



***EACB¹ ANSWER
TO
CESR CONSULTATION PAPER
“THE LIST OF MINIMUM RECORDS IN ARTICLE 51(3) OF THE MiFID
IMPLEMENTING DIRECTIVE”
REF.: CESR/06-552***

¹ The European Association of Co-operative Banks represents, promotes and defends the interests of its members and co-operative banks in general. Co-operative banks are among the major players in Europe’s financial and economic system: 130 million customers, approximately 650.000 staff members, 60.000 outlets, 4.500 banks and a 20% market share.



I. MiFID Level 3 Expert Group – 2006/2007 Work Programme

The EACB welcomes the opportunity to give its views on the list of minimum records of the MiFID implementing Directive. Taking into account that CESR also published its MiFID Level 3 work programme 2006/2007 at the same time as the consultation papers “The list of minimum records in Article 51(3) of the MiFID implementing Directive”, the EACB would like to underline that despite CESR work programme has now become clearly leaner in terms of its scope, it is necessary to highlight that the implementation deadline for banks (01 November 2007) remains a source of major concern. Indeed, according to the proposed work plan, the bulk of CESR's work will only be completed in the course of the first quarter 2007, thus going well beyond the original nine-month-window granted to banks for implementation. In this respect the EACB calls upon CESR to ensure timely completion of its work at level 3 of the Lamfalussy process in order to allow co-operative banks to meet the implementation deadline of 1 November 2007. Should CESR decide to stick to its current timetable, there is an urgent need for CESR to plead for an extension of the implementation deadline for banking institutions *vis à vis* the European Commission.

II. The list of minimum records in Article 51(3) of the MiFID implementing Directive

General

The minimum record keeping obligations have already been regulated at Level 1 and Level 2. A record keeping obligation can only be included into the list of minimum records pursuant to Article 51(3) of the MiFID implementing Directive if and when this record keeping obligation has been explicitly intended at Level 1 and Level 2.

This results from the wording under Article 51(3) of the MiFID implementing Directive (“...a list of the minimum records investment firms are required to keep under Directive 2004/39/EC and its implementing measures“). Moreover the duration of the record keeping obligation (the record keeping obligation shall generally last for five years, the record keeping obligation for client agreements shall last for the duration of the business relation) is merely applicable to “all the records required under Directive 2004/39/EC and its implementing measures ...“ (Article 51 (1) of the MiFID implementing Directive).



If Level 1 or Level 2 stipulate a requirement as regards mere organisation/logistics or a special form ("in writing"/"in a durable medium") then this does not give rise to any potential record keeping obligation. Instead, inclusion of said cases in the list of minimum records presupposes that Level 1 or Level 2 explicitly stipulate such a record keeping obligation.

Level 1 and Level 2 contain a final regime also as regards the content of the record keeping obligation. If and when Level 1 and 2 fail to specify the content of a record keeping obligation, this can no longer be recouped at Level 3. Instead, in such cases, records of a general nature (e.g. the banks' own organisational/logistics' instructions) have to be sufficient for the competent authority to verify compliance with MiFID's requirements under Article 13(6) MiFID and in order to ascertain that the investment firm has met all its obligations *vis à vis* the client or the potential client.

Hence, the list of minimum records pursuant to Article 51(3) of the MiFID implementing Directive should only serve for clarification purposes while the regulatory scope shall be limited to those record keeping obligations which have already been determined at Level 1 and Level 2. At last, the EACB estimates that CESR should clearly state the specific reference from the European MiFID texts from where the record requirements are derived. [Remark: Cf. CA-Remark, your E-Mail vom 28.11., 17:31, which I have included.]

Question 1: Do you agree that a common list of minimum records in all CESR members will benefit investor and industry?

Under the provisions of Article 51(3) of the MiFID implementing Directive the list of minimum records has to be prepared by the competent authority of each Member State. Therefore the EACB would only see the need for a common list of minimum records for all CESR members, if such a list would serve for clarification purposes. On the other hand it is recommended that the list is drawn up by the Member States' competent authority in order to take into account additional record keeping obligations that result under forthcoming national provisions and that can be adopted by the corresponding Member State under the provision of Article 4 of the MiFID implementing Directive.

Question 2: Do you agree with the content of the list elaborated by CESR? If not which records should be added or deleted and for which reasons?



Based on our general remarks we would like to submit the following more detailed comments concerning the list of minimum records:

Type of record	Comments
Categorisation and identity of each client	<p>Recording the identity of the client is required by Article 25 (2) MiFID as well as Artt. 7 and 8 of the MiFID implementing Directive. d warranted.</p> <p>However, neither MiFID nor the MiFID Implementing Directive warrant a record keeping obligation concerning the classification of clients as a retail client, professional clients and/or a eligible counterparty at the beginning of the business relation or during a re-categorisation. In the absence of such a record keeping obligation, the client categorisation cannot be included in the list of the minimum records.</p>
Retail client agreements	<p>We agree to include these record keeping obligations in the list of minimum records.</p>
Client details (Article 19 (4))	<p>The relevant provisions under MiFID or the MiFID implementing Directive merely require obtaining from the client the information which is mentioned in Article 19(4) MiFID. They do not set forth any record keeping obligation of this information. This means that such a record keeping obligation cannot be adopted as regards the list of minimum records.</p>
Client details (Article 19(5))	<p>Cf. our comments on "Client details (Article 19(4))" which apply accordingly.</p>
Records required under Article 25 (2)	<p>Article 25(2), MiFID sets forth record keeping obligations which may be accepted into the list of minimum requirements.</p>
Aggregated transaction that includes a client order	<p>Records of the client's identity already result from Article 25(2) MiFID as well as Artt. 7 and 8 of the MiFID implementing Directive. Hence, there is no need for a renewed inclusion in the list of minimum records.</p>
	<p>If and when a record keeping obligation is being assumed ("whether transaction is in whole or in part for discretionary managed investment portfolio and any relevant proportions") the</p>



legal mandate remains unclear. Article 22 MiFID merely stipulates the application of "procedures and systems" which provide for the prompt, fair and expeditious execution of client orders, relative to other client orders or the trading interests of the investment firm. Yet, this merely refers to an organisational/logistics' obligation. Hence, including the foregoing record keeping obligation into the list of minimum requirements lacks a legal mandate.

Aggregation of one or more client orders and an own account order

It is not quite clear, what the expression "intended basis of allocation" refers to. Probably it refers to the definition of principles concerning the order allocation as contemplated by Article 48(1) c) of the MiFID implementing Directive. But Art. 48 (1) c) of the MiFID implementing Directive merely refers to an organisational/logistics' obligation. A record keeping obligation for the principles of order allocation is not envisaged. This means that a corresponding record keeping obligation cannot be included in the list of minimum records.

Allocation of an aggregated transaction that includes the execution of a client order

Record keeping obligation as to the identity of the client already results from Article 25(2) MiFID as well as Artt. 7 and 8 of the MiFID implementing Directive. Hence, there is no need for a renewed inclusion in the list of minimum records.

If and when a record keeping obligation is being assumed ("whether transaction is in whole or in part for discretionary managed investment portfolio and any relevant proportions") the legal mandate remains unclear. Article 22 MiFID merely stipulates the application of "processes and systems" which provide for the prompt, fair and expeditious execution of client orders, relative to other client orders or the trading interests of the investment firm. Yet, this merely refers to an organisational/logistics' obligation. Hence, including the foregoing record keeping obligation into the list of minimum requirements lacks a legal mandate.

Re-allocation

The re-allocation is to be defined in the framework of the principles of order allocation (Article 49(3) of MiFID's Implementing Directive). This merely relates to an organisational/logistics' obligation. Neither MiFID nor the implementing provisions envisage a record keeping obligation concerning the re-allocation or the principles adopted in this regard.



Order received or arising or decision to deal taken in providing the service of portfolio management	This record keeping obligation is justified by Article 7 of the MiFID implementing Directive.
Orders executed on behalf of clients	Article 47(1) (a) of the MiFID implementing Directive merely relates to an organisational/logistics' duty for an immediate and correct compliance with the record keeping obligations pursuant to Article 8 of the MiFID implementing Directive (to Art. 8 cf. the following comments below). Pursuant to this, Article 47(1) (a) of the MiFID implementing Directive would not set forth any stand-alone record keeping obligation. Hence, Article 47(1) (a) of the MiFID implementing Directive should not be included in the list of minimum records.
Order carried out (other than those falling under the following row) and transactions effected for own account	This record keeping obligation is warranted under Article 8 of the MiFID implementing Directive and may thus be included in the list of minimum requirements.
Transmission of order received by the investment firm	This record keeping obligation is justified by Article 7 and Article 8(2) of the MiFID implementing Directive and can thus be included in the list of minimum records.
Periodic statement to clients	Article 41 of the MiFID implementing Directive does not warrant any record keeping obligation. The fact that the reports have to be communicated on a durable medium does not lend itself to inferring any record keeping obligation and thus mandatory retention over a period of 5 years pursuant to Article 51(1) of the MiFID implementing Directive. Hence, the "periodic statements to clients" cannot be included into the list of minimum records, either.
Client financial instruments held by an investment firm	The record keeping obligations contained in Article 16(1) (a) and (b) of the MiFID implementing Directive can be included in the list of minimum records.
Client funds	The record keeping obligations pursuant to Article 8 of the MiFID implementing Directive as well as Article 16(1) (a) and (b) of the MiFID implementing Directive have already been treated exhaustively.



Marketing communications	Neither MiFID nor the MiFID implementing Directive stipulate any need for record keeping in the event of marketing communications. Marketing communications particularly fail to qualify for a "transaction" or "service" as contemplated by Article 13(6) of MiFID. Hence, marketing communications may not included in the list of minimum records.
Investment research	Article 24(1) of the MiFID implementing Directive does not stipulate any record keeping obligation. At most, Article 13(6) of MiFID allows inferring a record keeping obligation as regards investment research because investment research is a “service” in terms of Art. 13 (6) MiFID. But this record keeping obligation has not been specified in greater detail at Level 2. Hence, there is only a legal mandate for a general record keeping obligation in the form of organisational/logistics' requirements. A record keeping obligation for each and every publication would exceed the scope defined at Levels 1 and 2 and can thus not be included in the list of minimum records.
The firms' business and internal organisation	The record keeping obligations contained in Article 5(1) (f) of the MiFID implementing Directive may be included in the list of minimum records.
Compliance polices and procedures	Article 6 of the MiFID implementing Directive exclusively sets forth organisational/logistics' obligations. It does not contain any record keeping obligation. Also Article 13(6) of MiFID does not allow inferring such a record keeping obligation since this qualifies neither for "transactions" nor for "services".
Services or activities giving rise to detrimental conflict of interest	The record keeping obligation contained in Article 23 of the MiFID implementing Directive only applies to " <u>the kinds of investment or ancillary service or investment activity</u> ".
Compliance reports	Article 6(3) (b) and Article 9(2) of the MiFID implementing Directive do not contain any record keeping obligation. The requirement that reports have to be communicated in a written form, does not mean that there is any record keeping obligation. As a consequence, the "compliance reports" cannot be included in the list of minimum requirements either.
Risk management reports	Please also cf. our comments on compliance reports which apply



	accordingly.
Internal audit reports	Please also cf. our comments on compliance reports which apply accordingly.
Complaints records	The record keeping obligations concerning complaints of retail clients set forth by Article 10 of the MiFID implementing Directive can be entered into the list of minimum records.
Complaints handling	The record keeping obligations concerning the complaints handling for retail clients (cf. Article 10 of the MiFID implementing Directive) may be included in the list of minimum records.
Records of prices quoted by systematic internalisers	The record keeping obligation contained in Article 24(1) (b) of the MiFID implementing Directive may be entered into the list of minimum records. However, the records of a systematic internalizer's quoted prices merely have to be retained for the minimum period of 12 months.
Records of personal transactions	The record keeping obligations contained in Article 12(2) (c) of the MiFID implementing Directive may be included in the list of minimum records.
Record of the information to be disclosed to clients regarding inducements	Neither MiFID (cf. especially Article 13(6)) nor the MiFID implementing Directive (cf. Article 39) envisage a record keeping obligation of the information on inducements. Hence, the information on inducements cannot be included in the list of minimum requirements.

Question 3: Do you consider that a specific requirement for keeping records of the provision of investment advice should be introduced?

No specific requirement should be introduced for the provision of investment advice. Since Article 13(6) of MiFID failed to set forth in greater detail any requirements as regards the provision of investment advice at Level 2, a separate requirement for keeping records of the provision of investment advice would exceed the regulatory scope defined at Level 1 and Level 2. The only eligible provision that might be contemplated may be a general re-



cord keeping obligation, for instance in the form of banks' internal organisational/logistics' instructions (cf. our general remarks).

Conclusions

The EACB trusts that its comments will be taken in due account by the CESR. For further information or questions on the paper, please do not hesitate to contact:

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