



EFFAS THE EUROPEAN FEDERATION OF FINANCIAL ANALYSTS SOCIETIES

CESR
Secretary General
Section: "Consultations"

via Email/Internet

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Public Consultation - The List of minimum records in Article 51(3) of the MiFID implementing Directive

Response by EFFAS European Federation of Financial Analysts Societies

Dear Mr. Demarigny,

The European Federation of Financial Analysts Societies, EFFAS, is the European umbrella organisation of national investment professional societies. It comprises 24 member associations representing more than 14,000 investment professionals in the areas of Equity and Bond Research, Asset and Portfolio Management as well as Investment Advice.

Please note our comments to the Public Consultation:

Question 1:

Do you agree that a common list of minimum records in all CESR members will benefit investors and industry?

We agree that a common list of minimum records in all CESR member states will benefit investors and industry.

Investors should know what to expect in the internal market as minimum records are to be kept by all investment firms. They need not scout websites of foreign supervisory authorities or other sources to determine the extent of minimum documentation. Due to this important and useful transparency they we will have a greater willingness to use investment firms located in other member states. Such investor reaction will foster competition and increase cross-border business. But these are also benefits for the industry. In addition, a minimum list will facilitate the administrative burden with regard to cross border business. This will hold true only if national regulators stick to this minimum requirements and avoid any national gold plating.

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?

The list is, generally speaking, exhaustive. No other item needs to be added. The following observations are to be made on individual items:

1. Records required under Article 25(2) of the Directive 2004/39/EC on Markets in Financial Instruments (MiFID): This item requires that CESR, if possible, develops a joint understanding of all members involved on the interpretation of the term “on behalf of a client“ in Article 25(2) of MiFID and in other provisions and definitions of this Directive. Other language versions of this directive provide different understandings.

The German version of the Directive uses the term “im Namen ihrer Kunden“. Similarly the French version uses the term “au nom d’un client“ and the Italian version “per conto di un cliente“. Similarly, the Spanish version reads “por cuenta de un cliente“ and the Polish version “w imieniu klienta“. The different versions could differ in their meaning. As opposed to the above examples, the English legal terminology “on behalf of“ does not necessarily distinguish between the activity of a disclosed (transmitting and receiving orders - introducing broker) or an undisclosed agent (executing orders - full broker). The continental legal terminology distinguishes between disclosed agents acting in the name of their clients and commission agents acting in their own name but for the account of their clients. The Directive must be interpreted independently of national legal terminology. It must be avoided that the different language versions imply different meanings. All versions must be reviewed under the entire spectrum of interpretation methods (historic, systematic, purpose etc.) and possibly corrected against differing “word“ interpretation. The uniform interpretation is important for all firms receiving and transmitting orders or acting as portfolio managers. Normally they act in the name and for the account of their clients. Commission agents (undisclosed agents) execute orders in their own name but for the account of their clients.

2. We have three detailed remarks to the proposed list of minimum records:

- a) Row 3: Client details (Article 19 (4))

We think that the text in the third column should read as follows: “**No later than** on giving advice or being appointed as a portfolio manager“.

Without this addition, every time the advice is given, the investment firm (which is not appointed simultaneously as a portfolio manager for that specific client) should record the information specified in the second column, even if nothing changes in the client’s situation. It should be enough to record this information on giving the first advice. If nothing changes, no information needs to be re-recorded.

There are also cases where the client asks for more complex advice, which cannot be given immediately, because it needs some study. The client provides the necessary information, the investment firm records it at that moment, but the advice is given after some period of time. Without the proposed addition the firm should record the same information for the second time, some days later, “on giving“ advice.

- b) Row 4: Client details (Article 19(5))

We think that the text in the third column should read as follows: “**No later than** upon providing the relevant service“.

The reasoning is the same as above.

- c) Row 12: Order carried out (other than those falling under the following row) and transactions effected for **own account**.

There is some discrepancy, because the text in the first column is about orders carried out for own account of the investment firm, while Art. 8(1) of the Regulation 2006/1287/EC (as in the second column) is about orders in the client's account.

3. Marketing Communications: This record keeping requirement should be restricted to written marketing communications (cf. requirement for investment research). It is reasonable that a firm keeps records of its written marketing material. It would, however, be excessive to require that investment firms establish records for each and every oral marketing communication. Such a requirement would entail an understanding by the industry and supervisory authorities of the required content and format for recording of oral marketing communication. It would be exaggerated if firms were required to make a verbatim transcript of non-written communications.
4. Compliance reports, risk management reports and internal audit reports: These records are not required for each and every investment firm. Whether these records are required or not depends on the nature, size and complexity of the investment firm's business. Other items are clearly restricted to specific firms providing specific services (e.g. systematic internalizers). The records in question do not depend on a simple and clear distinction of services categories, but rather on the evaluation of an application of the terms used in the Directive. Therefore, this qualification of the activities of the investment firm as to size, nature and complexity should enter this list. A uniform interpretation and application of these terms would be a pre-requisite for the uniform application of the list.

Question 3:

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

We are of the opinion that the investment advisors should keep records which concern the general relation to the client. This obligation is obviously met by the provision of row 3: Client details (Article 19(4)) on giving advice, etc. In addition, the investment advisor should be required to keep the records of written marketing communications and written investment advice made available to the clients.

Yours sincerely,



Fritz H. Rau
Chairman of EFFAS



Giampaolo Trasi
Chairman of the EFFAS MSG