

LIST OF MINIMUM RECORDS IN ARTICLE 51 (3) OF THE MIFID IMPLEMENTING DIRECTIVE

CESR PUBLIC CONSULTATION

FBF'S RESPONSE

GENERAL COMMENTS

The French Banking Federation (FBF) is the professional body representing over 500 commercial, cooperative and mutual banks operating in France. It includes both French and foreign-based organizations. FBF member banks have more than 25,500 permanent branches in France. They employ 500,000 people in France and around the world, and service 48 million customers.

The FBF welcomes the opportunity to give its feeling on the list of minimum records of the MiFID implementing Directive and fully agrees with the four objectives of CESR which are:

- promoting common implementation of MiFID;
- fostering supervisory convergence;
- facilitating the provision of cross-border investment services and activities;
- ensuring a common minimum basis for investor protection.

Nonetheless, the FBF notices that the message given by the CESR is ambiguous because this is a minimum list of records and not a definitive list.

The fact that the Member states could have a freedom to "gold plate" the requirements could lead to inconsistencies in Europe and clearly to the adverse effect of supervisory divergences. That's why the FBF draws the attention of CESR's member to avoid such divergences which would be detrimental to the building of the European single market and which would involve many issues and costs for cross border transactions realised by credit institutions. It would be very difficult for banks which act on a cross border basis to have to comply with different framework on such subject which involves costly IT developments and investments.

The main message the FBF would like CESR to set up common requirements and supervisory practices to avoid the risk highlighted in the former paragraph.

DETAILED REMARKS

1. ***Do you agree that a common list of minimum records in all CESR members will benefit investors and industry?***

Yes. The FBF welcomes the **principle of drawing up a common list of records** as it provides the basis for harmonisation of regulatory requirements in the Member States, even if the list remains a « minimum » list and not fully harmonised list.

Nevertheless, the FBF considers that CESR should be more precise on certain points:

- It would have been useful to set up a unique and harmonised delay of record keeping; this delay of keeping is indeed a major issue for credit institutions, especially for those who act in several Member states;

Thus the FBF wishes that CESR would be more prescriptive by imposing a harmonised retention period of five years, as stated in Article 51.1 of the implementing Directive.

- It would have been also useful that CESR consider the **interaction between minimum record keeping requirements under MiFID and those that emanate from other areas of European legislation** such as the Market Abuse Directive (e.g. the request to hold client identification). In such cases the record keeping requirement should be common to both Directives so that duplicitous requirements are avoided

2. Do you agree with the content of the list elaborated by CESR? If not, which records should be added or deleted for which reasons?

First, the FBF would like to highlight that a clear distinction should be done between the data which must be kept regarding the MiFID (article 13.6 of the Directive, article 51 of the implementing Directive and articles 7 and 8 of the implementing Regulation).

From a general point of view, the FBF estimates that CESR should at least clearly state the specific reference from the European MiFID texts from where the contents of the record are derived;

At last, the FBF estimates that CESR should reflect on the fact that the list of records to be kept by supervisors will differ:

- Firstly, if the supervisor is performing the duty of home or host state competent authority;
- Secondly, between those records that must be kept for client relations and those for the purposes of internal organisation.

In particular, the FBF would like to highlight the following points:

- Concerning the client details (Article 19 (4) & (5)): it is undisputable that these client details should be "obtained" since this is what the Directive requires. But it is not obvious that these details should be "recorded" since there is no explicit requirement to do so in Article 19.4 regarding the suitability test or Article 19.5 regarding appropriateness;
- Concerning the marketing communications, it seems that a sample of such marketing communications provided to a large number of clients will be sufficient to fulfil the recording obligation. Furthermore, there is no provision in the MiFID which imposes such record keeping.

Provided that these clarifications will be made by the CESR, the FBF agrees with the content of the list.

3. Do you consider that a specific requirement for keeping records of the provisions of investment advice should be introduced?

The FBF does not think that the introduction of a specific requirement for keeping records of the provisions of investment advice would be useful.

The FBF notices that the article 19-4 of the MiFID, concerning the delivery of investment advice, does not impose any further obligations to the investment services providers regarding those already set up for the relationship between the client and the bank. Indeed, the article 13.6 of the MiFID includes a general obligation for all investment firms to keep records of all services and transactions undertaken the basis to impose specific requirements for investment advice is given. However, Articles 7 and 8 of the implementing Regulation (which detail the requirements of Article 13.6 of the framework Directive) do not include any specific record keeping requirement for the service of investment advice. As Level 2 does not impose specific requirements for investment advice, new obligations shall not be created at Level 3.

Furthermore, there is an exemption for investment advice in Article 39 of the implementing directive. Whether and, if so, to what extent record-keeping obligations apply to investment advice must be decided at Levels 1 and/or 2 of the Lamfalussy process, in our view, not at Level 3.

Last but not least, the investment services providers have to ensure the suitability of the client orders and have therefore to implement some process to keep any relevant elements regarding the transaction. More than an obligation *vis à vis* the authority, it is a question a proof.

Considering these points, the FBF considers that specific requirements for keeping records of the provision of investment advice should not be introduced.