



DANISH BANKERS ASSOCIATION

CESR

CESR's call for evidence on the European Commission's second set of mandates for implementing legislation under the Markets in Financial Instruments Directive (MiFID)

Introduction

The Danish Bankers Association welcomes the opportunity to provide comments on the Commission's second set of mandates for implementing legislation under MiFID. At this stage, we would like to make the following general remarks regarding the mandate.

General remarks

The timetable

We would like to express our strong concern about the short time that has been left to develop implementing measures as a result of the Council's decision to publish the Directive earlier than had been expected. In the case of the second mandate, which covers those Articles which gave rise to greatest controversy at Level 1, where the quality of legislation will be crucial to the EU's economic welfare, and over which the greatest care is therefore needed, it is particularly unfortunate and dangerous that CESR has been given less than a year in which to provide advice to the Commission.

We fear that the tight deadline will have a negative impact on the quality of the consultation CESR is able to conduct. We believe that it is up to the Commission and the ESC to ensure that quality does not suffer as a result of timetables.

In approaching this difficult task CESR and the Commission should aim for the minimum amount of Level 2 measures necessary to implement the Directive in a way which protects investors and market integrity and promotes fair, competitive, transparent, efficient and integrated financial markets. CESR and the Commission should also adhere strictly to the principle that Level 2 measures should do no more than add technical detail to the Level 1 text. They should avoid reopening Level 1 controversies, and aim at an early stage for draft Level 2 measures that command the maximum level of consensus. In particular they should:

Avoid an excessive level of detail and prescription in Level 2 measures.

29 July 2004

Finansrådets Hus
Amaliegade 7
DK-1256 Copenhagen K

Phone +45 3370 1000
Fax +45 3393 0260

mail@finansraadet.dk
www.finansraadet.dk

File no. 514/11
Doc. no. 107838-v1

Be prepared to rely on the Level 1 text where it provides sufficient detail, and recommend no, or minimal, Level 2 measures at this stage, especially in relation to 'the Commission may' provisions, and other Articles where there is less urgency for detailed Level 2 measures.

Page 2

Avoid Level 2 measures, which would contradict the Level 1 text, go beyond what is provided for in the Level 1 text, or undermine the compromises on which the Level 1 text was based.

File no. 514/11

Doc. no. 107838-v1

Avoid trying to squeeze into the Level 2 timetable measures that would require many years of development before they could take effect.

Provide a thorough, article-by-article, analysis of how best to use transitional measures or phased implementation to ensure that firms have enough time to make the necessary changes to systems and procedures.

Level of detail

At this stage, it is important to stress that, especially in view of the short time available for CESR to prepare its advice, CESR should take care to avoid unnecessary new detail. CESR should follow the guiding principle that Level 2 expands on the principles inherent in the Level 1 Directive, but should not prescribe the specific methods and procedures to put those principles into practice.

It is particularly important to bear in mind that changes to the detail of rules may require firms to make very extensive changes to their systems, and that completely new rules, such as those associated with Article 27, are likely to be even more demanding. The time needed to make these changes – and the costs – mean that extensive changes would be impossible to make within the timescale available.

In some cases these considerations should determine whether a Level 2 measure should be deferred at this stage, or whether it should incorporate a practicable transitional provision.

Where appropriate, CESR should be prepared to advise the Commission that in particular areas further detailed implementing legislation, except perhaps a statement of high-level principles, is not appropriate, even where the 'shall' formulation is used in the Directive, because the Level 1 text provides sufficient detail.

The need for priorities

We would strongly support any attempt by CESR to prioritize its work on the advice requested on the basis that those items that will require more time and for which more data is needed are postponed to a later date while those that require less groundwork are completed by the deadline.

For instance, there appears to be no pressing reason to devote scarce resources to the development of detailed implementing legislation where

comitology provisions in the Directive are permissive ('...the Commission may...') rather than mandatory ('...the Commission shall...').

Page 3

It is also inappropriate, as part of the Level 2 legislative process, to propose measures which go beyond, or contradict, the specific terms of the Level 1 Directive. A particular case in point is the Commission's proposal on systems for the dissemination of Article 27 price information: 'it is important to bear in mind that regulatory intervention should be focused in facilitating general access to information and the use of the most effective means for disseminating price information in a consolidated manner' (paragraph 3.7.2.4). Article 27 requires 'systematic internalisers' to publish quotes and give their clients access to those quotes. The Level 1 text does not appear to refer to 'consolidability', and neither should Level 2 measures. Article 27 specifically permits firms to publish quotes through proprietary arrangements, an option which a 'consolidability' requirement would prevent firms from using.

File no. 514/11

Doc. no. 107838-v1

Transitional measures and grandfathering

The importance of allocating priorities is vital due to the early publication of the Directive in the Official Journal, and the resultant shortage of the time available for the Level 2 process, and for CESR to provide its advice. It will be vital for CESR to recommend the appropriate use of transitional provisions, or phased implementation.

In its consultation paper CESR should propose, in relation to each Article, specific methods that are best adapted to ensure a practical transition to any new requirements. Possible methods include:

Measures that explicitly give regulated entities more time beyond the implementation date to come into compliance with the new requirements.

Measures that require regulated entities to comply with a set of high-level principles by the implementation date, but which allow more time beyond the implementation date to make any necessary changes to the detail of their compliance arrangements.

Measures which permit firms to continue for a period to use existing systems, procedures, documentation, and agreements that are consistent with the general principles of the Level 1 text.

Use of existing standards

As in the case of the 1st mandate, we believe that it is important to consider the way in which CESR uses its existing standards on conduct of business rules and MTFs for its technical advice on the relevant subjects of the 2nd mandate. It is our opinion that CESR will need to take a fresh look at all of the subjects related to its existing standards based on the political principles established in Level 1. Even when the substance of an existing CESR rule may appear fully compatible with the new MiFID, the level of detail within the existing CESR rule may not be.

Conclusion

Page 4

We would like to stress the point that the tight timetable should not undermine the quality of the level 2-legislation since this would be damaging to the objective of well functioning EU capital markets.

Kind regards

File no. 514/11

Doc. no. 107838-v1

Berit Dysseholm Fredberg

Direct 3370 1070

bef@finansraadet.dk