BANQUE ET CAISSE D'EPARGNE DE L'ETAT, LUXEMBOURG

Contribution to CESR's consultation paper : CESR 10-292

CESR Technical advice to the European Commission in the context of the MiFID review – Transaction reporting – CESR 10-292

Introduction

Modifying reporting channels, tools or content is always a perilous exercise. Technology costs and reliability of reporting are such important considerations that they should not be amended lightly. A sufficient time frame shall in any way be given to allow a smooth upgrade – legal and technological.

Beyond the fact that more data means increasing costs and complexity at all levels from IFs to supervisory authorities up to CESR or the future ESMA, the data protection issues shall not be underestimated (e.g. SWIFT).

1-Key Terminology on Transaction Reporting

Question 1: Do you agree with the above analysis on trading capacity and the proposal to introduce a third trading capacity (riskless principal) into transaction reports?
Beyond the fact that this may make reporting more complex and readability of the reports more difficult as well as multiplying the types of intermediaries, BCEE sees no specific issue with this, beyond the need to qualify each transaction appropriately which may be rather burdensome.

Question 2: Do you have any comments on the distinction between client and counterparties?
BCEE does not support the use of the client field beyond professionals/institutionals (BIC) and consider that the system is working appropriately today and meeting its goals.

2-Collection of the client identifier/Meaningful counterparty identifier

Question 3: Do you agree with the above technical analysis?
Question 4: Do you see any additional advantages in collecting client ID?
It is at least debatable that Market Abuse (MA) occurs with such frequency that ALL client transactions should in a way be considered suspect, the remedy seems disproportionate. In any case IFs do apply internal rules to fight against MA. As "relevant persons", they also have to apply the MAD as well. Making requests to firms in the case of suspicious MA transactions does not seem to raise problems today. Furthermore, it would be appropriate to use the right tool to fight MA: the MAD is currently under review, why would MiFID solve what seems to be a market abuse issue?

Question 5: Do you agree with the above technical analysis?
Question 6: Do you see any additional disadvantages in collecting client ID?
The major problem with client ID is data protection. The easier the identification of the client, the more likely that its transactions will at some point be published, accessed or made available more or less widely for other purposes than preserving market integrity. This may even present a competitive issue as in the case of a chain of intermediaries, the ID of a client coming regularly may attract the attention of the IF that receives or transmits orders and may try to find out who is behind the ID.

As stated above, other effective tools are in place to fulfill the objective to fight against MA.

Question 7: Do you agree with this proposal?
Question 8: Are there any additional arguments that should be considered by CESR?
No real cost/benefit analysis has yet been provided that justifies such an amendment to the MiFID at this stage. This issue is of particular importance in turbulent times. There is clearly an issue on possible information leakage which could lead to unexpected situations that have nothing to do with fighting against MA. The current solutions are efficient enough, relatively cheap and not too cumbersome.

3-Standards for client and counterparty identifiers

Question 9: Do you agree that all counterparties should be identified with a BIC irrespective of whether they are an EEA investment firm or not?
Regarding institutional or professional counterparties, the BIC code although not perfect is sufficient. An alternative to the BIC code for non-financial entities might be an option, but it is questionable if it is feasible or sufficient if limited to EU.
Practice seems to show that the identification on IF level of transactions being executed by a “retail entity” are effective enough for market surveillance purposes.

Question 10: Do you agree to adapt coding rules to the ones available in each country or do you think CESR should pursue a more ambitious (homogeneous) coding rule?
Question 11: Is there any other available existing code that should be considered?
Question 12: When a BIC code has not been assigned to an entity, what do you think is the appropriate level for identification (unique securities account, investment firm, national or Pan-European)?
Question 13: What kind of problems may be faced at each of these levels?
Leaving aside the debate on the identification of professionals (BIC code) and concentrating on retail clients we consider that either no code should be introduced outside the IF’s limits, or, if such a code were to be introduced, that it should be global.
If the code is not global, this would mean that non-EU clients will not be covered and thus treated differently from EU clients. The same problem arises from the situation where clients that are EU residents with 2 passports choose one or the other in order to avoid supervision.
What would be the code to choose and how to avoid uncertainty in identification? Using the name of a person is out of the question as this would breach basic data

protection rules; also many persons have the same name, which makes identification highly unreliable (with the risk of creating many fake positive cases of MA).
Another tool that was proposed could be the social security code, but then the same problem arises: firstly, there would be a need to make sure that all codes across the EU have the same structure but also that there are no people with two or more codes.
Identification at national level will stumble on the same issues as EU identification with the additional problem of not identifying 3rd country persons?
If coding is at state level then there arises the question of the consistency of the code from country to country; even today not all Member States have identification cards, for example. But there are also practical issues, such as, what rules would be applied in case of joint accounts, a possibility that arises quite often (joint accounts between spouses, a father and his daughter, investment clubs…). In this case what code should be reported? If reports are to remain manageable, can we accept the notion of reporting, for example, 5 codes for a transaction?
As a consequence of the above, we propose to consider the pragmatic alternative of coding at IF level with the advantages, of building on a system that is currently working, preserving identification of the client from other IFs or leakage outside the close perimeter of the IF, and allowing IFs to continue to pursue their fight against MA. It would also make requests from authorities relatively easy to fulfill when they ask firms about suspect transactions.

4-Client ID collection when orders are transmitted for execution

Question 14: What are your opinions on the options presented in this section?
From BCEE's point of view, this choice regarding retail clients amounts to choosing the best of two evils. Either it would cost IFs a lot to produce reports where they currently do not have to, or else they have to transmit Client ID risking leakage of information and misuse or misappropriation to the detriment of data protection (cf question 6). In the relationship between an IF and its counterparties to execute a retail client order, only the fact that the order was placed by a "retail entity" should be transmitted. Regarding professionals, data privacy may be less problematic and international codes are available in the form of BIC.

5-Transaction reporting by market members not authorised as investment firms

Question 15: Do you agree with CESR's proposal on the extension of reporting obligations? If so, which of the two alternatives would you prefer?
The proposal may have some merit, but would question the local supervisors have sufficient authority in their respective jurisdictions to be granted this information. Usually authorities only have supervisory powers vis-à-vis regulated entities.