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CESR call for evidence: MiFID Review – Investor Protection and Intermediaries (CESR/10-417)

Dear Mr. Comporti,

BVI¹ is grateful for the opportunity to contribute to CESR's work on reviewing various provisions of the MiFID. The overwhelming majority of BVI members are managers of collective undertakings of various kinds, thus covered by the exemption from the scope of MiFID according to Article 2(1)(h). For these members, only some provisions of MiFID apply according to Article 6 (4) of Directive 2009/65/EC (UCITS IV Directive), specifically Articles 2(2), 12, 13 and 19. Therefore, we focus our comments on issues which are related to these Articles, which affect distribution of investment funds or which are relevant for the "buy side" participants of EEC financial markets.

Part 1: Recording of telephone conversations and electronic communications

BVI is of the opinion that an unconditional requirement to record telephone conversations and electronic communications with regard to client orders would be out of proportion and lead to a massive financial and administrative

¹ BVI Bundesverband Investment und Asset Management e.V. represents the interest of the German investment fund and asset management industry. Its 85 members currently manage assets in excess of EUR 1.7 trillion both in mutual funds and mandates for some 16 million investors. For more information, please visit www.bvi.de.

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burden on the affected investment firms. While agreeing on the importance of detecting market abuse and of protecting investors, BVI believes that recording requirements are not always justifiable, and that a more in-depth analysis and impact assessment should be carried out. Proportionality should in any case be applied, as many very small firms would be heavily impacted.

BVI strongly believes that duplication of recordings should be avoided, and agrees with CESR's recommendation that portfolio managers should not be included in recording requirements. If the exemption was applied only to orders passed to EEA investment firms, all telephone calls would have to be recorded anyway, as it would be impossible to make a distinction among phone lines and calls. The vast majority of orders (even for non-EU securities) is passed to investment firms in the EU and will therefore be captured by the requirements.

BVI is furthermore of the opinion that orders relating to investment fund subscriptions and redemption orders should be clearly exempt from recording requirements, as they do not raise market abuse issues and recordkeeping is already required. Transmissions of orders from final distributors/intermediaries to regional or global distributors which are part of the fund distribution chain (often MiFID-licensed firms belonging to the same group as the fund management company) should also be exempt from such requirements, as it neither entails any direct contact with investors, nor it can give rise to market abuse.

With regard to the length of the retention period, BVI believes that a period of 5 years is too long. Should any disputes arise with clients, they are likely to arise very quickly and certainly within 6 months, on the basis of trade confirmations and/or portfolio statements.

Data protection issues should also not be underestimated, particularly in case of very long retention periods and in relation to the use of private mobile phones. Notice should be taken of the recent decision (2 March 2010) on data retention by Germany's Federal Constitutional Court with regard to EU Directive 2006/24/EC requiring telecommunications providers to store information on telephone calls, e-mails, and Internet use. The ruling declares the national implementation of this Directive incompatible with German constitutional law.



Part 2: Execution quality data

BVI members agree that proper venue selection relies on sound information on the execution quality of all relevant markets. As institutional investors, however, they do not perceive any market failure requiring regulatory intervention in respect to execution quality data from regulated markets and MTFs. In any case, an increase of trading costs should be avoided.

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

BVI fully supports CESR's proposal in Para. 167 to maintain UCITS as non-complex instruments for the purposes of Article 19 (6).

UCITS should continue to be categorised as non-complex, as they are conceived as retail products, are very strictly regulated and provide a high degree of investor protection. UCITS are also very liquid (redemptions possible usually daily, but at least twice a month), do not involve any liability exceeding the acquisition cost, provide a very high level of disclosure to retail investors (which will be further improved with the introduction of the KII under UCITS IV), are subject to stringent risk management rules and, above all, are well diversified.

A partial exclusion from the definition of non-complex instruments of some UCITS on the basis of underlying investment strategies or techniques would create serious problems for distributors and advisors, as they in turn would require detailed information on such strategies and techniques (for example on the use of derivatives), information which is not always available to the public and certainly not on a timely basis.

A distinction among UCITS on the basis of risk differentiation would require the same treatment for all financial instruments, a very complex undertaking, as the KID risk/reward indicator discussion has shown.

In view of the above, BVI does not believe that ESMA should produce binding technical standards to distinguish which UCITS should be complex for the purpose of the appropriateness test.



Part 4: Definition of personal recommendation

BVI members are fully confident with the current wording of Article 52 of the MiFID Level 2 Directive and see no need for amendments.

Part 5: Tied Agents

BVI has no comment.

Part 6: MiFID Options and Discretions

As pointed out in our comment on Part 1 of this Consultation Paper (Recording Requirements), BVI has serious concerns over any extension of recording requirements, especially on communications with investors. From our perspective, it would be highly preferable to leave this issue to Member States' discretion. BVI therefore strongly recommends to abstain from the proposed amendment to Article 51 (4) of the MiFID Implementing Directive (cf. para. 201 of the Consultation Paper).

We hope you will find our comments helpful. Our response can be made public.

With kind regards

BVI Bundesverband Investment und Asset Management e.V.

(signed)
Marcus Mecklenburg

(signed)
Peggy Steffen