulation (EC) 1287/2007: see the definition in Article 2(8) thereof. Investment firms established in Turkey are not 'investment firms' for MiFID purposes. Only firms established in the EEA are such firms and can benefit from the MiFID passport. For more details, see the answer to question 41.2 on third country firms. Generally, there are a number of questions that relate to the territorial scope of MiFID. Please refer to the other questions in this database related to your question.
1. Are the MiFID provisions applicable to forwards on securities, in case that the underlying securities are admitted to trading on a regulated market? 2. The same question for non deliverable forwards on securities.	Yes, in both cases such instruments may be either transferable securities according to Article 4(1)(18) or other derivative contracts according to Section C(4) of Annex I of Directive 2004/39/EC.
Are the "know your client" requirements applicable to the credit institutions (banks) in those cases where they issue their own securities for primary trading (bearing in mind the fact that such MiFID rules are not applicable to the regular issuers)?	Public offering is not a MiFID service or activity in itself; the regulatory obligations in respect of public offerings are primarily addressed in the Prospectus Directive 2003/71/EC and these obligations apply to any issuer (subject to certain exceptions), regardless of whether it is a credit institution or another corporate entity. Conduct of business obligations apply when a MiFID service is provided in the subsequent sale and distribution of such issued securities to clients. The nature of the obligations will depend on the type of the client to whom the service is provided. This would include providing appropriate risk warnings and product information, performing a suitability or an appropriateness test if required (including relevant "know your client" requirements) and going through the client classification process. For example, a credit institution issues shares and distributes them to its clients through its branch network. When a client visits the branch the computer of the branch sales person reminds the sales person to engage in a conversation with the client to see if the client would be interested in subscribing to the new shares issued by the credit institution. The sales person effectively takes the initiative in recommending the investment to the client, who accepts the investment. In this case, MiFID does not apply to the public offering of shares by the credit institution, which is governed by the Prospectus Directive. However, MiFID does apply to the sale of a financial instrument –an advised sale of own shares in the above scenario. The 'know your client' requirements will therefore apply to the advised sale and the credit institution will need to perform a suitability test on its client.
The second part of Article 2.1 (l) has the following wording; '….or which deal for the account of other members of those markets or make prices for them and which are guaranteed by clearing members of the same markets, where responsibility for ensuring the performance of contracts entered into by such firms is assumed by clearing members of the same market.' Practically all trades traded on the various power exchanges are cleared by some clearing arrangement. This includes also major parts of OTC trades. Is an investment firm rendering services, Annex I Section A, (1), (2), and (4) in dealing with commodity derivates on the various power exchanges	We believe the Article 2(1)(l) exemption is a relatively narrow one which is meant to exempt 'locals' who exclusively deal on own account on derivative markets or deal for the accounts of members of those markets, rather than investment firms who do a potentially wider range of business with other clients. So, if the investment firm is a 'local' connected to the power exchange, then it may be able to take advantage of the 2(1)(l) exemption – provided it exclusively does 'local'-type business (i.e. dealing on own account or dealing for the account of members of the exchange). A firm which trades in commodity derivatives on a power exchange and provides a broader range of services to clients who are not other members of the exchange will not – notwithstanding that the trades may be cleared.

exempted from MiFID regulation due to the fact that the trades are cleared?	
We have identified a potential problem where we believe that the matching services provided by business angel networks to investors and entrepreneurs/unquoted companies would constitute "investment advice" and subsequently, if this "advice" is remunerated through a success fee, this would bring the activities of business angel networks within the scope of MiFID. (1) Is such a concern warranted, as MiFID applies to investment firms and regulated markets and business angel networks are neither? (2) In any case, would business angel investments in unquoted companies constitute transferable securities within the meaning of Article 4(1)(18) of MiFID? (3) Are there any other possible activities of angel networks (eg. syndicated investments in enterprises by groups of angels where a network would be involved; co-investments with venture capital funds, etc) that would bring business angel networks under MiFID?	1. Whether something is or is not an investment firm is a matter of the activities it conducts on a professional basis, rather than the type of internal business organisation it has. If an entity conducts investment services and activities on a professional basis, it would generally need authorisation as an investment firm unless an applicable exemption applies. As we understand it, a "business angel network" (BAN) is an organisation whose aim is to facilitate the matching of entrepreneurs (looking for venture capital) with business angels. BANs tend to remain neutral and generally refrain from formally evaluating business plans or angels. They may make introductions but they do not receive and transmit orders for execution, nor are transactions in investments concluded by means of their systems. According to this understanding, a BAN would not typically be conducting investment services and activities within Annex I, Part A of Directive 2004/39/EC, and would therefore not require authorisation as investment firm. A "business angel" is a private individual who invests part of his personal assets in a start-up and also shares his personal business management experience with the entrepreneur. According to Section B(3) of Annex 1 of Directive 2004/39/EC, the activity of "advice to undertakings on capital structure, industry strategy and related matters and services relating to mergers and the purchase of undertakings" is to be considered an ancillary service (not an investment service). Therefore, an entity providing only this type of advice does not require authorisation as an investment firm under MiFID. 2. In order to be financial instruments, shares have to be transferable securities within the meaning of Article 4(1)(18) of MiFID and in particular be 'negotiable on the capital market'. Those terms have to be understood in a broad manner in the sense that only under limited circumstances will a share that is negotiated not fall under the definition of financial instrument. In this sense, the phrase 'negotiable on the capital market' will include shares which are unlisted and not traded on any exchange or MTF, but which are still transferable in accordance with certain rules (which usually relate to private companies). (Please refer to our answers to questions 3.2, 61 and 146). 3. A BAN should be considered an investment firm requiring and authorisation to perform investment services or activities only in case it performs any of the investment services and activities listed in Annex I Section A of Directive 2004/39/EC in relation to financial instruments, such as reception or transmission of orders, execution of orders on behalf of clients, operating a multilateral trading facility, dealing on own account, portfolio management, investment advice, etc. However, in many cases one or more of the exemptions in Articles 2 and/or 3 of Directive 2004/39/EC will apply. The precise application of the rules is a matter for detailed advice in the circumstances of each case. Advice or guidance can be obtained professionally or from a financial regulator.
Can an investment firm refuse a request by an eligible counterparty to be treated as a professional client? In contrary to Annex II, Section I, article 24 has no wording that indicates that the investment firm has an option to deny a request from an eligible counterparty to be treated as a professional. Please advice of what is the correct understanding of article 24.	Article 50(2) of the Level 2 Directive 2006/73/EC clarifies that the eligible counterparty must be treated as a professional client only if the investment firm agrees to the client's request.
1. Do the requirements on information to be provided to the clients (specifically Article 19 of MiFID and Article 27 of implementing Directive) apply to the bank which is suggesting an investment product – structured deposit, where principal is guaranteed to the client, but potential return depends on the performance on certain financial index, bearing in mind the fact that such deposit is not explicitly included into the list of financial instruments in the Annex 1 of Mifid? 2. Do the requirements on information to be provided to the clients (specifically Article 19 of MiFID and Article 27 of implementing Directive) apply to the bank that is suggesting identical product, but designed as structured transferable note, where issuer guarantees nominal value to the client, but potential return depends on the performance on certain financial index?	1. No. A deposit is not a financial instrument as defined in MiFID, because it is not listed in Annex I Section C of Directive 2004/39/EC. A deposit per se is not a tradeable instrument and the initial capital cannot be lost. In general, an option embedded in a deposit (such as an interest rate structure) does not change its classification as a deposit. For instance, a floating rate of interest does not turn the deposit into a derivative contract. See also answer to question 118 on Article 4(1)(17) of Directive 2004/39/EC. 2. Yes. A deposit with an embedded derivative that has the potential of reducing the initial capital invested is a financial instrument under MiFID. See also answer to question 118.
According to the MIFID the UCITS Directive is changed in a way which states that Article 19 of the MIFID shall apply to the provision of the services referred to in Article 5 paragraph 3 of UCITS by management companies. In UCITS Directive there is no implication to Articles 21 and 22 of the MiFID (which covers the main best execution rules). However, according to the Article 1(2) and 45(6) of the MiFID implementing Directive the rules apply also to the management companies. Should best execution rules be applied to the management companies?	Management companies providing the service of (individual) portfolio management must comply (in case of UCITS management companies by virtue of Article 5(4) Council Directive 85/611/EEC UCITS) with the requirements set out in Article 45 Directive 2006/73/EC (adopted under Article 19(1) Directive 2004/39/EC) which obliges management companies to act in accordance with the best interests of their clients when placing orders with other entities for execution that result from decisions by the management company to deal in financial instruments on behalf of its client. According to Article 45(4) Directive 2006/73/EC, management companies must take all reasonable steps to obtain the best possible result for their clients taking into account the factors referred to in Article 21(1) Directive 2004/39/EC. Recital 75 Directive 2006/73/EC clarifies that this is not intended to require a duplication of effort as to best execution between a management company which provides the service of portfolio management and any investment firm to which that investment firm transmits its orders for execution. The management company should be entitled to rely on the ability of the executing investment firm to deliver best execution, and to fulfil its best execution obligations to the client in that way. However, when it also executes any orders received itself it will be subject to the best execution obligations under Article 21 of Directive 2004/39/EC. Please refer also to our answers to questions 37, 38 and 55, as well as Question 22 of CESR's "Best execution under MiFID Q&A" http://www.cesr.eu/index.php?docid=4606

The Directive imposes reporting obligations for transactions carried out outside a regulated market, and MTF and systematic internaliser transactions. What is the situation for transactions carried out on an OTC basis between two investors (without the intermediation of an investment service provider)? Recital 53 of the Directive exempts "pre-trade" transparency rules, but raises the question of whether there are any post-trade obligations.	Article 25(3) MiFID determines that investment firms have to report transactions in any financial instruments admitted to trading on a regulated market to the relevant authority, whether or not such transactions were carried out on a regulated market. The purpose of transaction reporting requirement is to enable the competent authorities to monitor the activities of investment firms with regard to financial instruments admitted to trading on a regulated market in order to ensure that they act honestly, fairly and professionally and in a manner which promotes the integrity of the market. The transaction reporting obligations of MiFID are only relevant to investment firms, therefore they do not apply when there is no intermediation by investment firms in the transaction. This implies that a trade between, say, two private individuals, without intermediation of an investment firm, does not require a transaction report. On the other hand any trade where an investment firm is involved, whether a broker or a bank, and whether the trade is internalised or traded OTC, requires a transaction report when undertaking transactions in instruments admitted to trading on a regulated market. If an investment firm was involved in the transaction, Article 27(4) of the implementing Regulation (EC)1287/2006 provides that where the transaction is executed outside the rules of a regulated market or an MTF, by agreement between the parties, one of the investment firms involved shall arrange to make the information public. If no agreement is made between the involved parties the ranking provided in this article shall be used to determine who has the obligation to report.
We would like you to clarify the notion of a "potential of reducing initial capital", in relation to your answer to question 118. For example, under an arrangement of a structured deposit with embedded option on stock index, the client is guaranteed the repayment of the principal. However, the client has to pay an initial fee (a subscription, or a similar fee) which is in some sense comparable to an option premium, and is not recoverable. In addition, there may be another fee charged to the client in case the client withdraws the structured deposit before the agreed maturity term. In either of the situation (early withdrawal, or adverse developments of financial markets) the client may end up with the amount recovered smaller than the total amount invested (the principal less the fees), on the account of the fees paid indirectly as indicated above. Can those situations be considered as having a potential of reducing the initial capital?	The possibility to embed derivatives into deposits, without this being considered a financial instrument, and therefore not covered by Directive 2004/39/EC should be understood in a narrow sense. Firstly, a conventional option coupled with a deposit is covered by Directive 2004/39/EC. The possibility mentioned in the answer to question 118 that the option falls outside that Directive only applies where the option is a method for calculating a cash return on the deposit like interest. As mentioned in the answer to question 118, one condition is that the embedded derivative may not imply a potential reduction of the initial capital. Where it is the investor that has the right to exercise the embedded option and does after he has made the deposit, the fact that he might not get back the whole of his principal does not necessarily mean that the product falls into Directive 2004/39/EC, as long as the investor is entitled not to exercise the option and is certain to get back his principal if he does not. In the assessment of whether a potential reduction of the initial capital could occur, all cost related to entering the transaction should be taken into account, including an initial fee of the type referred to in the question. Furthermore, the terms of the embedded option must be such as to make it certain that the investor will get back his initial capital. Thus even negative returns on the embedded derivative under the most adverse market conditions should be taken into account, however unlikely. However, if the client has to pay a fee if he withdraws the structured deposit before the agreed maturity term and if the result is that the client gets back less than his initial capital that does not necessarily mean that the deposit is covered by Directive 2004/39/EC. Note also that the autonomous trading of a derivative, although linked to a deposit, is covered by Directive 2004/39/EC. In general the assessment of concrete cases and structures is necessary in order to properly apply the mentioned principles.
According to Article 4(1)(19) of Directive 2004/39/EC money-market instruments means those classes of instruments which are normally dealt in on the money market, such as treasury bills, certificates of deposits and commercial papers and excluding instruments of payment. For level playing field issues and given that according to the branch of a UK credit institution, repurchase agreements (repos) and other money-market instruments are not included in the abovementioned definition. Could you please inform us which money-market instruments, other than savings and those clearly stated in the definition, fall under the provisions of MiFID?	It is commonly understood that money-market instruments are liquid debt instruments that are capable of being traded (although in practice most are held until maturity). They usually mature in less than one year. The list of examples referred to in MiFID is not exhaustive (Article 4(1)(19) of Directive 2004/39/EC). Several EC Directives define "money market instruments". Please see: Article 1(1) of Directive 85/611/EEC; Recital 4 of Directive 2001/108/EC; Recital 9 of Directive 2007/16/EC. Moreover, CESR's Advice to the European Commission on Clarification of Definitions concerning Eligible Assets for Investments of UCITS (CESR/06-005) contains a lot of references to money market instruments (http://www.cesr.eu/index.php?docid=3694). It specifies in paragraph 49 that according to the ECB statistical framework, money market instruments are defined as "those classes of transferable debt instruments which are normally traded on the money market (for example, certificates of deposit, commercial paper and banker's acceptances, treasury and local authority bills) because of the following features: (i) liquidity, where they can be repurchased, redeemed or sold at limited cost, in terms of low fees and narrow bid/offer spread, and with very short settlement delay; and (ii) market depth, where they are traded on a market which is able to absorb a large volume of transactions, with such trading of large amounts having a limited impact on their price; and (iii) certainty in value, where their value can be accurately determined at any time or at least once a month; and (iv) low interest risk, where they have a residual maturity of up to and including one year, or regular yield adjustments in line with money market conditions at least every 12 months; and (v) low credit risk, where such instruments are either: — admitted to an official listing on a stock exchange or traded on other regulated markets which operate regularly, are recognized and are open to the public, or — issued under regulations aimed at protecting investors and savings, or — issued by: □ a central, regional or local authority, a central bank of a Member State, the European Union, the ECB, the European Investment Bank, a non-Member State or, if the latter is a federal State, by one of the members making up the federation, or by a public international body to which one or more Member States belong; or □ an establishment subject to prudential supervision, in accordance with criteria defined by Community law or by an establishment which is subject to and complies with prudential rules considered by the competent authorities to be at least as stringent as those laid down by Community law, or guaranteed by any such establishment; or □ an undertaking the securities of which have been admitted to an official listing on a stock exchange or are traded on other regulated markets which operate regularly, are recognised and are open to the public". Therefore, instruments which have the features described above are to be considered money-market instruments.
If an insurance intermediary gives advice to a customer on how to invest the premium, is this service only covered by IMD or is it also covered by MiFID?	Once the premium has been paid, the premium does not belong to the customer and so he is unable to invest it. However, one possibility is that the question relates to a life policy that allows the customer to choose what his policy is invested in (e.g. advice on switching). What follows is based on the assumption that this is what intended by the question. According to Article 52 of Directive 2006/73/EC, investment advice is a personal recommendation that is made to a person in his capacity as an investor or potential investor. Even if the advice on how to invest the premium would normally fall under MiFID, the exemption provided for in Article 2(1)(j) of Directive 2004/39/EC would normally exclude it from the scope of application of MiFID.

Should the situation where an insurance intermediary gives advice on how to invest the premium before the conclusion of an assurance contract be treated differently from the situation where an insurance intermediary gives advice on how to reinvest the premium during the duration of the assurance contract?	Even if this type of recommendation could be considered as 'investment advice', the exemptions provided for in Article 2(1)(j) of Directive 2004/39/EC would normally exclude it from the scope of application of MiFID. See also answer to question 168.1.
In connection with the late transposition of MiFID to the Czech legal order I would like to know if there is any Commission statement concerning States which have not implemented MiFID in time. Are their business institutions allowed to provide financial services overseas via branch or currently valid passport and how should States with non-implemented MiFID treat business institutions from states where MiFID has been implemented willing to provide financial services in state with non-implemented MiFID?	CESR published a statement on this topic on Monday, 22 October 2007. Please check the following URL: http://www.cesr-eu.org/index.php?page=groups&mac=0&id=53.
1. What factors are relevant in determining whether a tied agent is established in a Member State? 2. What passporting rights do tied agents have?	1. Member States retain the power to decide whether or not to allow investment firms to appoint tied agents and to impose stricter standards for them. To determine where they are established, it is necessary to ascertain in which Member State the natural/legal person acting as the tied agent is registered (for business and/or residence) and which national jurisdiction it therefore belongs to. After that, MiFID requires that tied agents be registered in a public register (Article 23(5) Level 1) with the competent authority of that state. If the Member State where the tied agent is established does not allow investment firms authorised by their competent authorities to appoint tied agents, they shall be registered in the home Member State of the investment firm on whose behalf it acts. According to the ECJ case-law, the concept of establishment involves the actual pursuit of an economic activity through a stable infraestructure for an indefinite period (e.g. Judgment of 25 July 1991, Factortame I, Case C-221/89). 2. Tied agents are under the full and unconditional responsibility of the investment firm appointing them. They can operate across borders (e.g. into Member States that do not allow them for their own firms) when the above registration requirements are fulfilled, under the passport of the investment firm appointing them. When there is a clear indication that a tied agent has opted for a legal system in one Member State for the purpose of evading the stricter standards in another, in which it nonetheless operates, the relevant competent authority has to withdraw its registration (Recital 39 Level 1). When they work for more than one investment firm, they cease being tied agents and need to apply for authorisation as investment firms in their own right (Article 5 of Directive 2004/39/EC).
Do the new rules in MiFID no longer require an investment manager appointed on a discretionary mandate to provide contract notes for each trade executed?	Yes. MiFID enables portfolio managers to provide periodic statements to their clients containing the information in Article 41(2) of Directive 2006/73/EC. When the client chooses, transaction-by-transaction reports have to be provided: Article 41(4) of Directive 2006/73/EC.
Does the requirement to make a record of any relevant person acting on behalf of the client refer to a relevant person as defined in Directive 2006/73/EC (effectively referring to the employee of the firm acting on behalf of the client), or does it refer to any person acting as an agent of the client in giving an order to the investment firm.	The expression in Article 7(b) of Regulation 1287/2006, "any relevant person acting on behalf of the client", refers to any person acting as an agent for the client in giving the order to the firm. In other words, this would refer to situations such as the one where a person is delegated by the client to transmit the order to the firm on his/her behalf. As a consequence, the expression does not refer to the firm's personnel involved in the provision of services to clients.
We note that the term 'locals' in paragraph 1(h) of Annex II, Section I to the Directive is not defined in MiFID but a definition of the term 'local firm' is found in the Capital Adequacy Directive. This definition refers to firms dealing for their own account on markets in financial futures or options or other derivatives and on cash markets for the sole purpose of hedging positions on derivatives markets, or dealing for the accounts of other members of those markets and being guaranteed by clearing members of the same markets, where responsibility for ensuring the performance of contracts entered into by such a firm is assumed by clearing members o the same markets We would be grateful if you could confirm whether this definition would also apply to the reference to 'locals' in paragraph 1(h) of Annex II, Section I to the MiFID.	Yes, the definition of local firms in the Capital Adequacy Directive conforms to entities falling under paragraph 1(h) of Annex II of Directive 2004/39/EC.

While it is clear that the principles of MiFID should apply to non EEA clients of a MiFID firm, we require clarity in relation to the applicability of the MiFID conduct of business requirements to non EEA clients of such MiFID firms. It would appear that the 'host' regulator would be of the view that the conduct of business rules applying to these non EEA clients of MiFID firms should be set by the local regulations of such non EEA countries. For example, the classification of an Australian client as a professional/eligible counterparty may not sit well with local Australian regulations.	MiFID applies to clients of a MiFID firm who are non-EEA residents, as stated in answer to Q. 47.2. MiFID sets out a comprehensive regulatory regime covering investment firms and regulated markets which is to be applied within the EEA. Given the fact that Article 4 (1)(10) of Directive 2004/39/EC defines 'client' as the person to whom an investment firm provides investment and/or ancillary services, without making a distinction on whether the client is resident in the EEA, it means that MiFID as a whole is to be applied to transactions carried out by investment firms within the meaning of MiFID.
An Investment Firm Authorized in a EU state wishes to provide cross-border services in a third country e.g. Russia, India, US etc. a) Does it require to inform or acquire permission from the EU member state where it got authorization? b) If permission is required directly from the third country does the investment firm have to inform its home country (EU) on acquiring of such authorization? c) If the provision of services in that third country does not need approval, can the investment firm provide the services without informing its home country (EU)?	a) No, the notification requirements under Articles 31 and 32 of MiFID do not apply to the provision of services to third countries or establishment of branches in these countries. However, any investment firm that already operates in the EU should be authorised under Article 5 and 6 of MiFID to perform the investment services and activities it wishes to pursue. b) MiFID does not impose such a specific notification requirement. However, it would be prudent for a firm to keep its supervisor informed of all important developments in its business and regulatory status. Moreover, Article 16 of Directive 2004/39/EC provides that investment firms have to notify the competent authorities of any material changes to the conditions for initial authorisation. c) Yes, but as stated above, the firm should be authorised under Article 5 and 6 of MiFID to perform the investment services and activities it wishes to pursue.
Is it MiFID compliant that an independent compliance function and its activities are carried out through a special outsourcing company whose head staff fulfill the conditions in Article 6(3)? Should the company fall under the regulatory supervision in the Member State and in order to perform such an operation have authorization from the regulator? Under what conditions and to what extent is it the responsibility of the investment firm to perform the outsourced compliance function?	Article 6 of Directive 2006/73/EC does not prevent the compliance function and activities from being outsourced. In addition, the service provider does not need specific authorisation. However, the outsourcing firm would need to ensure that the function (whether performed in house or by an external company) meets the requirements in Article 6 of Directive 2006/73/EC. For example, it must have all necessary authority, resources, expertise and access to information. There would also need to be reports to senior management as required by article 9(2) of Directive 2006/73/EC. So all the same requirements relevant to the compliance function would still need to be met. Also, as the function is a critical or important operational function, the investment firm would need to ensure that all the conditions in Article 14 of Directive 2006/73/EC are met regarding the outsourced function. Specifically, Article 14(2)(i) of Directive 2006/73/EC provides that the relevant competent authority must have effective access to data related to the outsourced activities, as well as to the business premises of the service provider.
Thesis: When tied agents works for more than one investment firm, i.e. secondly also for their own accounts and / or business, they cease being tied agents and need to apply for authorisation as investment firms in their own right (Article 5 of Directive 2004/39/EC)? 1. Is a tied agent allowed to pay an investment firm for providing him the 'responsibility umbrella' in order to enable him to do legally and / or economically his own interests / business with clients that means: Is it possible for the tied agent to avoid an own authorization by acting legally and / or in fact only on paper on behalf of an investment firm? 2. Is it necessary that the tied agent acts legally and in fact for the investment firm or is he also allowed to act in his own name and for the economic benefit of the liable investment firm? 3. How to distinguish a tied agent from an investment firm: Is a tied agent entitled to claim 80% or 90% or 100% or whatever % of the clients payments for his investment services or buy these earnings by paying a fixed fee for the 'responsibility umbrella' to the investment firm?	A tied agent under MiFID represents an investment firm that decides to appoint him/her to provide the investment services to which it is authorised (and provided that the Member State so allows). A tied agent has to disclose the capacity in which he is acting and the firm that he is representing when contacting or before dealing with any client or potential client. A tied agent may act on behalf of only one investment firm, which maintains the full and unconditional responsibility for any action or omission on the part of the tied agent. As a consequence, tied agents are not allowed to provide investment services and activities independently of the investment firms that appoint them and that, ultimately, provide the services to clients.
In Spain, banks have the obligation to offer an instrument for hedging interest rate risk when offering mortgage loans. This instrument usually take the form of an interest rate swap (IRS) formalised in a separate contract. This is a different contract, which leads to an assessments independent of the main mortgage contract. The cancellation of the loan does not necessarily lead to liquidation of the IRS. Is an IRS in this context a financial instrument under MIFID? In the answer to question 118 certain	An interest rate swap is defined as a financial instrument in Section C, Annex I of Directive 2004/39/EC (MiFID). The circumstance that the interest rate swap is formalised in a separate contract and exists independently of the mortgage loan indicates that the classification of the instrument should be independent of the loan. The interest rate swap cannot be considered an embedded derivative and the circumstances are not comparable to those described in relation to question 118.

derivatives embedded in a deposit do not change the status of the deposit to become a financial instrument under MiFID.	
In the UK an adviser who wished to challenge an award made by the Financial Ombudsman Service should apply for leave for a Judicial Review. According to the High Court, if an award which the FOS has decided is 'fair and reasonable in all the circumstances', it cannot be challenged unless it is found to be irrational. Are there other remedies available under MiFID?	Article 53 of Directive 2004/39/EC requires Member States to encourage the setting-up of efficient and effective complaints and redress procedures for the out-of-court settlement of consumer disputes concerning the provision of investment and ancillary services provided by investment firms. This Article generally covers the Ombudsmen Schemes established in many Member States. The treatment of the decisions taken by Ombudsmen and similar schemes is generally covered by national substantive and procedural rules not mentioned by Directive 2004/39/EC. On the other hand, Article 52 of Directive 2004/39/EC establishes a right of appeal to the courts for review of certain decisions. This Article is to be seen in the context of the relationship between financial services providers regulated by MiFID and their competent supervisory authorities.
Some entities include in the simplified prospectus of financial instruments they issued (e.g. some kind of structured bonds) information about the MiFID product classification (complex or non-complex). This information is based on their judgment about the application of the MiFID criterions to classify the financial instruments (and in some circumstances this "judgment" is also "approved" by the regulator in the process of approving the prospectus – Directive 2003/71/CE). If the prospectus of a financial instrument contains information about it classification as a complex or non-complex MiFID instrument, are the financial intermediaries that will sell/receive orders to buy this instrument obliged to rely on the classification mentioned in the prospectus for the purposes of the appropriateness test/execution only services or, if they disagree in this classification, can they "reclassify" the instrument?	The prospectus directive does not require such a statement to be made in a prospectus. Further, under Article 19 of MiFID the onus is on the investment firm to judge whether the conditions in article 19(6) are satisfied. The intermediary is therefore not bound by the classification of an investment made by the issuer in the prospectus and also it cannot simply rely on any such a classification without considering the issue itself. Before executing orders on a client's behalf the investment firm has to make its own independent assessment of whether the financial instrument can be considered as non complex according to the national rules implementing Article 19(6) first indent Directive 2004/39/EC and Article 38 Directive 2006/73/EC. Only if it has assessed this to be the case and also assessed that the other conditions mentioned in Article 19(6) have been met (e.g. the service is provided at the initiative of the client) does it not have to carry out the appropriateness test provided for in Article 19(5).
Some financial institutions have adopted internal methodologies or policies to classify the financial instruments (complex/non-complex) they sell - with derived consequences for the appropriateness test. 1) Is it possible for two financial intermediaries to have diverging classifications of the same MiFID financial instrument (complex/non-complex), or is the classification of a financial instrument "universal" (as a result of the application of objective criterions defined in the Directive)? 2) Is it possible for a financial intermediary to perform an appropriateness test instead of allowing execution-only (including relevant disclaimers for non-complex products)? If yes, can the client refuse the appropriateness test or refuse to provide information needed to fulfill the test? 3) Is it possible to construct a scale to classify complex products, based on their complexity and risk [for example, between 1 (low complexity an risk) an 5 (high complexity an risk)] and use this scale to adjust the results of the appropriateness test? For example, if the result of the test for a specific client is less than 20 on a scale between 1 and 100, then the client is only sold products with low complexity an risk?	1) Different qualifications of a financial instrument (as complex/non-complex according to Article 19(6) of Directive 2004/39/EC cannot be completely excluded as each investment firm that wants to provide execution only services according to Article 19 (6) MiFID has to carry out its own assessment. However, in most cases the intermediaries should come to the same result based on the criteria as specified in Article 38 of Directive 2006/73/EC. 2) Investment firms may choose not to offer "execution only" services, even for non-complex products as Article 19 (6) MiFID does not oblige investment firms not to carry out the appropriateness test. When an investment firm carries out the appropriateness test as required by Article 19 (5) MiFID and the client refuses to provide information regarding his experience and knowledge in the relevant investment field, the firm shall warn the client that it is unable to determine the appropriateness of the given service or product. After having issued this warning the investment firm may provide the investment service to the client (but is not obliged to do so). 3) We do not see how such a scale would be relevant to Article 19 (6) MiFID which only requires the investment firm to assess whether the financial instrument is complex or non-compex. A further classification of financial instruments according to e.g. its complexity and risk may be used by the investment firm in the context of carrying out the suitability/appropriateness test (Article 19 (4) and (5) MiFID). However, MiFID is not prescriptive about what detailed systems an investment firm uses to meet its obligations under the directive. The onus is on the firm to ensure that whichever systems or procedures it uses enable it to meet its obligations.
Is the content of a portfolio managed under a portfolio management service restricted to the instruments known and experienced by the client? In other terms should the evaluation process of the client knowledge and experience of the financial instruments be as strong as the one that would be used for that client if he requested a non-managed account or an advised account ? The Article 35(1)(c) states that for the	To satisfy the requirements of Article 35(1)(c) of Directive 2006/73/EC, investment firms must not only assess the client's understanding of the risks involved in the general management of the portfolio, but also the risks linked to the specific transaction which is contemplated to be entered into (also refer to the answer to question 85). The assessment of the client's understanding of the risks of a particular transaction cannot be replaced by the mere delivery of information material on the nature and risks of financial instruments when entering into a portfolio management agreement between the client and the investment firm. The suitability test which has to be performed by the investment firm relates to a specific transaction, whereas most of the information duties set out in Article 31 of Directive 2006/73/EC only relate to specific types of instruments. In order to comply with the requirements as set out in Article 19 (4) MiFID and 35 (1) Directive 2006/73/EC the investment firm must assess, on a case-by-case basis, whether or not the client understands the risks linked to the specific transaction. The duty to deliver general information on the nature and risks of financial instruments (Article 31

specific transaction to be recommended or entered into in the course of providing a portfolio management service (the order of the words are of importance to understand the obligation that follows) the client must have “the necessary experience and knowledge in order to understand the risks involved in the transaction or in the management of his portfolio”. This is different from “the client musts have the necessary experience and knowledge in order to understand the risks involved in the management of his portfolio and/or in the transaction”. The latter would suggest that notwithstanding the client must understand the risks linked to the portfolio management he also has to understand the risks linked to the transaction and hence have the knowledge of the underlying financial instruments. It is the position that seems to be adopted in the answers to questions 1.2 and 85. If the requirements for the evaluation of the client knowledge and experience in the case of portfolio management are not that strong, can the respect of Article 31 of Directive 2006/73/EC, i.e. handing over to the client a detailed notice of information on the nature and risks of the financial instruments (see question 209.2) when entering into the agreement of portfolio management service, be the solution to the assessment of the client understanding of the specific risk linked to particular products (see question 85) and as such allow the scope of portfolio management service to be expanded to other instruments than the one that would be allowed for an investment advice or a non-managed account ? The answer given in question 85 could lead the less knowledgeable clients to bear more risks than the more knowledgeable ones since derivative products could for instance not be used in his portfolio to cover the risks in foreign exchanges.	of Directive 2006/73/EC) must be kept separate from the duty to assess the client's understanding of the risks of the specific transaction which is required by Article 35(1)(c) of Directive 2006/73/EC. Even if a strategy is intended to reduce the risk of a portfolio, the client's understanding of the risks of the specific instruments and transactions used to implement that strategy must be assessed by the investment firm.
Are MTFs required to use entities specifically authorised to undertake clearing and settlement functions? Can such clearing and settlement functions be carried out by an investment firm?	Article 14(5) of Directive 2004/39/EC (MiFID) requires investment firms or market operators operating an MTF to have in place necessary arrangements to facilitate the efficient settlement of the transactions concluded under the systems of the MTF. There is no requirement on EU-level for provider of clearing and settlement to be authorised. Nonetheless, in order for the clearing and settlement instructions to be protected (ring fenced in case of the insolvency of one of the participants in the clearing and settlement systems), such systems are designated by the Member States under the Settlement Finality Directive (98/26/EC) which provides such protection. This directive also provides that Member States may impose supervision or authorisation requirements on designated systems. In practice, in view of their systemic importance, such systems are normally supervised.
Since market operators operating an MTF are exempt from authorisation in the (Host) Member State pursuant to Article 5(2), does this mean that market operators operating an MTF do not need a passport to offer MTF services in other member states (as Article 31(1),(2),(3) or (4) only applies to investment firms)? Can Host Member States impose additional requirements on market operators operating an MTF in that Host Member State? What is the relationship between the passporting requirement for investment firms operating an MTF and Articles 31(5) and (6)?	Article 31(5) gives investment firms and market operators that operate an MTF the freedom to provide arrangements to facilitate access to and use of their system in all other Member States 'without further legal or administrative requirements'. It is therefore not possible for a host Member State to impose additional legal or administrative requirements, for the purpose of exercising the freedom to provide relevant arrangements in its territory. Article 31(6) provides the responsibility of the investment firm or the market operator that operates an MTF to communicate to the competent authority of its home Member State, the Member State in which it intends to provide such arrangements. CESR has published recommendations in relation to 'the passport under MiFID', further explaining what constitutes passporting for an MTF. Please see http://www.cesr.eu/index.php?docid=4603, page 11 and 12.
Item 4 of Annex 2 of the Directive 2004/39/EC is dealing with the residual residual category of per se professional investors. According to the provision, it is deemed to encompass: “Other institutional investors whose main activity is to invest in financial instruments, including entities dedicated to the securitisation of assets or other financing transaction” This category has not deserved any specific attention in the preparatory work performed by CESR. Indeed, the CESR 02-98b report	Whether the conditions to be considered a professional client according to Section I(4) of Annex II of Directive 2004/39/EC (MiFID) are met should be seen in the context of the specific circumstances. The purpose is to ensure a proper level of investor protection. As retail clients are offered a higher level of protection than professional clients the conditions to be considered a professional client should be interpreted in a prudent way. When assessing whether an institutional investor, as provided in Section I(4) of Annex II of MiFID, can be considered a professional client, this should be taken into account. Consequently, in a case where it is unclear whether the main activity is to invest in financial instruments, that investor would probably not qualify as a professional client based on Section I(4) of Annex II of MIFID. Securities financing transaction is defined in Article 2(10) of Regulation 1287/2006, for the purpose of that Regulation, with reference to lending and borrowing of financial instruments. However, Section I(4) of Annex II of MiFID refers also to securitisation of assets, and hence a SPV may be covered, provided that its main activity concerns securitisation and financing transactions. Although an investor may not qualify per se to be considered a professional client according to Section I of Annex II of MiFID, Section II of the same annex allows clients to be treated as professional clients on request, provided that certain criteria are met. At least two out of three criteria relating to (1) the frequency of

dated July 2002 (“A European Regime of Investor Protection – The Professional and Counterparty Regimes”), only mentioned that per se professional investors also encompass (cf. 10.b): “Other institutional investors whose corporate purpose is to invest in financial instruments” Our questions are the following: (i) how should be assessed the 'main activity' test? and (ii) what is the scope of 'financing transaction'? Does this cover SPV used for project finance type of deal?	transactions, (2) the size of the portfolio and, (3) working experience and knowledge in the relevant area, have to be met. This rule aims at providing an appropriate degree of flexibility in the classification of clients.
Does a spot foreign exchange transaction have to meet a "commercial purpose" test for it to be outside the scope of MiFID, or are all spot foreign exchange transactions not considered to be financial instruments under MiFID? Certain states appear to have introduced the concept of rolling spot forex to define speculative activity and thereby bring speculative spot forex transactions within the definition of financial instrument in Annex 1 Section C(4).	Spot foreign exchange transactions are not considered financial instruments under MiFID irrespective of the purpose of the operation, i.e. commercial or otherwise. Foreign exchange transactions which take the form of a derivative contract, for example by falling under Article 4(1)18(c) of Directive 2004/39/EC, or a contract for difference will however be considered as financial instruments.
Investment Firm A uses Investment Firm B as sub-custodian for certain holdings of financial instruments on behalf of Investment Firm A:s clients. A is based within the EU, whereas B is not. When B uses an upper-tier account provider (such as a sub-custodian or a CSD), B registers all its own holdings and its clients' holdings in its own name as proprietary positions. Consequently, B does not segregate financial instruments held on behalf of clients from its own holdings at the upper tier account provider (however B facilitates such segregation in its own internal custody system). Would the holding structure described above be consistent with the requirements of Art. 16.1 (d) in Directive 2006/73/EC? Would the answer to the first question be affected if the laws in the country where B is domiciled presume that an account which an account provider opens with an upper-tier account provider always contain (and give priority to in case of a default) clients' assets?	Article 13(7) of Directive 2004/39/EC requires investment firms holding financial instruments belonging to clients to make adequate arrangements so as to safeguard clients' ownership rights. Article 16(1)(d) of Directive 2006/73/EC (Implementing MiFID) requires investment firms to take the necessary steps to ensure that any client financial instruments deposited with a third party are identifiable separately from the financial instruments belonging to the investment firm and from financial instruments belonging to that third party, by means of differently titled accounts on the books of the third party or other equivalent measures that achieve the same level of protection. If the applicable law of the jurisdiction in which the client funds are held prevents investment firms from complying with Article 16(1)(d), Member States shall prescribe requirements which have an equivalent effect in terms of safeguarding clients' rights. The deposit of clients' financial instruments into accounts opened with a third party is further regulated under Article 17 of Directive 2006/73/EC. It requires the investment firm to exercise all due skill, care and diligence in the selection and appointment of the third party and of the arrangements for the holding and safekeeping of the financial instruments. Article 17(3) further requires to ensure that investment firms do not deposit financial instruments held on behalf of clients with a third party in a third country that does not regulate the holding and safekeeping of financial instruments for the account of another person unless one of the following conditions is met: 1) the nature of the financial instruments or the connected services requires them to be deposited with a third party in that third country; 2) where the financial instruments are held on behalf of a professional client, that client requests the firm in writing to deposit them with a third party in that third country. We understand your question as covering a situation in which: - an investment firm (A) uses, on a voluntary basis, a specific investment firm (B) in a third country to deposit clients' assets, - and investment firm (B), on a voluntary basis, does not segregate financial instruments held on behalf of clients. It uses an upper tier account provider and registers clients' holdings in its own name as proprietary positions. Under the said circumstances, investment firm A does not seem in compliance with requirements in Article 16(1)(d) and 17(1) of Directive 2006/73/EC. The fact that investmebt firm B simply facilitates the segregation of clients assets in its own internal system is not sufficient to ensure adequate protection to clients' assets. The law of the third country presuming that upper-tier accounts always contain clients' assets is not per se decisive in selecting a third party among others in that country. On the other hand, we believe that a definitive answer may depend on a number of concrete circumstances of the case, such as whether the firm had an obligation to appoint a sub-custodian in the third country concerned, whether a regulatory regime exist in that third country to protect clients' assets and whether the Member State of the firm has prescribed specific requirements to safeguard clients' rights in that third country. The competent authority of investment firm A would be in the best position to assess the specificities of each case.
Would you consider physical metals as complex products? What about metal accounts?	The provisions of Directive 2004/39/EC only applies to financial instruments. The list of financial instruments can be found in Annex I Section C. Although commodity derivatives are included in the list (please refer to items (5), (6) and (7)), the "physical" commodities are not. Commodities are defined in Article 2(1) of Regulation 1287/2006 as any goods of a fungible nature that are capable of being delivered, including metals, agricultural products and energy. Physical metals not being a financial instrument, the provisions of Directive 2004/39/EC would not apply. With respect to metal accounts, as contractual provisions are specific to each product, we would recommend you to refer to your national regulator.
How frequent do banks or investment firms have to carry out the suitability test?	Article 19.4 of Directive 2004/39/EC (MiFID) states that "when providing investment advice or portfolio management the investment firm shall obtain the necessary information..." This means that the investment firm must obtain adequate information prior to the commencement of the investment service. Whether and in which intervals firms that provide investment services to clients on a continuous basis have to update their information on the client can only be decided on a case by case basis, taking into account the development of the relationship between the investment firm and the customer. For instance, investment advice provided a very long time after the information gathering for the purposes of suitability may not be suitable any more (if the firm should be aware of any changes occurred in the client's personal circumstances). In this case the investment firm should update its information on the client before providing the advice.

Is there any interpretation of churning in the context of professional care that can be performed under MiFID legislation?	Churning (excessive buying and selling of securities by a broker for the purpose of generating commissions) is not defined in MiFID. However, as provided by Article 19(1) of Directive 2004/39/EC (MiFID) an investment firm must act honestly, fairly and professionally in accordance with the best interest of its client. According to Article 19(4) of MiFID an investment firm providing portfolio management must obtain information to enable the firm to assess the suitability of an investment service (or a financial instrument) in relation to the client. Article 35 of Directive 2006/73/EC further provides that in order for an investment service to be suitable it must, among other things, meet the investment objectives of the client. In addition Recital 57 of Directive 2006/73/EC, with reference to Article 19(4) of MiFID, specifically provides that a transaction may be unsuitable for a client because of the frequency of trading. It further states that a series of transactions that are each suitable when viewed in isolation may be unsuitable if the recommandation or the decision to trade are made with a frequency that is not in the best interest of the client. Accordingly, excessive buying and selling of securities by a broker is clearly a violation of MiFID.
Should a securities lending transaction be considered a contingent liability transaction with an uncovered open position according to Recital 63 and Article 42 of Directive 2006/73/EC?	The purpose of Article 42 of Directive 2006/73/EC is to keep retail investors adequately informed about losses arising from open positions involving actual or potential liability exceeding the cost of acquiring the instrument. Securities lending arrangements may take many technical forms and it is necessary to take into account the specific circumstances when assessing an individual arrangement. Normally, lending an instrument already held in a portfolio does not in itself create a potential liability exceeding the cost of acquiring the instrument. Similarly, borrowing a financial instrument does not necessarily in itself create a contingent liability exceeding the cost of acquiring the instrument. It should be noted however, that these activities may be part of an arrangement that constitutes a contingent liability transaction with an uncovered open position.
According to Article 2(1)(i) of Directive 2004/39/EC a company can provide investment services in derivatives contracts included in Annex I, Section C 10 to the clients of their main business, if this is an ancillary activity to its main business. Can a company with its main business "Insurance brokerage" sell also derivatives included in Annex I, Section C 10? In other words can a insurance broker sell also weather derivatives? Is provision of weather derivatives ancillary to the provision of weather related insurance?	A firm may provide investment services in relation to weather derivatives to its clients in an ancillary manner, provided that the arrangement meets the conditions of Article 2(1)(i) of Directive 2004/39/EC, for example the service must be provided to clients of their main business, it must be ancillary to the main business and also the main business must not be investment services or banking. Whether or not the provision of investment services in commodity derivatives or derivative contracts included in Annex I, Section C 10, such as weather derivatives, can be considered an ancillary activity depends on the nature of the main business of the firm. It is the activity of providing an investment service which is to be considered as ancillary to a main business, not the instrument which is to be considered as ancillary to another product. Nonetheless, depending on the specificities of the case, it can be questioned whether the selling of weather derivatives for investment purposes could be considered to be ancillary to a firm providing insurance brokerage as its main business, as both activities are financial services in a broad sense and the selling of weather derivatives may be considered to be complementary rather than ancillary to the selling of insurance products. In that case you most probably need an authorisation according to Article 5 of Directive 2004/39/EC. Therefore, before starting to provide investment services in relation to weather derivatives we would advise you to contact the competent financial services/securities authority in order to clarify whether the exemption of Article 2 (1) (i) is applicable or whether an authorisation to provide investment services is needed.
1) Are CO2 (EUA) - emission allowances covered by definition of commodity? 2) If yes, are the firms that trade with derivaties on emissions allowances exempt under Article 2, para. 1 (k)?	1. Emission allowances (EUAs) are not explicitly mentioned in Article 2(1) of Regulation 1287/2006. They are mentioned under Section C 10 of Annex I of Directive 2004/39/EC as an underlying the derivatives of which are to be considered financial instruments pursuant to Article 38(3) of Regulation 1287/2006 distinct from, but under the same conditions as, derivative contracts relating to commodities in Sections C 5, C 6 and C 7. 2. Firms that trade with derivatives on emissions allowances are not exempt under Article 2(1)(k) of Directive 2004/39/EC. While the determination of which derivatives on commodities and on underlyings referred to in Section C 10 is analogous, the treatment of firms dealing in the two is differentiated. Firms dealing on own account in the latter, such as EUAs, cannot avail themselves of the exemption in Article 2(1)(k) of Directive 2004/39/EC. This exemption is exclusively available for firms whose main business consists of dealing on own account in commodities and/or commodity derivatives, provided they are not a part of a group the main business of which is the provision of other investment services or banking services, with no possiblity of implicit extension to firms dealing in EUAs and/or EUA derivatives based on the analogous definition of financial instruments. Such firms may however benefit from other exemptions from MiFID, depending on the nature of their business.
LME Warrants are certificates representing entitlement to certain metals stored in a Warehouse. Such certificates are issued by the relevant Warehouse, and subject to certain standardisation by the rules of London Metall Exchange ("LME"). In case of physical settlement of an LME Derivative, the holder of such derivative will receive an LME Warrant and be entitled to claim entitlement to the physical commodity kept in store by the issuing Warehouse. However, there is also a liquid secondary market for LME Warrants as such arranged by LME, and an holder of an LME Warrant may therefore sell the warrant in the market. Would LME Warrants as described above be considered a "Transferable Security" for the purposes of MiFID?	According to the definition given on the LME website (http://www.lme.com/glossary/glossary_7561.asp), a warrant is defined as "a document of possession, issued by the warehouse company, for each lot of LME approved metal or plastics held within an LME approved facility. Warrants are used as the means of delivering metal or plastics under LME contracts". The list of financial instruments in Annex I Section C of Directive 2004/39/EC includes among others transferable securities (point (1)), commodities derivatives that can be physically settled provided that they are traded on a trading venue (point (6)), and commodity derivatives contracts that can be physically settled that have the characteristics of other derivative instruments (point (7)). As per Article 4 par. 18 of Directive 2004/39/EC the definition of a 'transferable security' covers among others "any other securities giving the right to acquire or sell any such transferable securities or giving rise to a cash settlement determined by reference to … commodities or … (lit. (c))". The settlement method of this instrument as well as the place of trading will be important elements to take into account to determine whether the warrant in question meets the definition of a financial instrument. As we are not in possession of the detailed features of these LME warrants and your question implies the assessment of practical elements concerning the functioning of the contract, we would advise you to contact the UK Financial Services Authority in charge of the supervision of the London Metal Exchange.
Does a rolling spot Foreign Exchange on margin take the form of a derivative contract or contract for difference to be considered financial instrument under MiFID ?	As opposed to spot trading where there is immediate delivery, a rolling spot FX contract can be indefinitely renewed and no currency is actually delivered until a party affirmatively closes out its position. This exposes both parties to fluctuations in the underlying currencies. Hence rolling spot foreign exchange contracts are a type of derivative contract (i.e. either a forward or a financial contract for difference) relating to currencies and are considered financial instruments as defined under MiFID (see Section C(4) or (9) of Annex I of Directive 2004/39/EC).

Can an insurance undertaking, authorised in accordance with the European Directive 73/239/EEC: (i)establish and manage occupational pension funds and/or (ii)provide the investment service of portfolio management to a pension fund without having authorization under MiFID and without complying with the obligations laid down in MiFID and in Level 2 Directive 2006/73/EC, due to the fact that it is exempted under article 2(1)(a) of MiFID? It is provided that the above insurance undertaking complies fully with the provisions of Directive 73/239/EEC.	The answer to this question depends on the nature of the service the insurance undertaking is providing, and whether the services provided fall under the exemption of Article 2(1)(h) of Directive 2004/39/EC. Article 2(1)(h) prescribes that the Directive 2004/39/EC shall not apply to collective investment undertakings and pension funds whether coordinated at Community level or not and the depositaries and managers of such undertakings. The term 'managers of such undertakings' in Article 2(1)(h) should be understood to also cover investment managers which are appointed by an institution for occupational retirement provision to manage the portfolio of a pension fund. However, the term 'managers' cannot be interpreted broadly as to also include entities which manage the assets of the pension fund only by way of delegation. In case of a delegation only the manager of the pension fund, but not the delegated party, is covered by the exemption under Article 2(1)(h) of MiFID, as the delegated party is not providing collective portfolio management to the end-investors, but individual portfolio management to the manager of the pension fund. This means that in the case the insurance undertaking is appointed as the manager of the pension fund it will not have to be authorised under Directive 2044/39/EC. However, when the insurance undertaking provides portfolio management services to a pension fund manager (i.e. individual portfolio management services), it will have to be authorised under Directive 2004/39/EC.
Is the trade of Binary Options an activity regulated under MiFID? Do Binary Options fall within the definition of financial instruments under MiFID? Scenario: Binary Options are typically offered to clients (retail and professional) via a platform where clients can trade binary/digital options in a number of underlying products (e.g. oil, gold, indices, currencies, stocks etc). These binary options are private contracts between the client and the Investment Firm – not traded anywhere else – and are settled in cash. Through these binary options, Clients can speculate on which direction the price of an underlying product will move within a specified time frame. When a binary option is purchased on the Investment Firm's platform, a contract is created which pays some fixed amount of cash if the option expires in-the-money or nothing if the option expires out-of-the-money. A brief example is when a client wishes to enter into a Microsoft binary option by investing an amount of €100, with the view that at the end of the day (time of expiration) Microsoft's shares will be higher than they currently stand (i.e. a call binary option). If Microsoft's shares at the end of the day are higher than at the time the binary option was purchased then the Binary Options Trading Company will offer a return on the Client's investment (e.g. 70%). If Microsoft's shares at the end of the day are lower than at the time the binary option was purchased then the client loses his entire (or part of) investment (i.e. a negative return on investment).	Point (4) of Section C of Annex 1 to Directive 2004/39/EC lists the financial instruments covered by this Directive. This list clearly covers, among others, any derivative contracts relating to securities, currencies, interest rates or yields, or other derivative instruments (point (4) of Section C Annex I) as well as derivatives relating to commodities that are settled in cash or that can be physically settled provided they have the characteristics of other derivative financial instruments (points (5) (6) and (7) of Section C Annex I and Article 38 of the Implementing Regulation No 1287/2006). As the binary option you are referring has the features of a derivative contract settled in cash (cf Articles 37 and 38 of the Implementing Regulation No 1287/2006), such binary products appear to meet the definition of 'financial instruments' laid down in Section C of Annex I to MiFID. Therefore, companies offering investment services and activities in these binary options should be authorised as investment firms under MiFID.
Does a Financial Institution have to perform appropriateness testing for those clients who are using only ancillary services (such as mergers and acquisitions)?	The provision of ancillary services alone does not require specific authorisation under MiFID but these services are subject to MiFID requirements when they are provided by MiFID authorised investment firms. While article 19(5) of MiFID 2004/39/EC requires investment firms to carry out an appropriateness test when providing investments services other than investment advice or portfolio management as listed under Annex I Section A of MiFID, this test does not apply to the provision of ancillary services such as mergers and acquisitions.

Recently we have seen, in certain EU jurisdictions, the flourish of several Binary Options Trading Companies. Very briefly, these Binary Options Trading Companies typically offer their Clients (retail and professional) a platform where they can trade binary/digital options in a number of underlying products (e.g. oil, gold, indices, currencies, stocks etc). These binary options are private contracts between the client and the Binary Options Trading Company – not traded anywhere else – and are settled in cash.

Based on the above, do you believe that the binary options offered by these Binary Options Trading Companies fall under the scope of MiFID's financial instruments and therefore these companies need to obtain an Investment Firm authorisation/license, assuming that all other relevant conditions are met?

Point (4) of Section C of Annex 1 to Directive 2004/39/EC lists the instruments covered by this Directive. This list clearly covers all derivatives relating to securities, currencies, interest rates or yields (point (4) of Section C Annex I) as well as derivatives relating to commodities that are settled in cash or that can be physically settled provided they have the characteristics of other derivative financial instruments (points (5) (6) and (7) of Section C Annex I and Article 38 of the Implementing Regulation No 1287/2006).

As the binary option you are referring to is a derivative contract settled in cash, it seems that these meet the definition of financial instruments. Therefore, companies offering investment services and activities in these binary options should be authorised as investment firms under MIFID./p

What are the functions regarding which investment firms must ensure that the firm to which it has outsourced an activity has put in place a system for recording transactions pursuant to Article 12(2)(b) of Directive 2006/73/EC?

More specifically, does this refer only to critical and important functions within the meaning of Article 13(5) of Directive 2004/39/EC or to any outsourced function, pursuant to Article 2(6) of Directive 2006/73/EC, which gives a broader definition of the concept of outsourcing without specifying the functions covered?

BACKGROUND

Pursuant to the Level 2 Markets in Financial Instruments Directive – MiFID (Article 12(2)(b) of Directive 2006/73/EC) "In the case of outsourcing arrangements the investment firm must ensure that the firm to which the activity is outsourced maintains a record of personal transactions entered into by any relevant person and provides that information to the investment firm promptly on request." This provision thus extends the personal transactions regime under the Level 1 MiFID (Article 13(2) of Directive 2004/39/EC), which is applicable only to managers, employees and tied agents relating to the investment firm, to cover [all] relevant persons in an outsourced service provider. However, the nature of outsourced functions in question is not specified.

The concept of outsourcing is defined in the Level 2 MiFID as "an arrangement of any form between an investment firm and a service provider by which that service provider performs a process, a service or an activity which would otherwise be undertaken by the investment firm itself;" (Article 2(6) of Directive 2006/73/EC). Accordingly, the nature of the functions in question is defined only as "a process, a service or an activity which would otherwise be undertaken by the investment firm itself;".

Furthermore, outsourcing is defined in the Level 1 MiFID only in terms of "critical operational functions" or "important operational functions". "An investment firm shall ensure, when relying on a third party for the performance of operational functions which are critical for the provision of continuous and satisfactory service to clients and the performance of investment activities on a continuous and satisfactory basis, that it takes reasonable steps to avoid undue additional operational risk. Outsourcing of important operational functions may not be undertaken in such a way as to impair materially the quality of its internal control and the ability of the supervisor to monitor

As part of the implementing measures for personal transactions pursuant to Article 13(2) of Directive 2004/39/EC, Article 12(2)(b) of Level 2 Directive 2006/73/EC requires the establishment of appropriate provisions so that the investment firm is 'informed promptly of any personal transaction entered into by a relevant person". The same Article extends this obligation to external service providers by requiring that the investment firm ensures that "the firm to which the activity is outsourced maintains a record of personal transactions entered into by any relevant person…'.
Article 2(6) of Level 2 Directive 2006/73/EC defines outsourcing as follows: 'an arrangement of any form between an investment firm and a service provider by which that service provider performs a process, a service or an activity which would otherwise be undertaken by the investment firm itself'.
The definition of 'relevant person' in Article 2(3)(d) of Level 2 Directive 2006/73/EC also refers in particular to: 'a natural person who is directly involved in the provision of services to the investment firm or to its tied agent under an outsourcing arrangement for the purpose of the provision by the firm of investment services and activities'.
Consequently, an investment firm must ensure that any task outsourced with a view to the supply of investment services and activities which would otherwise have been the responsibility of the investment firm itself is covered by arrangements for recording personal transactions by the provider of the outsourced services, and not only the critical and important operational functions within the meaning of Article 13(1) of Directive 2006/73/EC. By way of information, Article 13(2) excludes services which do not form part of the investment business of the firm from the critical and important functions

the firm's compliance with all obligations." (Article 13(5) of Directive 2004/39/EC).

The Level 2 MiFID provides a definition of critical and important functions. Functions are regarded as critical or important "if a defect or failure in its performance would materially impair the continuing compliance of an investment firm with the conditions and obligations of its authorisation or its other obligations under Directive 2006/1/EC, or its financial performance, or the soundness or the continuity of its investment services and activities." (Article 13(1) of Directive 2006/73/EC). This definition is laid down pursuant to both Article 13(5) and Article 13(2), which deals with the personal transactions regime.

AMAFI'S ANALYSIS

Provided that the Level 2 MIFID can legitimately extend the personal transactions regime limited, under the Level 1 MIFID, to the relevant persons in an outsourced service provider, the *Association Française des Marchés Financiers* – AMAFI (French Association of Financial Markets) considers, from a strictly legal point of view, that the outsourced activities to which this regime applies should be restricted to critical and important operational functions. This is the inevitable conclusion taking into account all of the relevant provisions, as above.

From an operational perspective, this solution is especially appropriate, as retaining a broader definition of the outsourced activities concerned would have a significant organisational impact on companies. This requirement would thus need to be justified given that there are limits to the circulation of information concerning outsourced activities not falling within the category of 'critical and important function'. Appropriate systems must be put in place to prevent the improper circulation of confidential information (Article 5(2) of Directive 2006/73/EC, adopted pursuant to Article 13(2) of Directive 2004/39/EC on personal transactions) or privileged information (as laid down in the 'Market Abuse Directive' 2003/6/EC), and to prevent conflicts of interest (Article 22 of Directive 2006/73/EC, adopted pursuant to Articles 13(3) and 18(1) of Directive 2004/39/EC)

As a reference, please find below the relevant articles relating to our question; we were unable to place all of them in the 'Provisions' section above.

Directive 2004/39/EC

Article 13: Organisational requirements

1. The home Member State shall require that investment firms comply with the organisational requirements set out in paragraphs 2 to 8.

2. An investment firm shall establish adequate policies and procedures sufficient to ensure compliance of the firm including its managers, employees and tied agents with its obligations under the provisions of this Directive as well as appropriate rules governing personal transactions by such persons.

3. An investment firm shall maintain and operate effective organisational and administrative arrangements with a view to taking all reasonable steps designed to prevent conflicts of interest as defined in Article 18 from adversely affecting the interests of its clients.

4. An investment firm shall take reasonable steps to ensure continuity and regularity in the performance of investment services and activities. To this end the investment firm shall employ appropriate and proportionate systems, resources and procedures.

5. An investment firm shall ensure, when relying on a third party for the performance of operational functions which are critical for the provision of continuous and satisfactory service to clients and the performance of investment activities on a continuous and satisfactory basis, that it takes reasonable steps to avoid undue additional operational risk. Outsourcing of important operational functions may not be undertaken in such a way as to impair materially the quality of its internal control and the ability of the supervisor to monitor the firm's compliance with all obligations.

An investment firm shall have sound administrative and accounting procedures, internal control mechanisms, effective procedures for risk assessment, and effective control and safeguard arrangements for information processing systems.

6. An investment firm shall arrange for records to be kept of all services and transactions undertaken by it which shall be sufficient to enable the competent authority to monitor compliance with the requirements under this Directive, and in particular to ascertain that the investment firm has complied with all obligations with respect to clients or potential clients.

7. An investment firm shall, when holding financial instruments belonging to clients, make adequate arrangements so as to safeguard clients' ownership rights, especially in the event of the investment firm's insolvency, and to prevent the use of a client's instruments on own account except with the client's express consent.

8. An investment firm shall, when holding funds belonging to clients, make adequate arrangements to safeguard the clients' rights and, except in the case of credit institutions, prevent the use of client funds for its own account.

9. In the case of branches of investment firms, the competent authority of the Member State in which the branch is located shall, without prejudice to the possibility of the competent authority of the home Member State of the investment firm to have direct access to those records, enforce the obligation laid down in paragraph 6 with regard to transactions undertaken by the branch.

10. In order to take account of technical developments on financial markets and to ensure the uniform application of paragraphs 2 to 9, the Commission shall adopt, in accordance with the procedure referred to in Article 64(2), implementing measures which specify the concrete organisational requirements to be imposed on investment firms performing different investment services and/or activities and ancillary services or combinations thereof.

Directive 2006/73/EC

Article 2(6)

"outsourcing" means an arrangement of any form between an investment firm and a service provider by which that service provider performs a process, a service or an activity which would otherwise be undertaken by the investment firm itself;

Article 5(2)

2. Member States shall require investment firms to establish, implement and maintain systems and procedures that are adequate to safeguard the security, integrity and confidentiality of information, taking into account the nature of the information in question.

Article 12: Personal transactions

1. Member States shall require investment firms to establish, implement and maintain adequate arrangements aimed at preventing the following activities in the case of any relevant person who is involved in activities that may give rise to a conflict of interest, or who has access to inside information within the meaning of Article 1(1) of Directive 2003/6/EC or to other confidential information relating to clients or transactions with or for clients by virtue of an activity carried out by him on behalf of the firm:

a) entering into a personal transaction which meets at least one of the following criteria:

i) that person is prohibited from entering into it under Directive 2003/6/EC;

ii) it involves the misuse or improper disclosure of that confidential information;

iii) it conflicts or is likely to conflict with an obligation of the investment firm under Directive 2004/39/EC;

b) advising or procuring, other than in the proper course of his employment or contract for services, any other person to enter into a transaction in financial instruments which, if a personal transaction of the relevant person, would be covered by point (a) or Article 25(2)(a) or (b) or Article 47(3);

c) without prejudice to Article 3(a) of Directive 2003/6/EC, disclosing, other than in the normal course of his employment or contract for services, any information or opinion to any other person if the relevant person knows, or reasonably ought to know, that as a result of that disclosure that other person will or would be likely to take either of the following steps:

i) to enter into a transaction in financial instruments which, if a personal transaction of the relevant person, would be covered by point (a) or Article 25(2)(a) or (b) or Article 47(3);

ii) to advise or procure another person to enter into such a transaction.

2. The arrangements required under paragraph 1 must in particular be designed to ensure that:

a) each relevant person covered by paragraph 1 is aware of the restrictions on personal transactions, and of the measures established by the investment firm in connection with personal transactions and disclosure, in accordance with paragraph 1;

b) the firm is informed promptly of any personal transaction entered into by a relevant person, either by notification of that transaction or by other procedures enabling the firm to identify such transactions;

In the case of outsourcing arrangements the investment firm must ensure that the firm to which the activity is outsourced maintains a record of personal transactions entered into by any relevant person and provides that information to the investment firm promptly on request.

c) a record is kept of the personal transaction notified to the firm or identified by it, including any authorisation or prohibition in connection with such a transaction.

3. Paragraphs 1 and 2 shall not apply to the following kinds of personal transactions:

a) personal transactions effected under a discretionary portfolio management service where there is no prior communication in connection with the transaction between the portfolio manager and the relevant person or other person for whose account the transaction is executed;

b) personal transactions in units in collective undertakings that comply with the conditions necessary to enjoy the rights conferred by Directive 85/611/EEC or are subject to supervision under the law of a Member State which requires an equivalent level of risk spreading in their assets, where the relevant person and any other person for whose account the transactions are effected are not involved in the management of that undertaking.

Article 13: Meaning of critical and important operational functions

1. For the purposes of the first subparagraph of Article 13(5) of Directive 2004/39/EC, an operational function shall be regarded as critical or important if a defect or failure in its performance would materially impair the continuing compliance of an investment firm with the conditions and obligations of its authorisation or its other obligations under Directive 2004/39/EC, or its financial performance, or the soundness or the continuity of its investment services and activities.

2. Without prejudice to the status of any other function, the following functions shall not be considered as critical or important for the purposes of paragraph 1:

a) the provision to the firm of advisory services, and other services which do not form part of the investment business of the firm, including the provision of legal advice to the firm, the training of personnel of the firm, billing services and the security of the firm's premises and personnel;

b) the purchase of standardised services, including market information services and the provision of price feeds.

Article 14: Conditions for outsourcing critical or important operational functions or investment services or activities

1. Member States shall ensure that, when investment firms outsource critical or important operational functions or any investment services or activities, the firms remain fully responsible for discharging all of their obligations under Directive 2004/39/EC and comply, in particular, with the following conditions:
a) the outsourcing must not result in the delegation by senior management of its responsibility;

b) the relationship and obligations of the investment firm towards its clients under the terms of Directive 2004/39/EC must not be altered;

c) the conditions with which the investment firm must comply in order to be authorised in accordance with Article 5 of Directive 2004/39/EC, and to remain so, must not be undermined;

d) none of the other conditions subject to which the firm's authorisation was granted must be removed or modified.

2. Member States shall require investment firms to exercise due skill, care and diligence when entering into, managing or terminating any arrangement for the outsourcing to a service provider of critical or important operational functions or of any investment services or activities.

Investment firms shall in particular take the necessary steps to ensure that the following conditions are satisfied:

a) the service provider must have the ability, capacity, and any authorisation required by law to perform the outsourced functions, services or activities reliably and professionally;

b) the service provider must carry out the outsourced services effectively, and to this end the firm must establish methods for assessing the standard of performance of the service provider;

c) the service provider must properly supervise the carrying out of the outsourced functions, and adequately manage the risks associated with the outsourcing;

d) appropriate action must be taken if it appears that the service provider may not be carrying out the functions effectively and in compliance with applicable laws and regulatory requirements;

e) the investment firm must retain the necessary expertise to supervise the outsourced functions effectively and manage the risks associated with the outsourcing and must supervise those functions and manage those risks;

f) the service provider must disclose to the investment firm any development that may have a material impact on its ability to carry out the outsourced functions effectively and in compliance with applicable laws and regulatory requirements;

g) the investment firm must be able to terminate the arrangement for outsourcing where necessary without detriment to the continuity and quality of its provision of services to clients;

h) the service provider must cooperate with the competent authorities of the investment firm in connection with the outsourced activities;

i) the investment firm, its auditors and the relevant competent authorities must have effective access to data related to the outsourced activities, as well as to the business premises of the service provider; and the competent authorities must be able to exercise those rights of access;

j) the service provider must protect any confidential information relating to the investment firm and its clients;

k) the investment firm and the service provider must establish, implement and maintain a contingency plan for disaster recovery and periodic testing of backup facilities, where that is necessary having regard to the function, service or activity that has been outsourced.

3. Member States shall require the respective rights and obligations of the investment firms and of the service provider to be clearly allocated and set out in a written agreement.

4. Member States shall provide that, where the investment firm and the service provider are members of the same group, the investment firm may, for the purposes of

complying with this Article and Article 15, take into account the extent to which the firm controls the service provider or has the ability to influence its actions.

5. Member States shall require investment firms to make available on request to the competent authority all information necessary to enable the authority to supervise the compliance of the performance of the outsourced activities with the requirements of this Directive.

Article 22: Conflicts of interest policy

1. Member States shall require investment firms to establish, implement and maintain an effective conflicts of interest policy set out in writing and appropriate to the size and organisation of the firm and the nature, scale and complexity of its business.

Where the firm is a member of a group, the policy must also take into account any circumstances, of which the firm is or should be aware, which may give rise to a conflict of interest arising as a result of the structure and business activities of other members of the group.

2. The conflicts of interest policy established in accordance with paragraph 1 shall include the following:

a) it must identify, with reference to the specific investment services and activities and ancillary services carried out by or on behalf of the investment firm, the circumstances which constitute or may give rise to a conflict of interest entailing a material risk of damage to the interests of one or more clients;

b) it must specify procedures to be followed and measures to be adopted in order to manage such conflicts.

3. Member States shall ensure that the procedures and measures provided for in paragraph 2(b) are designed to ensure that relevant persons engaged in different business activities involving a conflict of interest of the kind specified in paragraph 2(a) carry on those activities at a level of independence appropriate to the size and activities of the investment firm and of the group to which it belongs, and to the materiality of the risk of damage to the interests of clients.

For the purposes of paragraph 2(b), the procedures to be followed and measures to be adopted shall include such of the following as are necessary and appropriate for the firm to ensure the requisite degree of independence:

a) effective procedures to prevent or control the exchange of information between relevant persons engaged in activities involving a risk of a conflict of interest where the exchange of that information may harm the interests of one or more clients;

b) the separate supervision of relevant persons whose principal functions involve carrying out activities on behalf of, or providing services to, clients whose interests may conflict, or who otherwise represent different interests that may conflict, including those of the firm;

c) the removal of any direct link between the remuneration of relevant persons principally engaged in one activity and the remuneration of, or revenues generated by, different relevant persons principally engaged in another activity, where a conflict of interest may arise in relation to those activities;

d) measures to prevent or limit any person from exercising inappropriate influence over the way in which a relevant person carries out investment or ancillary services or activities;

e) measures to prevent or control the simultaneous or sequential involvement of a relevant person in separate investment or ancillary services or activities where such involvement may impair the proper management of conflicts of interest.

If the adoption or the practice of one or more of those measures and procedures does not ensure the requisite degree of independence, Member States shall require investment firms to adopt such alternative or additional measures and procedures as are necessary and appropriate for those purposes.

4. Member States shall ensure that disclosure to clients, pursuant to Article 18(2) of Directive 2004/39/EC, is made in a durable medium and includes sufficient detail, taking into account the nature of the client, to enable that client to take an informed decision with respect to the investment or ancillary service in the context of which the conflict of interest arises.

QUESTION

Quelles sont les tâches pour lesquelles une entreprise d'investissement doit s'assurer que l'entreprise à qui elle a confié une activité met en place un dispositif d'enregistrement des transactions personnelles au sens de l'article 12 § 2° b) de la directive 2006/73/CE ?

Plus précisément, s'agit-il seulement des tâches opérationnelles essentielles et importantes au sens de l'article 13 § 5 de la directive 2004/39/CE ou s'agit-il de toute tâche externalisée, l'article 2 § 6 de la directive 2006/73/CE donnant une définition large de la notion d'externalisation sans précision des tâches couvertes ?

ELEMENTS D'APPRECIATION

La directive MIF de niveau 2 (Dir. 2006/73/CE, art. 12 § 2 b) dispose que « Lorsque l'entreprise d'investissement a conclu des arrangements d'externalisation, elle est tenue de s'assurer que l'entreprise à laquelle l'activité externalisée a été confiée conserve un enregistrement des transactions personnelles réalisées par toute personne concernée et est en mesure de lui fournir promptement, à sa demande, ces informations ». Cette disposition vient ainsi étendre le dispositif des transactions personnelles applicable aux seuls directeurs, salariés et agents liés de l'entreprise d'investissement en vertu de la directive MIF de niveau 1 (Dir. 2004/39/CE, art. 13 § 2) aux personnes concernées au sein d'un prestataire de service externalisé. Toutefois, la nature des tâches externalisées concernées n'est pas précisée.

La notion d'externalisation est définie dans la directive de niveau 2 comme « tout accord, quelle que soit sa forme, entre une entreprise d'investissement et un prestataire de services en vertu duquel ce prestataire prend en charge un processus, un service ou une activité qui aurait autrement été du ressort de l'entreprise d'investissement elle-même » (Directive 2006/73/CE, art. 2 § 6). La nature des tâches concernées n'est ainsi définie qu'en tant qu'il s'agit d' « un processus, un service ou une activité qui aurait autrement été du ressort de l'entreprise d'investissement elle-même ».

Par ailleurs, dans le contexte de la directive de niveau 1, l'externalisation n'est envisagée qu'en tant qu'elle concerne des « tâches opérationnelles essentielles » ou des « fonctions opérationnelles importantes » : « Toute entreprise d'investissement prend, lorsqu'elle confie à un tiers l'exécution de tâches opérationnelles essentielles à la fourniture d'un service continu et satisfaisant aux clients et à l'exercice d'activités d'investissement de manière continue et satisfaisante, des mesures raisonnables pour éviter une aggravation indue du risque opérationnel. L'externalisation de fonctions opérationnelles importantes ne doit pas être faite d'une manière qui nuise sensiblement à la qualité du contrôle interne de l'entreprise d'investissement et qui empêche l'autorité de surveillance de contrôler qu'elle respecte bien toutes ses obligations » (Directive 2004/39/CE, art. 13 § 5).

La Directive de niveau 2 donne une définition des tâches opérationnelles essentielles et importantes. Est considérée comme telle celle qui « lorsqu'une anomalie ou une défaillance dans son exercice est susceptible de nuire sérieusement à la capacité de l'entreprise d'investissement de se conformer en permanence aux conditions et aux obligations de son agrément ou à ses obligations au titre de la directive 2004/39/CE, ou à ses performances financières ou à la continuité de ses services et activités d'investissement » (Directive 2006/73/CE, art. 13 § 1). Cette définition est prise en application de l'article 13 § 5, mais également de l'article 13 § 2 qui concerne précisément le dispositif relatif aux transactions personnelles.

ANALYSE DE L'AMAFI

Sous réserve que la directive MIF de niveau 2 puisse valablement étendre le dispositif des transactions personnelles limitativement prévu par la directive MIF de niveau 1 aux personnes concernées au sein d'un prestataire de service externalisé, l'AMAFI considère, d'un strict point de vue juridique, que le champ des activités externalisées auquel s'applique ce dispositif ne peut qu'être celui des tâches opérationnelles essentielles et importantes. La combinaison qui vient d'être rappelée des différentes dispositions à prendre en considération conduit nécessairement à ce résultat.

D'un point de vue opérationnel, cette solution est d'autant plus appropriée que retenir une vision plus large des activités externalisées concernées aurait un impact très lourd en termes d'organisation pour les établissements. Cette exigence demanderait alors à être justifiée dans la mesure où la circulation de l'information dans le cadre d'activités externalisées qui ne concernent pas une tâche opérationnelle essentielle et importante n'est de toute façon pas libre de toute contrainte. Des dispositifs appropriés doivent en effet être mis en œuvre pour circonscrire la circulation indue d'une information confidentielle (Directive 2006/73/CE, art. 5 § 2, pris notamment en application de l'article 13 paragraphe 2 de la Directive 2004/39/CE relatif aux transactions personnelles) ou d'une information privilégiée (comme le prévoit la Directive Abus de marché 2003/6/CE). Des dispositifs appropriés doivent également être mis en œuvre pour prévenir les conflits d'intérêts (Directive 2006/73/CE, art. 22, pris en application de l'article 13 § 3 et 18 § 1 de la Directive 2004/39/CE).

Pour référence, vous trouverez ci-après les articles pertinents concernant notre question que nous n'avons pas tous pu viser viser dans la rubrique "Provisions" ci-dessus.

Directive 2004/39/CE

Article 13 : Exigences organisationnelles

1. L'État membre d'origine impose aux entreprises d'investissement de satisfaire aux exigences organisationnelles énoncées aux paragraphes 2 à 8.

2. Toute entreprise d'investissement met en place des politiques et des procédures permettant de garantir qu'elle-même ainsi que ses directeurs, ses salariés et ses agents liés respectent les obligations fixées dans les dispositions de la présente directive ainsi que les règles appropriées applicables aux transactions personnelles effectuées par ces personnes.

3. Toute entreprise d'investissement maintient et applique des dispositions organisationnelles et administratives efficaces, en vue de prendre toutes les mesures raisonnables destinées à empêcher les conflits d'intérêts définis à l'article 18 de porter atteinte aux intérêts de ses clients.

4. Toute entreprise d'investissement prend des mesures raisonnables pour garantir la continuité et la régularité de la fourniture de ses services d'investissement et de l'exercice de ses activités d'investissement. À cette fin, elle utilise des systèmes, des ressources et des procédures appropriés et proportionnés.

5. Toute entreprise d'investissement prend, lorsqu'elle confie à un tiers l'exécution de tâches opérationnelles essentielles à la fourniture d'un service continu et satisfaisant aux clients et à l'exercice d'activités d'investissement de manière continue et satisfaisante, des mesures raisonnables pour éviter une aggravation indue du risque opérationnel. L'externalisation de fonctions opérationnelles importantes ne doit pas être faite d'une manière qui nuise sensiblement à la qualité du contrôle interne de l'entreprise d'investissement et qui empêche l'autorité de surveillance de contrôler qu'elle respecte bien toutes ses obligations.

Toute entreprise d'investissement dispose de procédures comptables et administratives saines, de mécanismes de contrôle interne, de techniques efficaces d'évaluation des risques et de dispositifs efficaces de contrôle et de sauvegarde de ses systèmes informatiques.

6. Toute entreprise d'investissement veille à conserver un enregistrement de tout service fourni et de toute transaction effectuée par elle même, permettant à l'autorité compétente de contrôler le respect des obligations prévues dans la présente directive et, en particulier, de toutes les obligations de cette entreprise à l'égard des clients ou clients potentiels.

7. Toute entreprise d'investissement prend, lorsqu'elle détient des instruments financiers appartenant à des clients, des dispositions appropriées pour sauvegarder les droits de propriété desdits clients, notamment en cas d'insolvabilité de cette entreprise, et pour empêcher l'utilisation des instruments financiers en question pour compte propre, sauf consentement exprès des clients.

8. Toute entreprise d'investissement prend, lorsqu'elle détient des fonds appartenant à des clients, des dispositions appropriées pour sauvegarder les droits desdits clients et, sauf dans le cas d'établissements de crédit, pour empêcher l'utilisation des fonds en question pour compte propre.

9. Pour toute succursale d'une entreprise d'investissement, l'autorité compétente de l'État membre où cette succursale est établie fait appliquer l'obligation prévue au

paragraphe 6 pour ce qui concerne les transactions effectuées par la succursale, sans préjudice de la possibilité, pour l'autorité compétente de l'État membre d'origine de l'entreprise d'investissement, d'accéder directement aux enregistrements concernés.

10. Afin de tenir compte de l'évolution des marchés financiers sur le plan technique et d'assurer l'application uniforme des paragraphes 2 à 9, la Commission arrête, conformément à la procédure visée à l'article 64, paragraphe 2, des mesures d'exécution précisant les exigences organisationnelles concrètes qu'il convient d'imposer aux entreprises d'investissement qui fournissent différents services d'investissement et services auxiliaires et/ou exercent différentes activités d'investissement ou offrent une combinaison de ces services.

Directive 2006/73/CE

Article 2 § 6

« externalisation», tout accord, quelle que soit sa forme, entre une entreprise d'investissement et un prestataire de services en vertu duquel ce prestataire prend en charge un processus, un service ou une activité qui aurait autrement été du ressort de l'entreprise d'investissement elle-même.

Article 5 § 2

2. Les États membres exigent des entreprises d'investissement qu'elles établissent, mettent en oeuvre et gardent opérationnels des systèmes et des procédures permettant de sauvegarder la sécurité, l'intégrité et la confidentialité des informations de manière appropriée eu égard à la nature des informations concernées.

Article 12 : Transactions personnelles

1. Les États membres exigent des entreprises d'investissement qu'elles établissent, mettent en oeuvre et gardent opérationnelles des dispositions appropriées en vue d'interdire les activités suivantes à toute personne concernée intervenant dans des activités susceptibles de donner lieu à un conflit d'intérêts ou ayant accès à des informations sensibles au sens de l'article 1er, paragraphe 1, de la directive 2003/6/CE ou à d'autres informations confidentielles relatives à des clients ou à des transactions avec des clients ou pour le compte de clients dans le cadre d'une activité qu'elle réalise au nom de l'entreprise:

a) réaliser une transaction personnelle qui remplit au moins l'un des critères suivants:

i) la directive 2003/6/CE interdit à cette personne de réaliser une transaction de la sorte;

ii) elle suppose l'utilisation abusive ou la communication inappropriée de ces informations confidentielles;

iii) elle est incompatible, ou susceptible de l'être, avec les obligations de l'entreprise d'investissement au titre de la directive 2004/39/CE;

b) conseiller ou assister toute autre personne, en dehors du cadre approprié de son emploi ou du contrat de services la liant, en vue de l'exécution d'une transaction sur instruments financiers qui relèverait du point a) ci-dessus, ou de l'article 25, paragraphe 2, points a) ou b), ou de l'article 47, paragraphe 3, s'il s'agissait d'une transaction personnelle de la personne concernée;

c) sans préjudice de l'article 3, point a), de la directive 2003/6/CE, communiquer à toute autre personne, en dehors du cadre approprié de son emploi ou du contrat de services la liant, des informations ou des avis dont la personne concernée sait, ou devrait raisonnablement savoir, que leur communication incitera vraisemblablement cette autre personne à agir comme suit:

i) réaliser une transaction sur instruments financiers qui relèverait, s'il s'agissait d'une transaction personnelle de la personne concernée, du point a) ou de l'article 25, paragraphe 2, points a) ou b), ou de l'article 47, paragraphe 3;

ii) conseiller ou assister une autre personne en vue de l'exécution de cette transaction.

2. Les dispositions à prendre en vertu du paragraphe 1 doivent en particulier être conçues pour assurer que:

a) toutes les personnes concernées relevant du paragraphe 1 sont au courant des restrictions portant sur les transactions personnelles et des mesures arrêtées par l'entreprise d'investissement en matière de transactions personnelles et de divulgation d'information en application du paragraphe 1;

b) l'entreprise est informée sans délai de toute transaction personnelle réalisée par une personne concernée, soit par notification de toute transaction de ce type, soit par d'autres procédures permettant à l'entreprise d'identifier ces transactions.

Lorsque l'entreprise d'investissement a conclu des arrangements d'externalisation, elle est tenue de s'assurer que l'entreprise à laquelle l'activité externalisée a été confiée conserve un enregistrement des transactions personnelles réalisées par toute personne concernée et est en mesure de lui fournir promptement, à sa demande, ces informations.

c) un enregistrement de la transaction personnelle qui lui a été notifiée ou qu'elle a identifiée est conservé. Celui-ci mentionne également toute autorisation ou interdiction liée à la transaction.

3. Les paragraphes 1 et 2 ne s'appliquent pas aux types de transactions personnelles suivants:

a) les transactions personnelles exécutées dans le cadre d'un service de gestion de portefeuille discrétionnaire pour lequel il n'y a pas de communication préalable concernant la transaction entre le gestionnaire du portefeuille et la personne concernée ou une autre personne pour le compte de laquelle la transaction est exécutée;

b) les transactions personnelles sur des parts d'organismes de placement collectif qui remplissent les conditions requises pour jouir des droits conférés par la directive 85/611/CEE ou qui font l'objet d'une surveillance au niveau national qui garantit un niveau équivalent de répartition des risques pour leurs actifs, pour autant que la personne concernée et toute autre personne pour le compte de laquelle les transactions sont effectuées ne participent pas à la gestion de cet organisme.

Article 13 : Définition des tâches opérationnelles essentielles et importantes

1. Aux fins de l'article 13, paragraphe 5, de la directive 2004/39/CE, une tâche opérationnelle est considérée comme essentielle ou importante lorsqu'une anomalie ou une défaillance dans son exercice est susceptible de nuire sérieusement à la capacité de l'entreprise

d'investissement de se conformer en permanence aux conditions et aux obligations de son agrément ou à ses obligations au titre de la directive 2004/39/CE, ou à ses performances financières ou à la continuité de ses services et activités d'investissement.

2. Sans préjudice de l'appréciation de toute autre tâche, les tâches suivantes ne sont pas considérées comme des tâches essentielles ou importantes au sens du paragraphe 1:

a) la fourniture de services de conseil et autres services ne faisant pas partie des activités d'investissement de l'entreprise, y compris la fourniture de conseils juridiques à l'entreprise, la formation de son personnel, les services de facturation et la sécurité des locaux et du personnel de l'entreprise;

b) l'achat de prestations normalisées, y compris des services fournissant des informations de marché ou des flux de données sur les prix («price feeds»).

Article 14 : Conditions à respecter pour l'externalisation de tâches opérationnelles essentielles ou importantes ou de services ou activités d'investissement

1. Les États membres veillent à ce que les entreprises d'investissement qui externalisent des tâches opérationnelles essentielles ou importantes, ou tout autre service ou activité d'investissement, demeurent pleinement responsables du respect de toutes les obligations qui leur incombent en vertu de la directive 2004/39/CE et se conforment en particulier aux conditions suivantes:
a) l'externalisation n'entraîne aucune délégation de la responsabilité des instances dirigeantes;

b) ni la relation de l'entreprise d'investissement avec ses clients ni ses obligations envers ceux-ci telles que définies dans la directive 2004/39/CE ne doivent en être modifiées;

c) les conditions que l'entreprise d'investissement est tenue de remplir en vertu de l'article 5 de la directive 2004/39/CE pour recevoir puis conserver son agrément ne doivent pas être altérées;

d) aucune des autres conditions auxquelles l'agrément de l'entreprise d'investissement a été subordonné ne doit être supprimée ou modifiée

2. Les États membres exigent des entreprises d'investissement qu'elles agissent avec toute la compétence, le soin et la diligence requis lorsqu'elles concluent, appliquent ou mettent fin à un contrat d'externalisation confiant à un prestataire de services l'exercice de tâches opérationnelles essentielles ou importantes ou de tout autre service ou activité d'investissement.

Les entreprises d'investissement sont en particulier tenues de prendre toutes les mesures requises pour que les conditions suivantes soient remplies:

a) le prestataire de services dispose des capacités, de la qualité et des éventuels agréments requis par la législation pour exécuter les tâches, services ou activités externalisés de manière fiable et professionnelle;

b) ce prestataire doit fournir les services externalisés de manière efficace, l'entreprise définissant à cet effet des méthodes d'évaluation du niveau de performance du prestataire;

c) le prestataire de services doit surveiller de manière appropriée l'exécution des tâches externalisées et gérer de manière adéquate les risques associés à l'externalisation;

d) des mesures appropriées doivent être prises s'il apparaît que le prestataire de services risque de ne pas s'acquitter de ses tâches de manière efficace ou conforme à la législation en vigueur et aux exigences réglementaires;

e) l'entreprise d'investissement, qui doit conserver l'expertise nécessaire pour contrôler effectivement les tâches externalisées et gérer les risques associés à l'externalisation, contrôle ces tâches et gère ces risques;

f) le prestataire de services l'informe de tout événement susceptible d'avoir un impact sensible sur sa capacité à exécuter les tâches externalisées de manière efficace et conforme à la législation en vigueur et aux exigences réglementaires;

g) l'entreprise d'investissement doit pouvoir, si nécessaire, résilier le contrat d'externalisation sans que cela nuise à la continuité ou à la qualité des prestations servies aux clients;

h) le prestataire de services doit coopérer avec les autorités compétentes dont relève l'entreprise d'investissement pour tout ce qui concerne les activités externalisées;

i) l'entreprise d'investissement, les personnes chargées du contrôle de ses comptes et les autorités compétentes dont elle relève doivent avoir un accès effectif aux données relatives aux activités externalisées et aux locaux professionnels du prestataire de services, et ces autorités compétentes doivent pouvoir exercer ces droits d'accès;

j) le prestataire de services doit assurer la protection des informations confidentielles ayant trait à l'entreprise d'investissement ou à ses clients;

k) l'entreprise d'investissement et le prestataire de services doivent concevoir, mettre en place et garder opérationnel un plan d'urgence en vue d'un rétablissement de l'activité après sinistre prévoyant un contrôle régulier des capacités de sauvegarde, dans tous les cas où cela apparaît nécessaire eu égard à la nature de la tâche, du service ou de l'activité qui a été externalisé.

3. Les États membres exigent que les droits et obligations respectifs de l'entreprise d'investissement et du prestataire de services soient clairement définis et consignés par écrit.

4. Les États membres prévoient, lorsque l'entreprise d'investissement et le prestataire de services appartiennent au même groupe, qu'en vue de se conformer aux dispositions du présent article et de l'article 15, l'entreprise d'investissement peut prendre en compte la mesure dans laquelle l'entreprise contrôle le prestataire de services ou peut exercer une influence sur ses actions.

5. Les États membres exigent des entreprises d'investissement qu'elles fournissent à l'autorité compétente, à la demande de celle-ci, toutes les informations nécessaires pour lui permettre de vérifier que les activités externalisées sont effectuées conformément aux exigences de la présente directive.

Article 22: Politique en matière de conflits d'intérêts

1. les États membres exigent des entreprises d'investissement qu'elles établissent, mettent

en oeuvre et gardent opérationnelle une politique efficace de gestion des conflits d'intérêts qui doit être fixée par écrit et être appropriée au regard de la taille et de l'organisation de l'entreprise et de la nature, de l'échelle et de la complexité de son activité.

Lorsque l'entreprise appartient à un groupe, la politique doit aussi prendre en compte les circonstances, qui sont connues ou devraient être connues par l'entreprise, susceptibles de provoquer un conflit d'intérêts résultant de la structure et des activités professionnelles des autres membres du groupe.

2. La politique en matière de conflits d'intérêts mise en place conformément au paragraphe 1 doit en particulier:

a) identifier, en mentionnant les services et activités d'investissement et les services auxiliaires prestés par ou au nom de l'entreprise d'investissement qui sont concernés, les situations
qui donnent ou sont susceptibles de donner lieu à un conflit d'intérêts comportant un risque sensible d'atteinte aux intérêts d'un ou de plusieurs clients;

b) définir les procédures à suivre et les mesures à prendre en vue de gérer ces conflits.

3. Les États membres veillent à ce que les procédures et les mesures prévues au paragraphe 2, point b), soient conçues pour assurer que les personnes concernées engagées dans les différentes activités impliquant un conflit d'intérêts du type mentionné au point a) du même paragraphe exercent ces activités avec un degré d'indépendance approprié au regard de la taille et des activités de l'entreprise d'investissement et du groupe dont elle fait partie et de l'importance du risque de préjudice aux intérêts des clients.

Aux fins du paragraphe 2, point b), les procédures à suivre et les mesures à adopter doivent comprendre, dans la mesure nécessaire et appropriée pour que l'entreprise assure le degré d'indépendance requis, les procédures et mesures suivantes:

a) des procédures efficaces en vue d'interdire ou de contrôler les échanges d'informations entre personnes concernées engagées dans des activités comportant un risque de conflit d'intérêts lorsque l'échange de ces informations peut léser les intérêts d'un ou de plusieurs clients;

b) une surveillance séparée des personnes concernées dont les principales fonctions supposent de réaliser des activités au nom de certains clients ou de leur fournir des services, lorsque les intérêts de ces clients peuvent entrer en conflit, ou lorsque ces clients représentent des intérêts différents, y compris ceux de l'entreprise, pouvant entrer en conflit;

c) la suppression de tout lien direct entre la rémunération des personnes concernées exerçant principalement une activité particulière et la rémunération d'autres personnes concernées exerçant principalement une autre activité, ou les revenus générés par ces autres personnes, lorsqu'un conflit d'intérêts est susceptible de se produire en relation avec ces activités;

d) des mesures visant à interdire ou à limiter l'exercice par toute personne d'une influence inappropriée sur la façon dont une personne concernée se charge de services ou d'activités d'investissement ou auxiliaires;

e) des mesures visant à interdire ou à contrôler la participation simultanée ou consécutive d'une personne concernée à plusieurs services ou activités d'investissement ou auxiliaires distincts, lorsque une telle participation est susceptible de nuire à la gestion adéquate des conflits.

Si l'adoption ou la mise en oeuvre concrète d'une ou de plusieurs de ces mesures et procédures ne permet pas d'assurer le degré d'indépendance requis, les États membres exigent des entreprises d'investissement qu'elles adoptent toutes les mesures et procédures supplémentaires ou de substitution qui sont nécessaires et appropriées à cette fin.

4. Les États membres veillent à ce que l'information communiquée aux clients en application de l'article 18, paragraphe 2, de la directive 2004/39/CE soit fournie sur un support durable et soit suffisamment détaillée, eu égard aux caractéristiques du client, pour que le client puisse prendre une décision informée au sujet du service d'investissement ou auxiliaire dans le cadre duquel apparaît le conflit d'intérêts.

Art. 19, para 3 of the 2004 directive refers to 'clients or potential clients', whereas the 2006 implementing directive only refers to 'retail or potential retail clients'. Does this mean that the obligation to inform clients about the costs and charges only applies to retail clients or does the implementing directive specify this obligation for retail clients and, consequently, does art. 19, para 3 2004 directive imply that there is a general obligation to inform all clients (also professional) about the costs and charges ?	Your last interpretation is the correct one. There is a general obligation to inform all clients irrespectively of their sophistication (i.e. also professional) about the costs and charges. Indeed, the provisions of Article 19 para.3 of the Directive should be understood as general principles ruling information to be delivered to retail and professional clients. It needs to be noted that the fact that Article 33 of Implementation Directive 2006/73/EC related to the fourth indent of Article 19(3) of Directive 2004/39/EC specifies the content of the information about costs and associated charges specifically for retail clients does not preclude the obligation to provide such information to the benefit of all clients, including professional clients.