



FEFSI COMMENTS ON

CESR'S 2ND CONSULTATION PAPER ON 1ST SET OF MANDATES UNDER MIFID

The European investment management industry, represented by FEFSI¹ welcomes the opportunity to comment on CESR's second consultation paper on the 1st set of mandates regarding draft Technical Advice on Possible Implementing Measures of the Directive 2004/39/EC on Markets in Financial Instruments².

GENERAL COMMENTS

FEFSI remarks that although CESR has adhered to the guiding principles of its own consultation practices of December 2001 (*CESR/01-007c*), there remains a measure of discretion over what transparency means in those same consultation practices. CESR offers very little indication as to what regard it has given to interested parties' earlier responses. Only the briefest summary of positions is given in the second consultation paper without, however, offering a motivated policy response. It leaves FEFSI wondering what has become of its earlier comments, which were at times echoed by other interested parties from the financial services industry. It is fair to say that we had expected a more reasoned response from CESR, which would have permitted the industry to understand better and appreciate with greater transparency the regulators' policy considerations, and not simply their preferences. FEFSI is also left in a void as to what will constitute the actual text of the technical advice that CESR aims to forward to the European Commission.

In the absence of a more reasoned reaction to the numerous points raised in the first consultation round and in the absence of a revised precise text of the technical advice, FEFSI wishes to reiterate the comments it made in its response of 17 September 2004.

¹ FEFSI, the European Fund and Asset Management Association, represents the interests of the European investment management industry (collective and individual portfolio management). Through its member associations from 19 EU Member States, Liechtenstein, Norway, Switzerland and Turkey, FEFSI represents the European asset and fund management industry, which counts some 41,100 investment funds with EUR 4.7 trillion in net assets under management. For more information, please visit www.fefsi.org.

² CESR/04-261b of June 2004.

SPECIFIC COMMENTS

On those individual points that CESR does raise in the Second Consultation Paper we have the following specific comments:

General questions from the first consultation

FEFSI acknowledges CESR's considerations regarding the responses received over the split between level2/level3, the degree of detail and the calibration of rules and fully agrees with CESR that there is indeed a trade-off between the level of harmonisation and the level of detail of the rules, but FEFSI has some misgivings over the process at which this trade-off is to be struck. Certainly, if it is solely left within the remit of CESR and to be evaluated on a case-by-case basis accompanied with or without an – in our eyes – incomplete consultation process, this does raise serious concerns in our minds. We would not disagree that a dogmatic approach is probably not the right solution, but what would be wrong with a systematic approach, which could indicate that CESR will be seeking for a higher level of detail in areas where retail investor protection or disclosure is at stake as opposed to back office institutional business aspects? We would encourage CESR to review in more detail an approach that could find some middle ground between dogma and the arbitrary. FEFSI stands ready to explore these ideas with CESR in more depth.

Record keeping and the burden of proof

FEFSI welcomes CESR's clarification that no reversal of the burden of proof is intended. We agree with CESR that the scope and the intensity of record keeping obligations should vary according to the nature and complexity of the business concerned. In this respect, we urge CESR to keep its technical advice as open as possible in order to leave room for different approaches on record keeping and not to impose additional burdens on investment firms, which go beyond the requirements laid down by the Directive.

Tape recording requirements

FEFSI shares CESR's view that recordings of client's orders originating from phone conversations may be a valuable part of documentation on a customer relationship. We do not, however, believe that the blanket mandatory provision for recordings of telephone conversations with retail customers is feasible and therefore do not believe it appropriate. For example, the increasing use of mobile telephones means that an investment manager is almost permanently reachable, also in cases when the manager is outside the structural arrangements for order

recordings – a strict application would entail that client order could not be deemed to have been received in those cases simply because the order cannot be recorded?

Furthermore, the broad recording requirements as proposed will most likely come into conflict with the national legislation on data protection in most Member States unless the client gives explicit consent for the recording of such data. It should therefore be left to the investment firms' decision by which means and to what extent to log the communication with the customer in line with the national legislation on data protection.

Independence of compliance

FEFSI welcomes CESR's fundamental considerations regarding the independence of compliance as set out in the Second Consultation Paper.

With regard to the two options presented for smaller firms, FEFSI would advocate the second solution to be the default situation thus allowing flexibility and tailoring to specific circumstances of the smaller or "one-man firms". Where the solutions offered by such firms do not end up finding favour of the regulator the option of compulsory outsourcing would still be viable.

Outsourcing of investment services

FEFSI welcomes the consistency argument that CESR has endorsed regarding the outsourcing regimes for portfolio management under the MiFiD and the UCITS Directive.

Investment research

FEFSI welcomes and supports the realisation that CESR has arrived at whereby different situations deserve different treatment. Also, the principles-based rule that clear disclosure should be imposed where firms do not fully comply with all requirements can be supported provided the requirements are known, which we feel is not the case in this Second Consultation Paper.

We hope to have contributed to the consultation process, but should you wish to discuss any particular aspect of our comments in greater detail, we remain entirely at your disposal for further information.

Robert Priester, 17 December 2004
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