European Association of Co-operative Banks
Groupement Européen des Banques Coopératives
Europäische Vereinigung der Genossenschaftsbanken

THE EUROPEAN ASSOCIATION OF CO-OPERATIVE BANKS COMMENTS ON

CESR WORK PROGRAMME ON MIFID LEVEL 3 WORK (CESR/06-413)

SEPTEMBER 2006

AN ASSOCIATION ON THE MOVE

Rue de l'Industrie 26-38 • B-1040 Brussels • www.eurocoopbanks.coop
Tel: (+32 2) 230 11 24 • Fax (+32 2) 230 06 49 • e-mail : secretariat@eurocoopbanks.coop

About EACB

The European Association of Co-operative Banks (EACB) is the voice of Co-operative Banks in Europe. It represents, promotes and defends the common interests of its 35 members and co-operative banks in general.

Co-operative banks form decentralised networks which are governed by banking as well as co-operative legislation. The co-operative banks business model is based on three pillars: democracy, transparency and proximity. Through those pillars co-operative banks act as the driving force of sustainable and responsible development by placing the individual at the heart of their activities and organization. In this respect they widely contribute to the national and European economic and social objectives laid down in the Lisbon Agenda.

With 60.000 outlets and 4.500 banks, co-operative banks are widely represented throughout the enlarged European Union playing a major role in the financial and economic system. In other words, in Europe one out of two banks is a co-operative. Co-operative banks have a long tradition in serving 130 million customers, mainly consumers, retailers and SMEs. They have also developed a strong foothold in the corporate market providing services to large international groups. Quantitatively co-operative banks in Europe represent 47 millions members, 650,000 employees with a total average market share of about 20%.

For further details, please visit **www.eurocoopbanks.coop**

General remarks

The European Association of Co-operative Banks (EACB)[1] welcomes the opportunity to provide our comments concerning CESR's draft "Work Programme on MiFID Level 3 Work". Yet, before addressing the work programme in detail, we should like to make some general remarks.

- **Content:** Level 3 shall exclusively deal with the interpretation of provisions previously adopted at Level 1 and Level 2. This means that Level 3 shall not serve for stipulating additional obligations for investment firms. In particular, requirements previously discussed by CESR which were abandoned in the course of MiFID's legislatory process, should not be relaunched once again at Level 3.

- Timetable: It must be done the utmost to prevent a scenario where banks would be compelled to undergo implementation efforts twice, i.e. first in time till 1 November 2007 and shortly afterwards on the basis of new CESR requirements. From the banks' point of view this would be unacceptable; neither would it be compatible with Commission's declared goal of better regulation. The institutes have already started with preliminary considerations concerning the implementation process in order to ensure the implementation of the Level 1 and Level 2 provision in time, i.e. till 1 November 2007. Furthermore they need legal certainty before starting the implementation. We therefore feel a compelling need for CESR to focus on those aspects where a clarification at the European level is indispensable for the implementation process. In our view, this includes the reporting obligations, the issue of the home/host relationship as well as post-trade transparency obligations. Any other Level 3 Work should be abandoned.

[1] The European Association of Co-operative Banks (EACB) is the voice of Co-operative Banks in Europe and represents, promotes and defends the common interests of its 30 members. Co-operative banks form decentralised networks which are governed by banking as well as co-operative legislation, and whose business model is based on three pillars: democracy, transparency and proximity. With 60.000 outlets and 4.500 banks, co-operative banks are represented through the enlarged European Union playing a major role in the financial and economic system. In Europe one out of two banks is a co-operative, representing 47 millions members, 650,000 employees with a total average market share of about 20%. Co-operative banks serve 130 million customers, mainly consumers, retailers and SMEs. They have also developed a strong foothold in the corporate market providing services to large international groups. For further details, please visit www.eurocoopbanks.coop.

I. Work in connection with upcoming Commission's Reports

- *Possible extension of the pre- and post-trade transparency obligations to transactions in classes of financial instruments other than shares. The Commission's report is due by October 2007. (Article 65 of the Level 1 Directive)*

We will submit our comments during the European Commission's public consultation on "Pre- and post-trade transparency provisions of the MiFID in relation to transactions in classes of financial instruments other than shares". Our comments will also and especially cover the envisaged timeline. In this context, we would like to question whether it is a meaningful approach concluding the consultation process prior to the deadline for national implementation of MiFID's market transparency provisions, i.e. before the first practical lessons learnt from the Level 1 implementation of the forthcoming provisions, can be incorporated into the debate. We see the need to wait for the first results to come in, which then may be analysed further. Yet, at the same time we should also be mindful of the fact that these results cannot be transferred to other areas on a 1:1 basis. Notwithstanding their limited transferability, the impact on share markets may also provide pointers as to a potential roll-out to other areas. Currently, there are preparations underway for an implementation of the relevant provisions under MiFID as well as the Implementing Regulation; this process has revealed a strong need for clarification on the ground. After all, Germany is not the only country where this implementation process ventures into largely uncharted territory. Furthermore, the European legislator obviously hoped for positive effects on market transparency as regards share trading in Europe – and it still remains to be seen whether these hopes will come true in practice. In view of the foregoing and before having even tackled Level 1, we feel that any decision on a potential extension of the scope of such provisions would be premature.

On a more general note, we would like to point out that we are unwilling to accept an expansion of MiFID's market transparency provisions. Our reservations are owed to the reasons discussed in the context of the „CESR wholesale day".

II. Work in connection with other Level 3 Committees

- *Substitute products*

The point is unclear. At any rate, Level 3 Work after the second quarter 2008 would clearly be too late.

III. Other Areas of Work

- *Aspects related to the functioning of the passport of investment firms and regulated markets (where relevant), including home/host relationships in the phases of authorization, free provision of services/activities, establishment of branches, crisis management; it also covers transitional provisions around the passport, and issues regarding the provision of cross border business by tied agents. (Articles 31 and 32 of the Level 1 Directive)*

Banks engaged in cross-border transactions take a vital interest in the forthcoming clarification of the home/host relationships. The issue of the competent authority for a dependent branch abroad (i.e. which authority shall be specifically responsible for such dependent branch) is in need of unambiguous clarification by January 2007. Hence, we feel that starting the work only after the first quarter 2007 would be too late.

- *Best Execution*

From our point of view, at Level 3, there is no compelling need for a further interpretation of the best execution provisions which, already, feature a high amount of details. Furthermore, based on MiFID and due to the Level 2 provisions, item 2 has become obsolete; hence, this is an issue which should not be pursued any further. The rationale behind item 3, 4 and 6 still remains unclear and it also remains unclear whether they would be covered by MiFID and the Level 2 provisions. At any rate, a start of the work in the second or third quarter 2007 would clearly be too late because of the new IT infrastructure which must be set up.

- *Record keeping*

In our view, the minimum list of records merely serves clarification purposes. At most, and subject to the conditions contained in Article 4 of the Level 2 Directive, Member States could provide for additional record keeping obligations; hence, at this juncture, it remains questionable whether CESR would have to and should have to become involved.

- *Execution only*

We do not perceive any need to draw up a list of non-complex instruments. However, the indicated timing, i.e. as of the second quarter 2008, would clearly be too late.

- *Inducements*

The item “softing and bundling” is exhausted already at Level 1 and Level 2. At any rate, Level 3 Work started or finished in the third quarter 2007 would clearly be too late.

- *Marketing communications*

We have strong doubts whether the proposed Level 3 Work on marketing communications are in line with the Level 1 and Level 2 provisions. More likely than not, these provisions will be identical with earlier CESR requests – requests which were either dropped in the course of MiFID's legislatory process or, if they were not abandoned altogether, they were at least not incorporated in the form in which they are currently reintroduced under the existing proposal. Hence, relaunching once again such provisions at Level 3 is not an option. At any rate, Level 3 Work after the second quarter 2008 would clearly be too late.

- *Appropriateness*

From our point of view, there is no need to look into Article 19 (5) MiFID. What is more, the stipulation of criteria for an assessment of the appropriateness incurs the danger of new obligations – and the adoption of such obligations at Level 3 is not a legitimate option. At any rate, Level 3 Work after the second quarter 2008 would clearly be too late.

- *Compliance*

We see no need to look into the matter of compliance issues. Besides, the items listed will probably not be covered by MiFID and the Level 2 Implementing Directive; in other words, more likely than not, they will have become obsolete in the meantime. At any rate, Level 3 Work after the second quarter 2008 would clearly be too late.

- *Information to clients*

We see no need for a CESR-level review of the requirements contained under Article 27 to 34 Implementing Directive; after all, these provisions are already highly detailed in their existing form. Furthermore, the rationale behind plans for CESR involvement in this matter remains rather unclear. At any rate, Level 3 Work after the second quarter 2008 would clearly be too late.

- *Reporting obligations*

The point is unclear. At any rate, Level 3 Work after the fourth quarter 2008 would clearly be too late.

- *Contingent liability transaction for retail clients*

We are not aware of any need for CESR-level involvement. Here, again, the rationale behind CESR involvement remains completely unclear. In any case, level 3 Work after the fourth quarter 2008 would be too late.

- *Conflicts of interest*

Banks have already started drafting a policy for handling potential conflicts of interest. In order to ensure timely information of customers, this work requires completion by mid-2007. Hence, interpretation which CESR might prepare after the second quarter 2008, would be too late. Expecting banks to change their workflow again after a few months, would be unacceptable.

- *Investment research*

The point is unclear. At any rate, Level 3 Work after the third quarter 2008 would clearly be too late.

- *Publication and consolidation of market transparency information*
  - *Publication of transparency information (accuracy of the information, avoiding double publication, requirements for proprietary arrangements etc.)*
  - *Consolidating the transparency information*

  (Articles 27, 28, 29, 30, 44, and 45 of the Level 1 Directive)

We feel that these aspects have the highest priority. Due to the reasons mentioned above, the final results should be available by January 2007, the latest. Otherwise, the remaining timeframe for the investment firms to realise the totally new obligations for market transparency till 1 November 2007 is reduced by this consultation schedule to an unacceptable minimum so that a postponement of the implementation will be unavoidable.

- *Required calculations and estimates concerning liquid shares and delayed publication*
  - *Free float: identification of holdings held by a collective investment undertaking or a pension fund and cooperation between competent authorities to share the information;*
  - *Average daily turnover*
  - *Estimates in relation to "new listings"*
  - *Block trade thresholds*

  (Articles 27, 28, 30 and 45 of the Level 1 Directive)

These points need to be addressed immediately. Due to the reasons mentioned above, findings should be made available by January 2007. We feel that this is an area which deserves the highest priority. Otherwise, the remaining timeframe for the investment firms to realise the totally new obligations for market transparency till 1 November 2007 is reduced by this consultation schedule to an unacceptable minimum so that a postponement of the implementation will be unavoidable.

- *Clarification of the nature of repo and stock lending*

We cannot detect any need for CESR involvement. Furthermore, the rationale behind a potential CESR involvement remains highly unclear. At any rate, Level 3 Work after the third quarter 2008 would clearly be too late.

- *Transaction reporting*

As to sub-item 2: more likely than not, service level agreements between the bank and the publication channel will primarily be of a bilateral nature. We see no need for a standard service level agreement in the form of a supervisory template; what is more, publication of such a template which is scheduled for the fourth quarter 2007 at the earliest would be too late. A general harmonisation of the format (cf. sub-item 4) would be incompatible with the Level 2 Implementing Regulation. Pursuant to Article 12 (1) (e) Implementing Regulation, the definition of the format falls under the jurisdiction of the competent authority. What is more, the exchange of information on transactions between competent authorities does not require a harmonised format at the level of the investment firms. All other issues are in need of a final interpretation by January 2007 the latest. This is due to the industry's obligation to make the necessary investments into its IT infrastructure in time, i.e. 1 November 2007. Otherwise a postponement of the implementation will be unavoidable.

5. Conclusions

The EACB trusts that its comments will be taken in account. For further information or questions on the paper, please do not hesitate to contact:

- Mr. Hervé Guider, Secretary General (h.guider@eurocoopbanks.coop)
- Mrs. Elisa Bevilacqua, Adviser, Financial Markets (e.bevilacqua@eurocoopbanks.coop).