

**REPORT BY THE CNMV ADVISORY BOARD ON THE CESR
CONSULTATION PAPER "Technical Advice to the European Commission in the
Context of the MiFID Review – Investor Protection and Intermediaries"**

The Advisory Board of the National Securities Market Commission is the Commission's advisory body. The Advisory Board consists of representatives of market members in the official secondary markets, securities issuers, investors and bodies with powers in the area of the securities markets. CESR has issued a consultation paper on technical advice to the European Commission in the context of the MiFID review dealing with certain aspects of investor protection and intermediaries.

The document contains a number of comments and questions on the following topics:

- Establishment of Europe-wide requirements relating to the recording of telephone conversations and electronic communications.
- Establishment of requirements regarding public disclosure of data on execution quality in the various order execution venues, with a view to achieving best execution.
- Review of the criteria for classifying products as complex and non-complex from the standpoint of risk.
- Definition of "personal recommendation" when given via distribution channels.
- Review of a number of matters relating to regulating tied agents, specifically (i) harmonisation of national regulations on tied agents, (ii) increased transparency, and (iii) clarification of the passport regime for tied agents.
- Elimination of certain member state options and discretions.

Part 1: Requirements relating to the recording of telephone conversations and electronic communications:

1. Do you agree with CESR that the EEA should have a recording requirement? If not, please explain your reasoning.

The obligation to record telephone conversations appears to be a useful development. Nevertheless, that should not signify that firms are obliged to accept orders by phone or e-mail. Recording should only be obligatory for firms that decide to accept orders via remote means.

2. If the EEA is to have a recording requirement do you agree with CESR that it should be minimum harmonising? If not, please explain your reasoning.

Since the regulatory requirements in the European Union should be applied on a standard basis, it would be advisable to establish minimum harmonising rules for obligatory recording of phone calls. Within this principle, the minimum harmonising rules should be based on attaining the pursued goal at the lowest possible cost.

3. Do you agree that a recording requirements should apply to conversations and communications which involve:
- The receipt of client orders;
 - The transmission of orders to entities not subject to the MIFID recording requirement;
 - The conclusion of a transaction when executing a client order;
 - The conclusion of a transaction when dealing on own account?

Yes.

4. If you do not believe that a recording requirement should apply to any of these categories of conversation/communication please explain your reasoning.

N.A.

5. Do you agree that firms should be restricted to engaging in conversations and communication that fall to be recorded on equipment provided to employees by the firm?

Yes. The goal pursued in recording communications would be seriously impaired if the range of instruments of which such communications can be conducted were not defined and employees were allowed to conduct such conversations using instruments or apparatus not subject to recording.

6. Do you agree that firms providing portfolio management services should be required to record their conversations/communications when passing order to other entities for execution based on their decisions to deal for their clients? If not, please explain your reasoning.

The reasons why it is advisable for conversations to be recorded in the context of receipt and transmission/execution of orders do not apply to the same degree when an entity with a portfolio management mandate makes an investment decision on the client's behalf. In the latter case, there is unlikely to be disagreement between the client's instructions and the execution by the firm since the operation does not involve execution of an instruction from the client.

Therefore, since cost should be a vital point of reference in this matter, it would be most appropriate not to require that portfolio management entities, and the portfolio management activity, be subject to conversation recording; this refers to conversations with the client when discussing the terms of management (although it would apply to direct investment instructions) or to conversations with the entity to which the order generated by the portfolio management entity is relayed.

7. Do you think that there should be an exemption from a recording requirements for:
- Firms with fewer than 5 employees and/or which receive orders of a total of €10 million or under per year; and
 - All orders received by investment firms with a value of €10,000 or under.

It does not make sense to exempt small firms from recording requirements since that would subvert the goal pursued by applying the requirement to larger firms. In this context, it is hard to implement the measure on a basis proportional to the entity's size (such an adaptation is possible in other spheres, where a similar effect can be attained using fewer resources in smaller firms).

Therefore, this Committee does not favour granting small firms an exemption from the recording obligation.

8. Do you agree that records made under a recording requirement should be kept for at least 5 years. If not, please explain why and what retention period you think would be more appropriate.

Retaining recordings carries a cost that should only be imposed upon firms to the extent that it is useful for the purpose pursued in making the recordings. In that light, the Committee considers that the current five-year period could be revised on the basis of the purpose pursued with the recordings, i.e. to serve as evidence in the event of client complaints and in investigations of allegations of market abuse.

9. Are there any elements of CESR's proposals which you believe require further clarification? If so, please specify which element requires further clarification and why?

No.

10. In your view, what are the benefits of a recording requirement?

Recording conversations in the context discussed in the Consultation Paper and in question 3 has a positive effect in that it provides evidence in the event of client complaints and also for investigating and pursuing actions that constitute market abuse.

Both functions are relevant, in this Committee's opinion.

11. In your view, what are the additional costs of the proposed minimum harmonising recording requirement (for fixed-line, mobile and electronic communications)? Please specify and where possible please provide quantitative estimates of one-off and ongoing cost.

The Committee does not have any data in this respect.

12. What impact does the length of the retention period have on costs? Please provide quantitative estimates where possible.

The Committee does not have specific quantitative data at this time, but conserving recordings does carry a cost which should be weighed against its utility as noted in reply to question 8 above.

Part 2: Execution quality date (Art 44(5) of the MIFID Level 2 Directive):

13. Do you agree that to enable firms to make effective decisions about venue selection it is necessary, as a minimum, to have available data about prices, costs, volumes, likelihood of execution and speed across all trading venues?

Yes.

14. How frequently do investment firms need a date on execution quality; monthly, quarterly, annually?

Since the information refers not only to execution prices (which is broadly covered by existing post-trade transparency rules regarding equities), the frequency with which this information should be produced and published should be based on the need to provide investment firms with useful information for the necessary periodic reviews of their best execution policies but it should not create an unnecessary cost for trading venues.

For that reason, the Committee considers that quarterly publication would suffice.

15. Do you believe that investment firms have adequate information on which to make decisions about venue selection for shares?

Firms currently have sufficient information to enable them to fulfil their best execution obligations, particularly in cases where order execution remains very centralised in a single venue.

However, the Committee considers that progress can be made with regard to the level of information that venues disclose since there is scope for improvement with regard to the availability and standardisation (and, consequently, comparability) of the data produced and presented by trading venues.

16. Do you believe investment firms have adequate information on which to make decisions about venue selection for classes of financial instruments other than shares?

In contrast with equities, products that are essentially traded bilaterally, where firms act as counterparties to the client, and where it is more difficult to find venues that operate as providers of liquidity for retail investors (e.g. the fixed-income market) pose difficulties with regard to obtaining information that is comparable between alternative venues.

This market structure suggests that the best execution principle should be applied differently in comparison with the equities market.

17. Do you agree with CESR's proposal that execution venues should produce regular information on their performance against definitions of various aspects of execution quality in relation to shares? If not, then why not?

Yes.

18. Do you have any comments on the following specifics of CESR's proposal:

- Imposing the obligation to produce reports on regulated markets, MTFs and systematic internalisers;
- Restricting the coverage of the obligation to liquid shares;
- The execution quality metrics;
- The requirements to produce the reports on a quarterly basis?

The Committee considers that CESR's proposal is appropriate.

19. Do you have any information on the likely costs of an obligation on execution venues to provide regular information on execution quality relating to shares? Where possible please provide quantitative information on one-off and ongoing costs.

The Committee does not have any data in this respect.

20. Do you agree with CESR that now is not the time to make a proposal for execution venues to produce data on execution quality for classes of financial instruments other than shares?

As indicated in response to question 16, the Committee considers that any progress in this connection with products whose markets are structured very differently from the market in equities should be preceded by a broader debate about those markets' structure and transparency rules.

Part 3: MIFID complex vs. non complex financial instruments for the purposes of the Directives' appropriateness requirements:

21. Do you have any comments about CESR's analysis and proposals as set out in this Chapter?

The Committee agrees with CESR that the classification of products as complex or non-complex should be based essentially on an analysis of each product's risk.

Nevertheless, regarding shares of collective investment schemes that are not UCITS, and unlisted shares, the Committee considers that, if non-UCITS that pass the test set out in article 38 of the Directive are to be classified as non-complex, they must be "execution only". Therefore, it considers it would not be appropriate to exclude them outright, as set out in the wording proposed for article 19(5), (a), (i).

This opinion is also in line with the provisions of section 157 of the Consultation Paper.

22. Do you have comments on their proposal from some CESR members that ESMA should work towards the production of binding Level 3 material to distinguish which UCITS should be complex for the purpose of the appropriateness test?

The Committee agrees with CESR that we must wait for the results of the recently-approved Key Investor Information regulations, which have not yet been implemented. Therefore, it is too soon to address this issue.

The Committee also considers that UCITS should be classified as non-complex since (as the Consultation Paper states), they are governed by UCITS regulations in force throughout the European Economic Area, which regulators consider to be sufficient and which have recently been improved (e.g. development of the Key Investor Information document with a distinction between UCITS types based on risk). The KII document should enable an investor to understand the product readily since it must be succinct and concise, provide appropriate information, use non-technical language, employ a common format, and be clear, impartial and not misleading.

23. What impact do you think CESR's proposals for change would have on your firm and its activities? Can you indicate the scale of, or quantify, of any impact you identify?

The Committee does not have any specific data in this respect.

Although firms have already established a structure for distinguishing, for the purposes of the appropriateness test, between complex and non-complex products, a reassessment of all collective investment institutions from the standpoint of risk would impose an additional burden on firms which the Committee considers to be unjustified.

Part 4: Definition of personal recommendation:

24. Do you agree with the deletion of the words "through distribution channels or" from Article 52 of the MIFID Level 2 Directive?

The Committee disagrees with that deletion. That electronic or other similar means may be used to give personal recommendations (and, therefore, to provide advice) should not affect the fact that, in those cases, such channels are acting as "communication channels" with the client and not as product "distribution channels". As their name indicates, "distribution channels" are used to "distribute", not to provide advice.

This distinction between "communication channels" used by advisors with specific clients and "distribution channels" focused on distributing products to the public or a broad collective of clients without consideration for the recipients' individual circumstances is a conceptual distinction that can be made on an interpretative level without any need to amend the wording of the Directive in this regard (a wording which this Committee considers to be appropriate in this regard).

Accordingly, the same technical or operational mechanisms can be used as "communication channels" or "distribution channels". The Committee considers that the distinction can be made by interpretation of the circumstances without any need to amend the Directive.

Additionally, the concept of "distribution channel" is broader than that suggested by CESR (internet and mailings) and the Committee does not consider it is correct to convert any recommendation made via distribution channels into a personal recommendation (the underlying goal of the CESR proposal).

Part 5: Supervision of tied agents and related issues:

25. Do you agree with CESR that the MIFID regime for tied agents has generally worked well, or do you have any specific concerns about the operation of the regime?

The Committee considers that there should be greater harmonisation of the level of disclosure, so that firms, the supervisor and clients should be able to access information about the identity and contact details of tied agents working in each jurisdiction, including disclosure of the firm to which they are tied.

26. Do you agree with the proposed amendments to Article 23, 31 and 32 of MIFID?

The Committee agrees with the CESR proposal regarding the regulation of tied agents as regards harmonising the rules on disclosure, the possibility of appointing agents, and treating actions via agents as equivalent to actions via a branch.

The Committee also agrees with the proposal to prohibit agents from handling client money, on the grounds that it is prudent.

27. Could you provide information on the likely impacts of the deletion of the ability of tied agents to handle client money and financial instruments?

The Committee considers that such an amendment would have no effect on Spanish firms since that prohibition already exists in domestic legislation.

Part 6: MIFID Options and Discretions

28. Do you agree with the suggested deletions and amendments to the MIFID texts proposed in this chapter?

The Committee considers that CESR's proposals regarding the delegation of supervision and regulation of tied agents make sense.

The Committee considers it appropriate that host country supervisors should be able to obtain statistical information on branches operating in their territory.