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Unser Zeichen, Sachbearbeiter	Datum
BSBV 64/2004	11.10.2004
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	3137

CESR Consultation Paper on Implementation Measures for the Directive on Markets for Financial Instruments

Representing the entire Austrian Banking Industry, the Bank and Insurance Division of the Austrian Federal Economic Chamber would like to comment CESR's Consultation Paper on Implementation Measures for the Directive on Markets for Financial Instruments as follows:

In its Consultation Paper, CESR presents proposals for technical measures to implement the Directive on Markets in Financial Instruments. These implementation measures are of severe importance for the entire European banking industry. The following basic concerns are of fundamental importance:

- **Transitional provisions:**

  To ensure that the introduction of the Directive has an optimal impact on all clients and the market it will be necessary to consider grandfathering arrangements and transitional measures for some of the Level 2 requirements of the Directive. For example, grandfathering arrangements for client agreements and transitional provisions for best execution should be considered.

- **Compliance with the scope laid down by MiFID:**

  CESR's recommendations should not go beyond the framework laid down by the Directive.

- **Cost-benefit-analysis**

  Equally significant is the fact that each regulation proposed should be subject to a critical cost-benefit-analysis. Measures that merely result in increased expense without offering the invesfor any relevant better protection or raising the efficiency of the market should be dispensed with. Hense, this should be taken account where the "Standards and Rules for Harmonizing Core Conduct of Business Rules for Invesfor Protection", already developed by CESR, are drawn on for CESR proposals on MiFID.

  It seems that CESR believes that the quality of investment services can only be improved through tight supervisory provisions at a very detailed level. This is not the case. In oder to enhance the quality of investment services, an effective competition is needed. Yet, too tight supervisory rules rather abort this competition. Particularly for smaller investment firms, the proposed regulafory amendments are likely to drive up the costs for their services so that they will no longer be capable of providing these services at competitive rates.

- **Compliance function (Box 1)**

  The recommendations on compliance strongly interfere with the organisational structure of investment firms also in Austria. It should be carefully reconsidered whether the proposed regulations take sufficient account of the different structures and sizes of investment firms. Particularly the call for independence of compliance should not relate to organisational independence but should rather ensure independence of the fulfilment of the compliance task. "A one size fits all-approach" should be avoided.

- **Record-keeping obligations (Box 4 item 2(b))**

  The obligation provided for in the context of record-keeping duties, to document the issuance of orders on a voice recording system, in any event, goes beyond the regulafory framework of the MiFID. Such rules would entail great expense for a multitude of banking institutions and could have a negative impact on relations with clients. Data protection aspects also constitute an objection to such recording measures.

  We oppose the obligation to keep voice records of thelephone orders envisaged under item 2 (b). Such practice may be standard market practice with regard to dealings with institutional invesfors. Yet, in the field of retail clients, we feel it would be utterly inappropriate. The effective potential value-added for the client which may result from such a measure is that it may allow for an easier investigation in those very rare exceptions where there has not been correct recording, and/or where the forwarding of a client order. This potential benefit is not comparable with the financial and organisational logistics which would be triggered through a technical change to the infrastructure of thousands of bank branches. Furthermore, such an obligation lacks a legal basis under Article 13.6 of the Directive, which does not differentiate between the various forms of communication. Hence, subjecting any individual form of communication to a specific regime is not warranted by the MiFID.

  Even where there are recording systems in use, a practical concern here would be sforage capacity, triggering an immense cost to comply with CESR's proposal. At a more concep-

tual level, the proposal would not lead to any commensurate benefit, because in most cases, clients' complaints would be settled in a short period of time and keeping such records would not have any added value.

One way of solving this problem might be allow the firm to make a record of the order (a note) instead of a voice recording, as is the way some jurisdiction implement the CESR Standards for Invesfor Protection.

- **Outsourcing (Box 3)**

  We believe that there should be no prior notification, irrespective of whether there is a materiality test. We believe that requiring a notification of outsourcing arrangements, even if very narrowly defined, would lead to confusion about the respective roles of the regulafor and the intermediary. Although it is now clear to us that CESR did not intend this requirement to involve approval by the regulafor, the process would inevitably create the impression of tacit approval, which would lead to difficulties for the regulafor in case of any adverse turn of events.

  Regarding the definition of outsourcing, we would like to state again that Article 13.5 of the Directive speaks about outsourcing of important operational functions; therefore it is not clear to us why (as listed in paragraph 3 of Box 3) outsourcing arrangements for the human resources department and marketing, for example, should fall within the scope. In our opinion, these activities are not operational functions.

  Thirdly, we would like to point out that the scope of the outsourcing section should not include intra-group operations, as these clearly have a different nature.

- **Client agreement (Box 9)**

  The proposals on client agreements could fail to create a higher degree of invesfor protection but in our point of view result in excessive additional costs. This is the case whenever these provisions shall also apply to existing clients. Millions of client agreements for existing securities deposits have to be amended and enormous costs will arise. Furthermore, the recommendations go beyond the MiFID's regulatory scope and considerably interfere with Member States' (not harmonised) civil law.

  Overall, the client agreements should contain only the vital information which will be of direct use to the client. In this regard, we welcome the provision in Paragraph 3 of Box 9 stating that the retail client agreement must be clear and easily understandable. However, we doubt the value of the enormous amount of information for the client written down in the following paragraph 4. Over-charging the basic retail client agreement with information that is not vital would lead to the client not reading the document and therefore not being informed of the vital characteristics of the service offered.

  CESR's proposals contain a large number of stipulations as to detail and information. This partly contradicts Art 19, para. 7, of the Directive, which also permits references to other documents or legal texts. Neither the Directive nor the Commission's mandate ask for provisions ruling the form and the content of contracts.

We would like to provide some further examples of items from the client agreement which are not justifiable from the perspective of usefulness to the invesfor and should be deleted or amended:

Paragraph 4 (b) -We reject the proposal that the phone number of the investment firm has to be indicated in the basic retail client agreement. In those cases where the investment firm refuses to conclude contracts via telephone because of liability reasons, the indication of a telephone number makes no sense at all. In addition, it is almost impossible to indicate all the telephone numbers of the contact persons in charge, and the client would be rather confused to find out who is the right contact person for his/her problem or question. If the telephone numbers have to be changed (which may not necessarily be initiated by the investment firm), the expense for information of the clients would be disproportionate to the expected benefit for the client.

Paragraph 4 (c) -The version from the Distance Selling Directive seems to be more appropriate; therefore we propose that the proposed paragraph here be deleted completely. It is absolutely unclear who the "relevant representative of the firm" should be (presumably a representative of the investment firm). The fact that the client enters into an agreement with the firm does not mean that the various representative offices will be contacted by the client. The services asked for by the clients and all possible sanctions will be subject to civil law, administrative penal law and regulatory provisions.

Paragraph 4 (e) is not necessary and would cause additional operating expenditures(resulting from updates) as this information is subject to very frequent change.

Paragraph 4 (f) would make the contract excessively long as the full list of withdrawal rights is very long. Therefore 4 (f) has to specify that only those rights of withdrawal which are directly linked to the basic client agreement are to be included. A listing of all possible rights of withdrawal or cooling-off periods would not be appropriate. This is also in the interest of the client, who would not be able to judge which rights of withdrawal would be relevant. Many such rights (e.g. in ca se of default of a door-to-door sale) would not be applicable and their inclusion would be misleading.

Paragraph 4 (h) corresponds to information that is available to the client in general terms but would be too cumbersome to include in the client agreement, especially as it would require constant updating. Furthermore, it raises the question as to what use there would be in informing the client of all the services and products that may not be accessible to the client. Compliance with Paragraph 4 (h) as drafted would be impossible for banks because of the extent of the services they provide. Moreover, this provision would lead to a clash with contract law, because each alteration would necessarily result in an amendment of the contract, whether or not the respective client has already called for the services by that point. To provide this information in the client agreement would be very costly and counterproductive.

Paragraph 4 (I) -We are not sure as to what is meant by "full details" in this paragraph. Generally speaking, information on a firm's fees and prices charged for the provision of services is available to the client. In many cases, they may be displayed by banks in the cashier's hall. But the basis of calculation for the charges/fees can by no means be indicated. This is because it would be rather difficult to calculate this in detail in most cases;

moreover, such disclosure would violate the right of banks to maintain the privacy of proprietary, internal information.

Paragraph 4 (m) -It should be sufficient that the client has easy access to the information as per Paragraph 4 (m), e.g. via the internet on the homepage of the investment firm. Therefore such information should not be required to be included in the contract itself.

Paragraph 4 (o) -Concerning the procedure mentioned in this paragraph, i.e. out-at-court complaint mechanisms and redress procedures, information to the client on demand should be sufficient.

Paragraph 5 -It should additionally be stated that this provision can also be applied for the other two agreements mentioned (portfolio management and trading in derivatives).

Finally, we object to the use of the terms "as a minimum" before the list of items. It is obvious that the firm would be free to include additional items if necessary. The use of such a term preceding a mandafory list, especially one that is already so detailed, is unfortunate because it would lead to overlapping requirements imposed by competent I authorities. Hence the phrase should be deleted .

- **Information to clients in a standardised format (Box 8)**

  Art 19 (3) allows investment firms to provide the client with the necessary information in a standardised format. This possibility is not part of the recommendations. The wording contained in Box 8 under item 7 and 9 renders the provision of information in a standardised format virtually impossible. This is inconsistent with the respective Level 1 provision: The obligation in item 7 and 9 cannot be met in a standardised format. Instead, it will have to be met individually for every single product.

Yours sincerely,

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