

**RESPONSE TO THE REVISED CONSULTATION PAPER ON THE 1ST SET OF MANDATES OF
IMPLEMENTING MEASURES OF THE MiFiD**

The Banking and Insurance Department of the Austrian Federal Economic Chamber would like to comment the consultation Papers as follows:

A. General remarks

We welcome the opportunity of commenting on this 2nd Consultation Paper concerning the 1st set of mandates of the implementing measures of the Markets in Financial Instruments Directive (MiFiD), as we strongly feel that some issues covered in this 1st set of mandates consultation paper need further discussion and thought.

In this regard we would like to point out one major concern that remains: the tape recording requirement. As expressed before we strictly oppose the obligation of a mandatory voice recording requirement of all telephone orders. Especially for banks the implementation of a voice recording system for every branch and mobile phone would trigger immense cost. We therefore urge CESR to revisit its approach on the issue and discuss alternative solutions.

Furthermore, we have noted that some of the hotly debated issues of the 1st CESR consultation paper are not included in this newly revised CP. Stating this, we would like to reiterate our concerns with respect to these subjects, brought forward in our position paper to the 1st CP (see enclosed our position paper of September 2004). We therefore would like to underline that our remarks in our first response – especially concerning the points “basic retail client agreements” and “information to the client” - still stand.

B. Detailed remarks

The independence of Compliance

As mentioned in the consultation paper the principle of independence of compliance is key to ensure effective performance of its role. However, it must be taken into account that some kind of flexibility should be possible especially in case of small firms, therefore we strongly feel that the independence of the compliance function should be a functional, rather than an organizational, requirement. In this sense, explicit organizational and structural requirements set up by CESR would and could not be implemented in all companies.

In regard to small firms we believe that outsourcing of the compliance function should be a possible option, but never a compulsory requirement. Furthermore we feel that asking for criteria to define small firms is not the right way forward, as it depends on the nature and scale of the business firm. Here, the underlying principle should be that firms have to choose a method that is appropriate and proportionate to the nature, scale and complexity of their business. Nevertheless - acknowledging that in small firms flexibility would be required - we believe that the following minimum standards should be valid also for small firms:

- Compliance Officer is reporting and responsible to the whole board.
- Compliance Officer is not involved in any daily business activity related to trading, sales, research or settlement of financial instruments – preferred areas would be: internal audit, legal.
- Compliance Officer should be nominated for a certain minimum period of time – (e.g. 2 years in Austria).
- The independence of Compliance in view of budget and personnel must also be valid in small companies.

Record keeping and the burden of proof

We agree with the approach taken by CESR and expressly welcome that CESR does not intend to reverse the burden of proof, and that there is “no assumption of guilt”.

We especially would like to draw CESR attention to the fact that CESR itself acknowledges in its approach that *the intensity of these record keeping obligations varies according to the nature and complexity of business carried out by investment firms*. This is exactly why we feel that it should be left to the discretion of the investment firm to decide how they will establish their compliance with the rules and vis-à-vis the clients.

Tape recording requirement

As expressed in our prior response to the 1st Consultation Paper, we strictly oppose the obligation of a mandatory voice recording requirement of all telephone orders. Such a practice may be standard market practice with regard to dealings with institutional investors. Yet, in the field of retail clients, we strongly feel it would be utterly inappropriate.

Taping and record keeping of all retail phone conversations (applying to the competent authorities requirements) could technically be realized if every single retail phone conversation would be taped; in praxis this would mean that all phone connections and extensions had to be supplied with a tape-recorder or tape recording had to be organized through a central phone system (excluding mobile phone conversations). It has to be stated that for recording requirements a distinction between retail phone conversations relating to clients' orders and other phone conversations is practically impossible. So every phone conversation would have to be taped and put in order to be able to find it again and costs therefore would be raised enormously irrespective of the duration of recording.

Regarding the duration of the storage:

As the costs for the industry lie mainly on the implementation side rather than the record keeping duration side, we want to underline that the cost-benefit-relation is not significantly changed by reducing the record keeping period from a shorter to a longer record-keeping requirement, as these cost have only a limited impact on the overall costs.

Nevertheless, at the moment if tape records are kept by banks they are generally only kept up to a period of 6 months and then the tapes are used again. So increasing the period by 6 months would require the banks to double the number of tapes and to ensure additional storage space.

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 (for the bank and not for the client as the bank usually has to proof that the clients telephone order was executed properly) is not comparable with the financial and organizational 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.

The termination of telephone order service could be the consequence in retail branches. Retail clients would be forced to order through execution only service providers (discount broker, online banking) if they desired or had to order by phone, which means that they won't get any advice before ordering.

We therefore strongly urge CESR to revisit its approach on a basis of cost-benefit analyzes and discuss alternative models. In this regard we would like to suggest once more an alternative solution: One way of solving this problem might be to allow the firm to make a record of the order (a note) instead of a voice recording, as is the way some jurisdictions implement the CESR Standards for Investor Protection.

Outsourcing of investment services

To this subject we would like to point out again, that

we believe that the outsourcing firm should retain regulatory responsibility for the outsourced function with appropriate emphasis on due diligence to be carried out in appointing service providers, and we oppose the idea of extending the rules on outsourcing to other services than portfolio management.

Conflicts of interest and the segregation of areas of business

The proposed CESR approach seems to be appropriate for smaller investment firms but not in case of bigger ones. An approach which leaves suitable flexibility for investment firms to choose appropriate methods of managing conflicts of interest is generally welcomed.

However, to make information barriers not mandatory would have negative impact on the function of the Compliance Officer and the Compliance function within the companies. Furthermore, some business areas need to be separated in any case by information barriers as well as by reporting lines and disciplinary responsibilities – e.g. Trading and Sales or Research – it does not seem appropriate to put them together and to allow free information flow.

So some minimum standards regarding the segregation of business areas should be defined.

Investment Research

Fully agree with the viewpoint taken by CESR. If so called „non objective“ research is produced it must be clearly expressed to the customer. Therefore, clear disclosures informing that the company does not fully comply with the requirements should be a must.