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Fédération Européenne des Conseils et Intermédiaires Financiers

TO: CESR - Committee of
European Securities Regulators
11-13 Avenue de Friedland
75008 Paris

Ref: CESR/10-417

Brussels, 31st may 2010

Object: Consultation paper:" CESR technical advice to the European Commission in the context of the MiFID review - Investor protection and Intermediaries

INTRODUCTION

The Fédération Européenne des Conseils et Intermédiaires Financiers represent approximately 300,000 European financial intermediaries through:

- 24 national trade associations representing 247,896 registered intermediaries from 12 EU Member States
- One financial institution operating cross border
- 13 pan European commercial networks incorporating 34,150 registered intermediaries operating across 22 EU Member States

FECIF has also created three national chapters, FECIF-France, FECIF-Greece and FECIF-Poland to accommodate the smaller local national associations.

ANSWERS

Part 1: Requirements relating to the recording of telephone conversations and electronic communications

Questions 1- 12:

FECIF agrees with CESR that the EEA should have a recording requirement, which should be minimum harmonising. It facilitates the resolution of disputes between customers and intermediaries and ensures transparency, with the possibility for supervisors to monitor with greater simplicity and clarity the activity of the intermediaries.
We believe that these requirements should not be applied to any conversation and communication with clients or potential clients, but only to conversation and communication involved in the orders.

Part 3: MiFID complex vs non complex financial instruments for the purposes of the Directive's appropriateness requirements

Questions:
21. Do you have any comments about CESR's analysis and proposals as set out in this Chapter?
The amendments proposed by CESR can be sharable, in order to increase investor's protection. Complex products have been offered to retail investors without the necessary protection. The proposed additions would bring improvement to the current situation.

22. Do you have any comments on the proposal from some CESR members that ESMA should work towards the production of binding Level 3 standards to

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distinguish which UCITS should be complex for the purpose of the appropriateness test?
We believe it should be useful to establish standards to identify which UCITS can be regarded as complex.

Part 4: Definition of personal recommendation

Question:
24. Do you agree with the deletion of the words 'through distribution channels or' from Article 52 of the MiFID Level 2 Directive?
Yes we agree.
CESR has stated on several occasions what constitutes a personal recommendation, so that it may be considered advice. If a recommendation is addressed to a particular person and is presented as suitable for that person and based on the characteristics of the person, no matter what medium is used. Advice can be provided in many ways, face to face, by telephone, by email, on a website, or through the provision of an interactive software system.
We agree with CESR, in order to assess whether a message sent to several customers can be regarded as investment advice must be taken into account several factors: the target audience, message content and language used. Of course **not each** communication about investment through distribution channels could be considered as investment advice.

Part 5: Supervision of tied agents and related issues

Questions:
25. Do you agree with CESR that the MiFID regime for tied agents has generally worked well, or do you have any specific concerns about the operation of the regime?
We agree that the MiFID regime for tied agents has been working well. Indeed the potential risks that this distribution channel poses can be appropriately managed. In some Member States where the discipline that regulates tied agents is in place for years, such as for example in Belgium and Italy, tied agents have to comply with high standards of integrity as well as legal requirements and internal guidelines. But nevertheless we would like to stress that this was already the case before the implementation of MIFID. Tied agents are a professional reference for savers for the competence and professionalism that characterizes them.
It's necessary now to understand if MiFID has provided a real contribution to the quality of the services. If the rules introduced, especially the appropriateness and suitability of an investment, are taken consciously, by who offer the services and by the savers, it is possible to provide really a complete service, taking into account the time horizon, risk profile of the client, his needs, etc. Then the application of MiFID is a great opportunity. If the rules are reduced to mere formal obligations, with only extra administrative burden, then the directive is emptied of its value.
We also believe that a kind of level playing field concerning the profiling of the clients would be recommendable. This would avoid any competition on this between the different firms.

26. Do you agree with the proposed amendments to Articles 23, 31 and 32 of MiFID?

<u>Art. 23:</u>
We agree that the scheme provided for tied agents is extended to all countries, eliminating the discretion expected today.

FECIF doesn't agree with the flat prohibition of tied agents from handling clients'money and financial instruments. Since the distribution channel of tied agents can be appropriately managed we do not understand the need to prohibit tied agents form handling clients' money and financial instruments. This prohibition is totally baseless in cases where an investment firm is permitted to handle clients'money and financial instruments and at the same time this investment firm is fully liable for the activity of the tied agent. Tied agents act on behalf of only one investment firm under its full and unconditional responsibility.
According to our opinion, the risk for the client is eliminated by this liability. Tied agent should have the possibility to dispose of the same capacity as the legal entity he is tied to. Of course not in countries where the possibility of handling money and financial instruments is excluded by domestic laws.
We want to stress that there cannot be a level playing field on this matter between tied agents of investment firms and tied agents of credit institutions. The fact that tied agents of credit institutions would be prohibited from handling clients' money and financial instruments would have an enormous impact on the business of tied agents of credit institutions active in Europe.
We believe therefore that the prohibition of handling client money and financial instruments is not a level-playing issue between tied agents of investment firms and tied agents of credit institutions that should be tackled by the EC.

Art. 31 (2)
We agree with CESR that all investment firms wishing to provide services or activities on the territory of another Member State for the first time, or wanting to change the range of services or activities offered shall notify the competent authority of their Member State of origin, if they intend to use tied agents, the identity of them.

Art. 32 (2)
CESR intends to modify the Art. 32 of MiFID L. 1, which sets that where the investment firms use a tied agent established in a Member State outside its home Member State, such tied agent shall be assimilated to the branch and shall be subject to the provisions of this Directive relating to branches.
CESR now clarifies that all tied agents established in a Member State other than the investment firm's home Member State should jointly be treated as one single branch. We agree if it means that the tied agents has to follow rules of conduct of the branch and if the scope of these rules is only to facilitate convergence on passporting notifications.
On the contrary we don't agree if it means that an investment firm can operate in another State through a tied agent established there only with a permanent establishment. This would lead to the conclusion that the use of a tied agent itself entails the classification of the activity as a stable organization.
In some order tied agents are treated, only for the application of rules of conduct, as a branch established within the State. The requirement is to ensure the principle of equal treatment.
In some countries investment firms entitled to operate out of the office have an obligation to use tied agents. If a tied agent established in this country, working on behalf of the EU investment firm, was considered a branch to all effects, not only for the rules of conduct, and was classified as a dependency of the intermediary, rules concerning the off-site offer would not be applicable. In fact, the branch would be equivalent to dependence on the intermediary and, for the same reason the activities carried out there would not be considered offsite. As is known, the MIFID directive does not, in itself, regulate the offer outside, leaving the ability to emanate national regulations to the individual Member States. Moreover, the assimilation of the tied agent to a branch leads to considerable differences for the investment firm and the tied agent at various levels - organisational, control, fiscal and substantial.

So we ask to clarify the provisions in this part of the consultation document.

27. Could you provide information on the likely impacts of the deletion of the ability of tied agents to handle client money and financial instruments?
In Europe tied agents are an important distribution channel for credit institutions. Most of them handle clients' money and financial instruments. We have no knowledge of any problems caused by this. The credit institutions employ robust procedures to ensure that tied agents comply with high standards of integrity. It is also clear that the credit institutions remain fully and unconditionally responsible for any action or omission on the part of tied agents used by them.
We fear that the deletion of the ability of tied agents to handle client money and financial instruments would cause the end of all activities for many tied agents and perhaps even the end of the distribution model of tied agents in some countries, for example in Belgium.
Since a lot of tied agents have also an important activity as insurance intermediary this would also affect their business as insurance intermediary causing a disadvantage towards those insurance intermediaries not prohibited to handle client money.
Since such provision would prohibit agents to handle funds or financial instruments from clients in transactions relating to investment services, it goes without saying that it would call into question the model itself.
We may therefore stress the danger of such a provision with the following remarks:

- CESR's paper does not really justify why we should question the current regime
- Since the credit institutions are fully responsible for all the acts of their tied agents , there is no real justification for such a measure
- Introducing such a measure would create the suspicion that those type of networks are not secure

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Please do not hesitate to contact us for any clarification.

Yours Sincerely,

Vincent J.Derudder
Chairman

Daniel Nicolaes
Secretary General