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Set up in 1960, the European Banking Federation is the voice of the European banking sector (European Union & European Free Trade Association countries). The EBF represents the interests of some 5000 European banks: large and small, wholesale and retail, local and cross-border financial institutions.
The EBF is committed to supporting EU policies to promote the single market in financial services in general and in banking activities in particular. It advocates free and fair competition in the EU and world markets and supports the banks' efforts to increase their efficiency and competitiveness.

Response to CESR's consultation on draft technical advice to the European Commission in the context of the MiFID review – investor protection and intermediaries

Key Points

- The EBF would support harmonised telephone recording requirements for calls between professional traders. On the retail markets, telephone recording can be helpful to solve disputes between banks and clients. However, there are other ways of achieving this objective.

- On execution quality, improvements to the quality of post-trade data on the equity markets are seen as a necessary pre-condition for a fully informed discussion. Nevertheless, banks overall feel that they have meaningful data already today to make well-informed choices about execution venues. A mandatory reporting requirement on execution quality would risk undermining the well-balanced definition of best execution.

- The EBF does not believe that the distinction between complex and non-complex products should be re-opened in the current MiFID review. Workable solutions have by now been found to deal with the current legal text.

- The definition of personal recommendations should not depend on the medium of communication, but rather on the way in which recipients are addressed. The key criterion of what constitutes investment advice is whether or not correspondence is based on the analysis of an individual's investment needs.

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Related documents: CESR consultation document: http://www.cesr-eu.org/popup2.php?id=6544

General remarks

The European Banking Federation welcomes CESR's thorough work to review the issues addressed in the current consultation paper. At the same time, the EBF would like to express disappointment about the short timeframes given to the industry to respond to this and other consultations that are ongoing in parallel. The Federation is aware that this is a result of the Commission's timetable and that CESR has already extended the timelines, as compared with the Commission's initial request. Nevertheless, such short timing inevitably impinges on the quantity of input that can be collected for the EBF's responses, and therefore ultimately also on the quality of the industry's feedback.

Responses to CESR's specific questions

Part 1: Requirements relating to the recording of telephone conversations and electronic communications

1. Do you agree with CESR that the EEA should have a recording requirement? If not, please explain your reasoning.

The EBF welcomes CESR's thorough considerations regarding different possibilities for an EEA-wide recording requirement and regarding related benefits and costs. The EBF also welcomes CESR's open approach in revealing dissenting members' concerns.

Upfront, the EBF would like to make a distinction between telephone recording between professional traders and telephone recording requirements in the retail markets. The EBF would support mandatory telephone recording between investment professionals, especially on the basis of the argument that this could help supervisors to detect or prove market abusive practices. Recording on one end of the line should be considered sufficient for such a requirement.

As regards the retail markets, banks generally feel that an EU-harmonised approach would be ideal if regulation was to start from a blank page. Today's fragmented picture, however, results from a number of regulatory specificities in different countries, not only in the area of telephone recording. This is also in light of civil law considerations. At least in some countries, the burden of proof on the correct execution of client orders lies with the bank, meaning that disputes are rare. Furthermore, some countries have put in place requirements for detailed documentation of both the advice given by investment firm to their clients and the orders made by clients. Banks in these jurisdictions do not see any benefit from an additional mandatory telephone recording requirement in the retail sphere, but only costs. In addition, banking structures differ significantly between Member States and between individual firms. Banks with a high number of branches, spread out widely, would typically incur particularly high costs to install the necessary infrastructure for telephone recording. Typically, in the jurisdictions where telephone recording in the retail markets is not mandatory, telephone recording is nevertheless used for orders given through dedicated call centres. Clients have the choice to either make their orders through such call centres, where orders are recorded; or to make their orders via the branch, meaning that orders are not recorded.

In terms of potential benefit of a telephone recording requirement, the experiences of those countries where telephone recording requirements are already in place today are generally

positive. Banks in these jurisdictions have found that in cases of doubt, recorded orders are helpful to solve disputes between banks and clients. Benefits are also seen in the fighting of market abuse in the professional markets.

In any case, the EBF would make two essential observations if CESR continues to believe that telephone recording requirements must be harmonised across the EU:

- Recording requirements must be limited to those lines that are explicitly destined for the reception of orders. In the view of the EBF it would not be possible, or acceptable from a cost- and data-protection perspective, to mandate the taping of the private mobile phones held by banks' staff. Banks have guidelines in place forbidding staff to take orders on their private phones, and proper enforcement of such guidelines must of course be monitored.

- The EBF welcomes that CESR limits its proposals to orders, rather than suggesting that telephone conversations be recorded in their entirety. Such a recommendation would otherwise raise confidentiality concerns and could potentially conflict with applicable national legislation in respect of privacy protection.

2. If the EEA is to have a recording requirement, do you agree with CESR that it should be minimum harmonising? If not, please explain your reasoning.

The EBF is uncertain about what exactly is meant by 'minimum harmonisation'. Past experience with such an approach has not always been positive, in that minimum harmonisation is often topped up at national level in a significant manner. This does not lead to the desired level playing field.

Rather, the EBF would support the harmonisation of telephone recording requirements for those markets with significant cross-border aspects, i.e. involving trader desks.

If CESR believes that harmonisation of telephone recording is also necessary in the retail markets, full harmonisation is seen as less important. Nevertheless, as noted above this should not lead to significant silver-plating at national level.

As an alternative approach, if CESR comes to the conclusion that the solutions put in place by those Member States that have not so far opted for telephone recording are equally acceptable to achieve the identified objectives, the Committee could consider to harmonise elements of telephone recording among those Member States where telephone recording is considered necessary.

3. Do you agree that a recording requirement should apply to conversations and communications which involve:

- **the receipt of client orders;**
- **the transmission of orders to entities not subject to the MiFID recording requirement;**
- **the conclusion of a transaction when executing a client order;**
- **the conclusion of a transaction when dealing on own account?**

Generally, the EBF agrees with the mandatory recording of client orders when these are given to staff based in a trading room. Such a requirement could subsequently also apply to the transmission of orders and the conclusion of deals, where staff based in a trading room is involved.

Client conversations with other departments or offices in the bank should not be recorded, for privacy reasons and in view of cost-benefit considerations.

Mobile phones should only be subject to a recording requirement for those members of staff explicitly authorised to receive orders by mobile phone. It would not be possible, or acceptable from a cost- and privacy-perspective, to record all telephone calls made to all persons employed by a firm. As a matter of course, investment firms must have clear rules in place on the reception of orders and must monitor compliance with these rules.

4. If you do not believe that a recording requirement should apply to any of these categories of conversation/communication please explain your reasoning.

5. Do you agree that firms should be restricted to engaging in conversations and communication that fall to be recorded on equipment provided to employees by the firm?

The EBF does not believe that it is the ownership of equipment that matters. Rather, recording requirements should be limited to lines explicitly destined to receive orders.

6. Do you agree that firms providing portfolio management services should be required to record their conversations/communications when passing orders to other entities for execution based on their decisions to deal for their clients? If not, please explain your reasoning.

No. Such a requirement would in most cases not be necessary, as the conversation will be taped at the receiving end, i.e. by the person receiving the order.

7. Do you think that there should be an exemption from a recording requirement for:

- **firms with fewer than 5 employees and/or which receive orders of a total of €10 million or under per year; and**
- **all orders received by investment firms with a value of €10,000 or under.**

These exemptions do not make sense, in the view of the EBF. In particular, exempting small orders stands in direct contrast with CESR's objective of enhancing the protection of small investors. If CESR believes that exemptions should at all be applied, the Committee should consider other criteria than those proposed above.

8. Do you agree that records made under a recording requirement should be kept for at least 5 years? If not, please explain why and what retention period you think would be more appropriate.

Considering CESR's objective and the focus on orders, it would not be necessary to keep data for five years. Such a requirement would therefore not seem appropriate. In terms of investor

protection, if there is any confusion about orders given this will become apparent within a few weeks, or at the maximum within a few months. Usually, where orders are initially recorded, they are subsequently confirmed in writing. Unless there is a signal of disagreement by the client, the order is considered as confirmed after a certain period. Such "tacit confirmation" has been working well in those Member States where telephone recording requirements are already in place to date.

A retention requirement of about six months or one year, for example, would be appropriate. It would also be more cost-effective – please cf. our below remarks on the costs of the regime.

Where supervisors believe that certain recordings should be kept for longer, this can be required case-by-case.

9. Are there any elements of CESR's proposals which you believe require further clarification? If so, please specify which element requires further clarification and why.

The EBF believes that national legislation in respect of privacy considerations and national employment law will need further consideration, as well as the EU's Data Protection Directive (95/46/EC).

The EBF also believes that there is room for further clarification with respect to the requirements where orders are transmitted cross-border.

10. In your view, what are the benefits of a recording requirement?

As noted above, the EBF recognises that supervisors consider telephone recordings helpful to detect or prove market abuse. The EBF therefore supports mandatory recordings in the professional markets.

In the retail markets, the experiences made in those Member States where telephone recording is already required today demonstrate that recorded orders can be helpful to solve disputes and to speed the settlement and resolution process. Nevertheless, there are other ways of achieving this objective.

11. In your view, what are the additional costs of the proposed minimum harmonising recording requirement (for fixed-line, mobile and electronic communications)? Please specify and where possible please provide quantitative estimates of one-off and ongoing costs.

Costs will vary largely across different Member States and across different institutions. Factors that have an important influence on costs include:

- National law,
- Firms' business models, and
- Firms' branch structures.

As demonstrated by the different numbers quoted by CESR, these elements can lead to widely diverging costs.

Storage costs are also expected to be of major significance. The costs of a regime with a five year retention period would far exceed those of a regime with a retention period of a few months.

Costs for submitting mobile phones to recording requirements are expected to be very large, too.

12. What impact does the length of the retention period have on costs? Please provide quantitative estimates where possible.

As a Federation, the EBF is not in the position to provide quantitative estimates. Nevertheless, EBF members concur that the length of the retention period would have a significant impact on costs, taking into account the need for:

- Storage,
- Retrieval mechanisms,
- Back-up solutions,
- Security mechanisms and
- Administrative costs.

Part 2: Execution quality data

Upfront, the EBF would like to express some doubts about the foundation of the discussion about execution quality. The EBF has in the past underlined the shortcomings in the comparability and quality of post-trade data, which imply according uncertainties about aspects of execution quality addressed by CESR's questions.

The EBF therefore believes that the improvements to post-trade transparency which CESR suggests in its consultation on the equity markets are not only of great relevance to the further discussion of execution quality, but that they should indeed be seen as a pre-condition for a fully informed discussion of the questions raised by CESR.

Also, while banks take the best execution requirement very serious, the EBF would as an aside note that other factors are arguably more important for the investment outcomes and the satisfaction of retail investors; including for example the quality of investment advice and the timing of orders.

13. Do you agree that to enable firms to make effective decisions about venue selection it is necessary, as a minimum, to have available data about prices, costs, volumes, likelihood of execution and speed across all trading venues?

The EBF agrees. Indeed, banks today gather information about the mentioned elements to assess execution quality and to ensure that decisions about execution quality and the general quality of different execution venues are made on an informed basis.

It is true this information, to some extent, suffers from the shortcomings in the quality of post-trade data. For banks' detailed views on the need to improve the quality and reliability of post-trade data, please cf. the EBF's response to CESR's consultation on the equity markets.

At the same time, banks would see some benefits in the use of uniform metrics across different trading venues to refine their judgement. However, banks are sceptical that such metrics could be defined through regulation, certainly not at Level 1 of the Lamfalussy process. Overly bureaucratic solutions would not be workable, in view of the great level of detail that would be necessary for such rules to be meaningful. Alternatively, CESR could consider some complementary measures to encourage industry-driven solutions.

Importantly, whatever measures or system might be put in place must give due regard to the various factors that are part of the best execution definition and must not over- or undervalue any of those factors.

14. How frequently do investment firms need data on execution quality: monthly, quarterly, annually?

Banks gather data on execution quality in regular intervals. While Article 46 (1.2) of MiFID Level 2 foresees an annual review of investment firms' execution quality, data is typically gathered more frequently than annually.

The EBF, generally, does not believe that a regulatory requirement for trading platforms to regularly publish reports on aspects of best execution would as such be conducive to CESR's objective. If CESR nevertheless decides to pursue this proposal, some EBF members have expressed the view that annual data would be proportionate.

15. Do you believe that investment firms have adequate information on which to make decisions about venue selection for shares?

Yes. As noted by CESR, investment firms receive such information from a range from different sources, and to an entirely satisfactory degree.

16. Do you believe investment firms have adequate information on which to make decisions about venue selection for classes of financial instruments other than shares?

As rightly noted by CESR, investment firms have little choice of execution venues for non-liquid instruments, as is usually the case for instruments other than shares. The EBF therefore believes that the present discussion is only relevant to shares.

17. Do you agree with CESR's proposal that execution venues should produce regular information on their performance against definitions of various aspects of execution quality in relation to shares? If not, then why not?

In view of the above considerations, banks do clearly not believe that regulatory requirements to this effect would be appropriate and conducive to CESR's objective.

18. Do you have any comments on the following specifics of CESR's proposal:

- **imposing the obligation to produce reports on regulated markets, MTFs and systematic internalisers;**
- **restricting the coverage of the obligation to liquid shares;**

- **the execution quality metrics;**
- **the requirement to produce the reports on a quarterly basis?**

As noted above, banks feel that they have sufficient information already today. On the contrary, the EBF believes that there is a risk of over-reliance on such metrics in the determination of trading venues, which could ultimately harm the markets. In particular, it is important to maintain a definition of "best execution" which is based on several factors. This must not be undermined by a particular concept of measuring execution quality, which would likely give greater weight to the price than to other equally important factors.

19. Do you have any information on the likely costs of an obligation on execution venues to provide regular information on execution quality relating to shares? Where possible please provide quantitative information on one-off and ongoing costs.

20. Do you agree with CESR that now is not the time to make a proposal for execution venues to produce data on execution quality for classes of financial instruments other than shares? If not, why not?

The EBF agrees. As noted above, it is in general unclear to the EBF how the best execution requirement could usefully be applied to instruments for which there is no real choice of execution venues.

Part 3: MiFID complex vs. non complex financial instruments for the purposes of the Directive's appropriateness requirements

21. Do you have any comments about CESR's analysis and proposals as set out in this Chapter?

The EBF has in the past expressed the view that the principle of distinguishing between "complex" and "non-complex" products is flawed in itself. At the same time, workable solutions have been found to deal with the MiFID provisions. The EBF does therefore not find changes to MiFID in respect of these provisions helpful at this point in time.

While CESR's proposals are for the most part meant to clarify the current requirements, banks do not believe that the issue of complex-/ non-complex products should at all be re-opened in the current MiFID review.

Rather, there is a high risk that changes would further complicate matters, rather than help to clarify them. For example, the EBF is unconvinced that it would be appropriate to treat shares as non-complex specifically under the condition that they are traded on an EU regulated market or on an equivalent third country market. This makes the trading venue the determining factor for (non-)complexity, where in the view of European banks the focus should really lie on the investment product's substance.

The EBF would also disagree with the approach suggested in paragraph 161 of CESR's consultation paper, whereby a financial instrument should be considered as complex when the purchase is financed by a credit. In such cases, it is not the product that deserves greater attention. Rather, it is important to ensure that the client understands well the risks involved in the transaction as a whole.

22. Do you have any comments on the proposal from some members that ESMA should work towards the production of binding Level 3 material to distinguish which UCITS should be complex for the purpose of the appropriateness test?

The EBF does not believe that any changes to the current rules in respect of complex-/ non-complex products would be appropriate or helpful.

23. What impact do you think CESR's proposals for change would have on your firm and its activities? Can you indicate the scale of, or quantify, any impact you identify?

Not applicable.

Part 4: Definition of personal recommendations

24. Do you agree with the deletion of the words 'through distribution channels or' from Article 52 of the MiFID Level 2 Directive?

The EBF does not feel that the proposed wording would achieve greater clarity of the legal text. Indeed, the EBF is unsure about the rationale behind this recommendation. Generally, it is of great importance, in the view of European banks, to maintain a clear distinction between personal advice, research, and marketing material.

The definition of personal recommendations, specifically, should not depend on the medium of communication, but rather on the way in which recipients are addressed. The key criterion in this respect is whether or not correspondence is clearly based on the analysis of an individual's investment needs. While some media are better suited than others to personally address investors in this way, the medium used does not automatically determine whether a communication amounts to investment advice.

European banks do not perceive a need for any change to the current legal text, but if CESR believes there is a need for clarification the EBF would rather suggest that the current wording be maintained, adding: "and contains no consideration of the personal circumstances of the clients to whom it is distributed".

Part 5: Supervision of tied agents and related issues

25. Do you agree with CESR that the MiFID regime for tied agents has generally worked well, or do you have any specific concerns about the operation of the regime?

EBF members agree that the tied agents regime has overall worked well.

However, the EBF notes that Member States' approaches diverge with regard to the question whether an authorised entity may appoint a tied agent in another Member State without having to establish a branch in that jurisdiction. The EBF welcomes CESR's clarification that the establishment of a branch in another jurisdiction is not a pre-condition for the appointment of a tied agent in that jurisdiction, under Article 32(2) of MiFID.

Furthermore, according to MiFID's definition of tied agents (Art. 4, section 1, point 25), a tied agent may only act on behalf of one investment firm. In a narrow interpretation, this seems to be read as "only one investment firm or credit institution". The EBF would welcome clarification that a tied agent may act on behalf of several investment firms and/or credit institutions within the same group (group level consideration). The EBF does not believe that this would in any way deteriorate the quality of investor protection. In line with Article 3 of Directive 2006/48/EC, "group" should be understood to include the central body and its affiliated institutions as a whole.

26. Do you agree with the proposed amendments to Articles 23, 31 and 32 of MiFID?

The EBF does not agree with the amendments proposed by CESR in paragraphs 179, 183 and 184. The EBF understands that CESR's intention is to (1) establish a level playing field between tied agents acting on behalf of investment firms and tied agents acting on behalf of credit institutions; and (2) to prohibit tied agents from handling client money and financial instruments.

The EBF is not convinced, however, that the objective of greater legislative harmonisation justifies CESR's implicit expression of a preference for specific business models. Tied agents acting on behalf of credit institutions are not subject to MiFID. Moreover, and referring to paragraphs 174 and 175 of the consultation paper, CESR does not provide any justification for modifying the current regime. Indeed, CESR states that the regime governing investment firms' use of tied agents has worked well and that there is no need to change the rules governing tied agents' supervision, nor investment firms' oversight of the tied agents acting on their behalf.

27. Could you provide information on the likely impacts of the deletion of the ability of tied agents to handle client money and financial instruments?

The EBF believes that the proposed prohibition is not proportionate to the aim of ensuring competitive equality between all tied agents. Prohibiting tied agents to handle client money and financial instruments will directly affect all banks whose business models rely on the use of a tied-agents network. In Belgium, for example, there are more than 4000 registered tied agents, all acting under the responsibility of financial institutions. This means that out of all credit institutions' points of sale, about every second is managed by a tied agent.

Part 6: MiFID options and discretions

28. Do you agree with the suggested deletions and amendments to the MiFID texts proposed in this chapter?

The EBF agrees with the proposed deletions and amendments. For banks' considerations with regard to telephone recording, please cf. the remarks in part 1 of this response.

Additional comment: third-country aspects

The EBF would like to draw CESR's attention to a current uncertainty around the rules for non-EU subsidiaries of European companies where the European parent entity acts as a

"booking centre". Specifically, a European entity is considered to be acting as a booking centre for a subsidiary in a non-EU country where:

- All client-facing activity in the third country is conducted through a subsidiary in that country;
- Due to the lack of systems in the subsidiary, some operations related to these activities are conducted through the European-based parent entity.

Currently, there is uncertainty around the supervisory arrangements for such third-country subsidiaries. CESR has specified, in question 89 of "Your Questions on MiFID", that the host rules should apply where similar business is conducted through a branch. The EBF believes that it is logical, therefore, that the host rules should also apply to third-country subsidiaries. Banks would however welcome CESR's written confirmation in this respect.