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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 – transaction reporting

Key Points

- The current transaction reporting system is overall working well, in the view of the EBF.

- The European banking industry is opposed to the introduction of a third trading capacity. Banks in many Member States feel that unambiguous reporting is already possible today. In any case, CESR's proposals are not seen as proportionate even if or where some additional reporting clarity could be achieved.

- The proposal for client identifiers must be analysed from a cost-benefit perspective and in the light of sensitive privacy considerations. The EBF is sceptical that direct client identifiers would be appropriate. Instead, it is appropriate that firms disclose client identifications to competent authorities upon request.

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Related documents: CESR consultation document: http://www.cesr-eu.org/popup2.php?id=6545

General remarks

Upfront, the European Banking Federation 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.

As regards specifically the issues addressed in the current consultation, the EBF supports CESR's objective of ensuring the smooth functioning of the transaction reporting system. Banks have not however identified significant shortcomings of the current system. On the contrary, the current systems overall seem to be working well. While it is true that reporting requirements vary to some extent between Member States, this is partly the result of different business types. Further differences are the result of historical developments, which was acknowledged during the initial MiFID negotiations and solved by a system in which the necessary information exchange takes place directly between the supervisory authorities. European banks continue to believe that this is the right approach, and that it should be used to the greatest possible extent.

The EBF would also like to remind CESR that market participants should be able to rely on a stable set of rules. This is in particular true in respect of the fully automised transaction reporting systems, where modifications are complex and need through consideration of the effects on other parts of the system.

The European banking industry fully recognises the need for supervisors to have comprehensive access to the data allowing them to effectively perform the supervisory functions. Nevertheless, changes to the existing system should only be introduced where there is clear evidence that this objective cannot be achieved in a satisfactory manner on the basis of the current system or through alternative and more straight-forward approaches.

EBF members have questioned CESR's proposals in this respect. In particular, the introduction of a unique client identifier is expected to be costly, while there might be alternative and more efficient ways for supervisory authorities to check suspicious transactions. Indeed, according to the information available to banks, market abuse investigations are much more frequently the result of suspicious trade reports than the result of findings from transaction report analysis.

Responses to CESR's specific questions

Key terminology on transaction reporting

As a general remark, the EBF welcomes CESR's work to further consider the transaction reporting terminology and especially, the very definition of a "transaction". There are indeed ambiguities in the current Level 3 definition which need to be addressed.

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?**

The EBF is concerned about this proposal.

EBF members have not experienced significant difficulties in the reporting of the cases addressed by CESR's proposals. National approaches vary somewhat and in some Member States, banks believe that the current reporting systems already allow to identify information about third trading capacities. Where banks do at all see a grey area, the problem is not perceived as significant. Consequently, the potential added value of an additional trading capacity would be marginal, while the costs are expected to be very large, especially in view of the considerable manual work that would be necessary to implement CESR's proposals. Certainly, in the view of the European banking industry the proposal made by CESR would not be proportionate to address the shortcomings identified by CESR.

As one major consideration, 'riskless principal' is not a term commonly used in all markets. As such, there are no existing cross-market indicators that would enable firms to readily identify reportable transactions. The EBF apprehends that the introduction of a 'riskless principal' trading capacity might lead to differing interpretations and misunderstandings.

For example, it does not become clear from the consultation paper what this third trading capacity would mean for banks which have a clear division between the market side and the client side. Supposedly, in the case that two transactions take place, these will continuously be reported in separation as they cannot easily be married up. This is especially true because the market side trade is triggered by risk considerations which might be entirely independent of the client side, but may rather be the result of transactions by other clients, market developments, risk appetite etc. Furthermore, the back-to-back transactions may be in the form of completely different instruments such as, for instance, derivatives. Accordingly and also building on the discussion at CESR's Open Hearing of 17 May 2010, banks believe that it will not be necessary to lump the two transactions into one single report.

The EBF would however like to welcome CESR's conclusion, in paragraphs 33 and 35, that it is not necessary to introduce harmonised identifiers for transactions conducted by market makers/ liquidity providers.

Question 2: Do you have any comments on the distinction between client and counterparties?

No. Generally, the distinction is seen to work well.

Collection of the client identifier/ Meaningful counterparty identifiers

The question of client identifiers/ counterparty identifiers must be seen in its sensitive context, keeping in mind privacy considerations. The desire for increased reporting requirements must be carefully analysed in respect of its need and appropriateness. Furthermore, it must be borne in mind that private data must only be used for well-defined purposes, where the person concerned has given explicit consent for such use or where there is another clear legal justification for the use of the data. Each person also has the right to obtain information about the data stored about him or her, and to request corrections if necessary.

Question 3: Do you agree with the above technical analysis?

Question 4: Do you see any additional advantages in collecting client ID?

The EBF acknowledges the potential benefit of collecting client identifiers, both for the supervisory authorities and for the reporting firms. Such benefit should however be weighed against the cost which would be incurred by reporting firms, both to implement the necessary system adjustments and to maintain the systems on an ongoing basis.

Rather, it could be a more pragmatic solution that firms disclose client identifications to competent authorities upon specific request. Indeed, all firms have compliance units that are used to dealing with such requests. Introducing client identifiers by default is therefore not necessary, in the view of the EBF.

Furthermore, the EBF is not convinced by CESR's argument that the introduction of client identifiers would help competent authorities to police the short selling rules. For the most part, the short selling rules refer to positions, rather than transactions. Even when there is a large sell order in a stock, supervisors would therefore still have to find out more about an investor's position. The EBF has in the past expressed both support for a harmonised short selling rule in the EU and disappointment about the diverse recommendations by CESR around short selling, which lack due process. The EBF would strongly urge that CESR await further work and definite conclusions by the European Commission before taking any additional steps that are likely to lead to greater fragmentation and yet more confusion around the short selling rules in different Member States.

Question 5: Do you agree with the above technical analysis?
Question 6: Do you see any additional disadvantages in collecting client ID?

The EBF agrees with the disadvantages of collecting client identifiers noted by CESR.

As rightly set out by the Committee, there are alternative and likely more effective ways of market supervision which might not justify the added cost of introducing client IDs in the reporting systems. Already today, banks are unsure about the use and usefulness of the vast amount of data collected by competent authorities. The EBF would welcome an open-minded debate with CESR about this impression and about the most effective ways of addressing concerns around market abuse.

As noted above, legal considerations and especially data protection concerns are also of great significance, in the view of the EBF. CESR, indeed, suggests that highly confidential data is sent not only to firms' competent authorities, but is then also shared with other competent authorities through the Transaction Reporting Mechanism.

Besides, the EBF is unsure about how CESR would intend to treat investors that are based outside the EU. CESR mentions that many parties involved in short selling are hedge funds based outside the European Economic Area (EEA), which seems to imply that CESR would like to implement the client identification regime on a global scale. This would cause some serious questions of extraterritoriality and may, indeed, be unworkable. European banks deal with thousands of counterparties across the entire world, often through a chain of intermediate banks. To require the disclosure of the underlying client for all transactions could materially impact on the functioning of the European markets.

Question 7: Do you agree with this proposal?

As set out above, while recognising that there could be some benefit in introducing client identifiers, the EBF is not convinced that this is the most efficient way to improve the detection of cases of market abuse. As one consideration, introducing unique client identifiers for all clients, including millions of retail clients, does not seem proportionate to fight market abuse.

Nor is the EBF convinced that the introduction of client identifiers is appropriate, in view of the important arguments against client IDs set out by CESR itself.

Therefore, with regard to paragraph 88 of CESR's consultation paper the EBF believes that only options c) (unique identifier at investment firm level) and d (unique identifier at securities account level) merit further consideration.

Question 8: Are there any additional arguments that should be considered by CESR?

Cf. the introductory remarks and the responses to questions 5 and 6.

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?

BICs are already widely used today. It would seem an efficient approach to build further on them.

Nevertheless, CESR should be mindful of the fact that a) one firm often has multiple BICs, and b) BICs are assigned by SWIFT and there is no general right to obtain a BIC.

The EBF does therefore not believe that the BIC can be the only solution. Instead, it would be most efficient to allow for a range of solutions at national level.

An alternative approach could be based on the registers of investment firms which Member States were required to set up pursuant to Article 5, paragraph 3 of MiFID. If CESR comes to the conclusion that client identifiers should be introduced into the transaction reports, the already existing national registers could be developed into one single European register, with machine-readable identification numbers. Such a register would render the way of identification of counterparties irrelevant.

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?

The EBF recognises that a homogeneous rule would in principle be desirable. However, this is essentially a question of expected costs and benefits. Banks expect that a homogeneous rule would require great adaptations to the current systems. These costs would have to be borne by all firms, including those that are only active on a national basis. Differing approaches across Member States, on the other hand, will result in greater ongoing costs for cross-border active

firms, due to the need to deal with multiple reporting feeds and accordingly more complex IT infrastructure.

Question 11: Is there any other available existing code that should be considered?

The EBF is not aware of alternatives.

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)?

The EBF appreciates CESR's objective to achieve a straight-forward solution for client identification.

However, banks are greatly concerned about the practicalities of achieving a pan-European solution. Rather, banks would consider preferable either an ID at the level of the investment firm, or national IDs. In case of the latter, consideration would have to be given to the question of how to allocate IDs to people accessing a market from another Member State or from outside the EU.

It is also important to keep in mind confidentiality considerations, notably with regard to the suggested use of tax codes or comparable personal codes.

Further complex questions would arise with regard to firms that operate on a global basis. For these firms, an approach that covers EEA alone would not meet CESR's objectives, but it would not be appropriate in the view of the EBF to impose a regime with extra-territorial implications on European banks.

Question 13: What kind of problems may be faced at each of these levels?

The introduction of a pan-European ID would necessitate enormous adjustments and related costs, which the EBF does not believe would be justified. Indeed, conceptually only global IDs could ensure that no loopholes remain.

Furthermore, some of CESR's proposals would imply difficult data protection considerations. Difficulties can furthermore be expected to obtain the required information, also keeping in mind the divergence in available information in different jurisdictions.

Client ID collection when orders are transmitted for execution

Question 14: What are your views on the options presented in this section?

The EBF is very sceptical about the feasibility of CESR's proposals. Every day, millions of transactions are passed on through chains of correspondent banks. EU firms cannot know the underlying client for all of these transactions. In addition, CESR's proposals would likely lead to duplicate reporting, would raise serious data protection issues and would cause extremely high implementation costs. Banks believe that there are more efficient ways to fight market abuse.

Furthermore, the EBF does not think that it would be appropriate or feasible to impose a transaction reporting obligation on firms worldwide. Such a rule would probably be in conflict with penal law, administrative law, banking secrecy and client confidentiality rules in many countries around the world.

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 alternatives would you prefer?

The EBF is unsure about what exactly CESR proposes.

However, European banks agree that transaction reporting obligations should apply to all firms that are members of regulated markets and MFTs, even when these are not authorised as investment firms under MiFID; or that such an obligation should apply to the regulated markets or MTFs where these undertakings operate. The objective should be that all trades executed on EEA-markets are reported, including those that are carried out by, for example, proprietary traders; firms that make use of sponsored access; asset management companies; and non-EU firms.