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Europäische Vereinigung der Genossenschaftsbanken

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EACB Answer
to the Commission Call for Evidence
on MiFID Transposition

25 September 2008

The **European Association of Co-operative Banks** (EACB) is the voice of co-operative banks in Europe. It represents, promotes and defends the common interests of its 28 members and co-operative banks in general. With 60,000 outlets and 4,500 banks, co-operative banks – which are privately owned entities- are widely represented throughout the enlarged European Union and play a major role in the financial and economic system. In Europe, one out of two banks is a co-operative. Co-operative banks have a long tradition in serving 140 million customers, mainly consumers, retailers and SMEs. Quantitatively, co-operative banks in Europe represent 47 millions members, 730,000 employees with a total average market share of about 20%.

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General remarks

Before answering to the individual questions raised in this call, we would like to make a series of more general remarks relating to the transposition process of the Directive.

First of all, we would consider that the information collected as part of this consultation is based on initial assessment only. As we are still less than a year after the implementation deadline of MiFID, unintended effects may still arise at a later stage. Any conclusions to be drawn from this consultation should therefore be interpreted with care.

Secondly, as a general reminder, we would like to underline that European co-operative banks, which are typically retail oriented, have been especially involved in an adequate implementation of the end-customer provisions.

Thirdly, we would like to point out that the deadline for the transposition of MiFID and its implementing measures turned out to be too tight both for the Member States, which had difficulty in developing the relevant legislation in time, and for the banks. Indeed, in practical terms, banks have had to start preparing for the implementation of the consequences of MiFID even before the text of the relevant national legislation and of some of the CESR Recommendations was known. Considering the above mentioned retail oriented nature of co-operative banks, you will appreciate the time, resources and efforts that have gone in to organising for timely compliance with MiFID. We would therefore like to respectfully ask the Commission set a more generous timeframe for the transposition of this kind of legislation in future. In this context, it should also allow for an adequate implementation period for the banks. More in particular, the start of the implementation period for banks should not lie before the end of the work on Level 3.

Finally, now turning to the actual provisions of MiFID, they seem to have been widely implemented in most countries. However, additional requirements seem to have been developed in some countries, such as for example on the topic of the “record keeping” in Germany and in Finland. These requirements refer back to the CESR Recommendations (to this issue see more under “Organizational requirements (initial and ongoing)”.

1. MiFID Authorisation

Authorisation procedure and requirements / maintenance of previous authorisation

- **Is your home Member State requiring the fulfilment of additional requirements to those provided by MiFID in order to grant the relevant authorisation?**

Have investment firms encountered any problem concerning the transition from the ISD to the MiFID regime?

- **Have investment firms encountered other administrative, legislative etc. obstacles to the provision of investment services and activities and ancillary services for the financial instruments covered by MiFID?**

- **Have transitional measures concerning information communicated for the purposes of ensuring cross-border activities, been respected (Article 71(4) MiFID)?**

This paragraph serves as an answer to all the above questions.
The general observation made above relating to the tight implementation delays also applies here of course. Problems in trying to identify the meaning of certain definitions have also been reported by some of our members. Otherwise, we are as yet not aware of any particular problems but would caution against drawing definite conclusions in line with what was said earlier.

Organisational requirements (initial and ongoing)

- **Have investment firms encountered any specific concern with respect to compliance, internal audit, risk management and senior management requirements (Articles 6-9 Directive 2006/73/EC)?**

Here too the time pressure and the later availability of transposition texts in some member states was an issue. Otherwise these MiFID requirements seem to have been implemented in line with requirements.

- **Have investment firms encountered any specific concern with respect to other organisational requirements, e.g. outsourcing conflicts of interest, record keeping?**

Regarding record keeping, the CESR Level 3 Recommendations on the List of minimum records in Article 51 (3) of the MiFID implementing Directive from February 2007 (Ref: CESR/06-552) go beyond the explicitly regulated record duties of Level 1 and Level 2.

This leads to the following fundamental question: is there still scope in Level 3 for an interpretation of Level 1, if Level 1 legislation contains authorization for elaboration of its provisions at Level 2?

In our judgment, the answer to this question should be negative. Indeed, the intention behind developing the principle of layered legislation, was exactly to limit the content of Level 1 legislation to that of a general legislative framework and to allow for more specific legislation at Level 2 to define more detailed measures. The idea being that this would allow for more flexibility to make fast track adjustments to adapt to changes in the market. But if the concrete content and scope of a provision only result from Level 2 provision, the interpretation that can be given at Level 3 needs to stay withing the boundaries set by Level 2. Any other approach would lead to the situation where at Level 3 under the reference of the wide framework provision of Level 1, new requirements could be stipulated that are not covered by Level 2, therefore a subordinated level that could go beyond a higher level. Such an interpretation would contradict the democratic principle. For reasons of legal certainty, it is necessary that for the affected banks the basic content and scope result from Levels 1 and 2.

We would appreciate it if the Commission could clarify that an interpretation of Level 1 legislation at Level 3 could only take place if Level 1 does not already contain authorisation for implementing measures at Level 2.

Applying this logic to the concrete case mentioned above, we have to conclude that the above quoted CESR Recommendations go beyond the provisions set out in Levels 1 and 2, in particular when CESR refers for this purpose to Article 13 (6) MiFID.

- **Have investors encountered any problem concerning the handling of complaints (Article 10 Directive 2006/73/EC)?**

We are not aware of any problems in that respect.

Freedom to provide services and establishment of branches

- **Are additional requirements being applied in host Member States when making use of the "MiFID passport"?**

No comments.

- **Concerning branches, have supervisory authorities of the host Member States exceeded their competences with regard to Article 32(7) MiFID?**

No comments.

2. Investor Protection

Best Execution

All questions regarding best execution seem somewhat premature as more obstacles may occur when more new execution venues have become active in the market.

- **Have investment firms encountered any obstacle in a given Member State concerning the MiFID requirements related to best execution?**

As far as we can oversee, said MiFID requirements have been widely implemented.

- **Is best execution respected by all the market players? Are firms really looking for the best possible result? Are they taking all relevant venues into consideration?**

In this respect, we are aware that supervisors in several Member States are carrying out market surveys at the moment. We have as yet no knowledge of the results.

- **Have investment firms encountered problems in accessing data enabling them to compare relevant venues?**

No comment.

Information Requirements

- **Have investment firms being hindered in their provision of investment services by the application in a given Member State of additional information requirements to those set up in MiFID and its implementing measures?**

We are not aware of any problems in that respect.

- **How are costs and charges disclosed to clients (Article 33 of Directive 2006/73/EC)?**

Various practices exist depending on the bank in question. To our knowledge, they are all in accordance with the relevant legal provisions.

Know Your Customer Test

- **Have investment firms/investors observed in some Member States that no clear distinction is made between suitability and appropriateness? Are investment firms applying the suitability and appropriateness tests in accordance with MIFID requirements?**

Question 1: We are not aware of any problems.

Question2: Co-operative banks seem to have implemented the suitability and appropriateness tests in line with the relevant requirements and apply them accordingly in practice.

- **Have investment firms/investors encountered any obstacle in a given Member State concerning MiFID requirements related to the suitability and appropriateness tests?**

We are not aware of any problems.

- **Have investment firms/investors encountered problems in the provision of "execution only" services with regard to non-complex instruments (Article 19(6) of Directive 2004/39/EC and Article 38 of Directive 2006/73/EC)?**

We are not aware of any problems.

Inducements

- **Have you encountered any obstacle in a given Member State concerning the MiFiD requirements related to inducements which hinder the provision of services?**

We are not aware of any problems.

3. Competition between trading venues

It is too early to be able to answer in particular the first two questions.

- **Have investment firms encountered legal or administrative problems or other obstacles in obtaining a licence to operate a MTF or in operating as systematic internalisers?**

- **Have investment firms encountered problems in the application of pre-trade transparency requirements for MTFs and systematic internalisers?**

- **Have investment firms encountered problems in relation to the use of published pre-trade transparency information in terms of availability, accuracy and commercial terms on which the information is provided?**

We are not aware of any problems.

- **Have investment firms encountered problems in the application of post-trade transparency requirements?**

We are not aware of any problems.

- **Could you identify any obstacles that due to an inaccurate transposition/application of MiFID hinder efficient price formation process of access to data related to price?**

We are not aware of any problems.

- **Are there any problems concerning the access to central counterparty, clearing and settlement facilities and the right to designate settlement system?**

Users would like to have the same choice they have in choosing a trading venue in the area of clearing. Users today still have little choice of central counterparties and CSDs. Users encouraged Market Infrastructures to prioritise a small number of links where there was a plausible business case for doing so. Establishing links under the Code of Conduct for Clearing and Settlement is quite complex due to the need for compliance with local legal, fiscal and technological frameworks and practices. Progress on this chapter of the Code of Conduct will take longer than anticipated. Market Infrastructures must work with users to establish genuine business cases for the links that offer the greatest potential. With regard to Germany, an intensified and structured dialogue with Clearstream Banking Frankfurt exists.

4. Transaction Reporting

- **Have investment firms encountered any problem in fulfilling their transaction reporting obligations arising from MiFID and its implementing measures in a given Member State?**

In relation to Article 5(3) of the MiFID, Member States should ensure that they fulfil their obligation to establish and regularly update the register of all authorised investment firms. Not all Member States have made their registers publicly available.It is essential for cooperative banks that all EU Member States adopt a consistent approach with regards to their national register in order for market participants to be able to fulfil their own reporting obligations (e.g. Article 25 of the MiFID, in particular annex I table 1, No. 20 of the implementing regulation of the MiFID). In fact, the EACB believes that a European list of authorised investment firms compiled by CESR based on the national registers would be the optimal outcome.

In addition, it has been reported to us that, with regard to transaction reporting, supervisory authorities in the Member States do not seem to have the same view when it comes to which supervisory authority the reporting should be addressed to and what the content should be (example “Client ID”).

5. Efficient Supervision / Cooperation among authorities

- **Have investment firms / regulated markets faced problems due to the fact that there is a lack of cooperation among competent authorities?**

It has been reported to us that , with regard to transaction reporting, supervisory authorities in the Member States do not seem to have the same view when it comes to which supervisory authority the reporting should be addressed to and what the content should be (example “Client ID”).

Contact:

The EACB trusts that its comments will be taken into account.
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