

CESR

27 November 2006

EAPB Comments to the public consultation of CESR on the list of minimum records in Article 51 (3) of the MiFID implementing Directive

The European Association of Public Banks (EAPB) represents the interests of 25 public banks, funding agencies and associations of public banks throughout Europe, which together represent some 100 public financial institutions. The latter have a combined balance sheet total of about EUR 3,500 billion and represent about 190,000 employees, i.e. covering a European market share of approximately 15%.

The EAPB would like to thank CESR for the opportunity to comment on the envisaged list of minimum records in Article 51 (3) of the MiFID implementing Directive.

Before answering the three questions of the consultation, the EAPB would like to address some general remarks with regard to the envisaged list of minimum records. We would very much appreciate CESR considering these comments and taking them into account.

1. General Remarks

Article 51 (3) of the implementing Directive establishes that competent authorities shall draw up and maintain a list of the minimum records investment firms are required to keep under the MiFID and its implementing measures.

CESR envisages issuing recommendations in this respect to its members with regard to the content of the list of minimum records that competent authorities need to draw up. The EAPB feels that such a list is dispensable (see below the answer to question 1). However, if CESR sticks to its plans to publish such a list, it must not include any record keeping

obligations not explicitly stipulated in the MiFID (Level 1) or in the MiFID implementing measures (Level 2).

Moreover, mere requirements as to the form or the logistics of data provision (“in writing” / “in a durable medium”) have to be distinguished from record keeping requirements and must therefore not be included in the list of minimum records either.

In addition, Level 1 and Level 2 also determine the *content* of the record keeping requirement. As far as specifications of the content have not been made on Level 1 and 2, Level 3 is not supposed to do so. In these circumstances, records of general nature are sufficient for the competent authority to verify, according to Article 13(6) MiFID, compliance with the legal requirements. These limitations will have to be observed as well, should CESR envisage harmonising the content of the different records in the list at a later stage.

Eventually, the EAPB takes the liberty to come back on the 2006/2007 Level 3 work programme issued together with the present consultation which we see rather critical. The main stake of CESR’s Level 3 work will be finished in the first and second quarter of 2007 only, which we feel is much too late. Only if work undertaken by CESR on Level 3 of the MiFID will be completed by the end of January 2007 the financial institutions having to implement the new legislation will be able to do so by 1 November 2007. If, however, CESR intends to stick to its work programme as it stands, the EAPB would like to urge CESR to plead for a prolongation of the MiFID transposition period vis-à-vis the European Commission.

2. Answers to questions posed by CESR

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

The EAPB does not see any need for a common list of minimum records for all CESR members as the list can only serve to clarify record obligations set out in Level 1 and Level 2. Such a list can, in any way, not serve as a substitute for the lists to be established by the different national authorities according to Article 51(3) implementing Directive. The supervisory authorities will have to include additional record keeping requirements due to national specifications which have to be passed by the Member States according to Article 4 of the 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?

As set out in our preliminary remarks, the list of minimum records should not go beyond the requirements set out in Level 1 and 2 of the MiFID. The following elements of the proposed list do not meet this requirement:

- *Categorisation and identity of each client* as regards a record keeping obligation concerning the classification of clients as a small-scale investor, professional clients and/or a suitable counterparty at the beginning of the business relation or during a re-categorisation;
- *Client details (Article 19(4))*: the legal provisions only require that those information are obtained from the client;
- *Aggregated transactions that includes a client order*: this relates only to organisational / logistics' obligations;
- *Aggregation of one or more client orders and an own account order*: this refers merely to organisational / logistics' obligations;
- *Allocation of an aggregated transaction that includes the execution of a client order*: this refers merely to organisational / logistics' obligations;
- *Re-allocation*: mere organisational / logistics' obligations;
- *Orders executed on behalf of clients*: mere organisational / logistics' obligations;
- *Periodic statement to clients*: Article 41 implementing Directive does not stipulate any record keeping obligation; the fact that reports have to be communicated on a durable medium does not implicate a record keeping requirement;
- *Client financial instruments available for, and subject to, stock lending activities*: Article 19(2) implementing Directive does not stipulate any record keeping requirement as to the identity of the client financial instruments available for stock lending activities nor regarding the identity of the client financial instruments subject to stock lending.
- *Marketing communications* are not subject to record keeping requirements according to Level 1 or Level 2;
- *Investment research* does not fall under the obligations stipulated in Article 24(1) implementing Directive. At the most, a record keeping requirement being deducted from Article 13(6) MiFID could only comprehend a general record keeping requirement in the form of mere organisational / logistics' obligations.
- *Compliance policies and procedures*: mere organisational / logistics' obligations;

- *Compliance reports* are not subject to any record keeping requirements under Level 1 or Level 2; the same is true for *risk management reports* and *internal audit reports*.
- *Record of the information to be disclosed to clients regarding inducements*: a record keeping obligation of the information on inducements can not be deducted from any provision in the MiFID or the MiFID implementing Directive.

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

The EAPB does not support the introduction of specific requirements in this regard. Any requirements for record keeping of investment advice would go beyond the requirements set out in the MiFID and the MiFID implementing Directive, as Article 13 (6) MiFID is not substantiated on Level 2. Only a *general* record keeping obligation, for instance in the form of banks' internal organisational / logistics' instructions, could be considered.

Kind regards,

A handwritten signature in black ink, appearing to read 'Schoppmann', written in a cursive style.

Henning Schoppmann
EAPB

A handwritten signature in black ink, appearing to read 'Hemetsberger', written in a cursive style.

Walburga Hemetsberger
EAPB