European Association of Co-operative Banks
Groupement Européen des Banques Coopératives
Europäische Vereinigung der Genossenschaftsbanken

2012 International Year of Cooperatives

Review of the Markets in Financial Instruments Directive

Questionnaire on MiFID/MiFIR 2

19 December 2011

The **European Association of Co-operative Banks** (EACB) is the voice of the co-operative banks in Europe. It represents, promotes and defends the common interests of its 28 member institutions and of co-operative banks in general. Co-operative banks form decentralised networks which are subject to banking as well as co-operative legislation. Democracy, transparency and proximity are the three key characteristics of the co-operative banks' business model. With 4.200 locally operating banks and 63.000 outlets co-operative banks are widely represented throughout the enlarged European Union, playing a major role in the financial and economic system. They have a long tradition in serving 160 million customers, mainly consumers, retailers and communities. The co-operative banks in Europe represent 50 million members and 750.000 employees and have a total average market share of about 20%.

EACB AISBL – Secretariat • Rue de l'Industrie 26-38 • B-1040 Brussels
Tel: (+32 2) 230 11 24 • Fax (+32 2) 230 06 49 • Enterprise 0896.081.149 • lobbying register 4172526951-19
www.eurocoopbanks.coop • e-mail : secretariat@eurocoopbanks.coop

The members of the European Association of Co-operative Banks (EACB) would like to thank the ECON Committee for the opportunity to respond its questionnaire on the review of the Markets in Financial Instruments Directive.

SCOPE

1) Are the exemptions proposed in Directive Articles 2 and 3 appropriate? Are there ways in which more could be done to exempt corporate end users?

The EACB welcomes the further tightening of the optional exemptions for Member States (Article 3) regarding the provision of investment advice and/or the reception and transmission of orders in the mentioned securities to ensure an equivalent level of investor protection in all Member States. With regards to investor protection and a level-playing field in the whole EU, we believe that the same service should be regulated under the same requirements in every Member State and should therefore be regulated under MiFID. Consequently, Article 3 should be deleted.

Along those lines, and with a nod to the current European debt crisis, we would also like to question the re-examination of the exemption for public bodies charged with the management of public debt (Article 2 para. 1 lit. g). We believe that this exemption should be deleted, as far as these entities also perform investment (or ancillary) services towards clients and should therefore guarantee the same required level of investor protection.

2) Is it appropriate to include emission allowances and structured deposits and have they been included in an appropriate way?

Structured Deposits (Article 1 para. 3 clause 1)

The broader definition now disproportionately extends the scope to the great majority of bank deposits since only deposits with a "rate of return which is determined in relation to an interest rate" are to be exempted. This may lead to the understanding that only deposits whose rate of return is contractually linked to a benchmark (such as Euribor or Eonia) would therefore be exempted. But this is only the case with a minority of deposit products, as the majority are either fixed-rate products, variable-rate products or are geared to a benchmark like those mentioned above without their rate of return being contractually determined.

However, these simple products (such as savings deposits and fixed-term deposits) are not structured and should therefore also be explicitly excluded from the scope of MiFID. The definition therefore needs to be amended accordingly. As the current wording is not clear enough, the EACB would therefore ask to clarify the scope further in order to exclude all types of simple deposits (fixed-rate and simple variable-rate) from the scope of MiFID.

Otherwise such an extension would lead to drastic changes in the organisation of our banks, which have strictly separated investment business and deposit business so far. The upshot would be high costs and a disproportionate bureaucratic burden that are by no means justified for these simple deposit products (savings book, fixed-term deposits, etc.).

3) Are any further adjustments needed to reflect the inclusion of custody and safekeeping as a core service?

So far it is unclear to the EACB what additional responsibilities are connected to including custody and safekeeping as a core service, as our banks already provide these services to our customers. Does this now mean that we have to provide an appropriateness test to our clients before offering depositary services? We doubt that all obligations can be applied to the safekeeping and administration of financial instruments. We therefore would ask for further clarification on this issue or would ask that custody and safekeeping services should be kept as ancillary services.

CORPORATE GOVERNANCE

5) What changes, if any, are needed to the new requirements on corporate governance for investment firms and trading venues in Directive Articles 9 and 48 and for data service providers in Directive Article 65 to ensure that they are proportionate and effective, and why?

The EACB is critical towards the newly proposed corporate governance requirements for investment firms (Article 9), which will be further detailed by the European Commission and ESMA at the upcoming Level 2. We do not see a reason why corporate governance rules should also be implemented into the MiFID.

The European Commission has already covered this in its proposal for CRD IV (which, in turn, is based on the EC's green paper[1]. According to the CRD's definitions in Article 1a both credit institutions and investment firms should be within its scope. We therefore believe that a double regulation is unnecessary and can even lead to the risk of contradicting requirements in both legislations. As a note to CRD IV, we would like to underline that its proposals also do not properly accommodate allowances for different corporate governance regimes (such as two-tier systems). A good example, for both MiFID and CRD, is the citing of diversity as one of the criteria for selecting its management body, which does not take into account the size of the management body or the nature of banks. This is especially true for small locally active banks, where neither the bank nor its clients benefit from such a policy.

Furthermore on a more technical note, we would like to mention that it is contradictory for ESMA to draft specific binding technical standards – which will be issued in the form of a Commission Regulation as a complement to a Directive – which has the feature that

[1] COM(2010) 286 final dated 02 June 2010

it is flexible enough to take into account the different situations and laws existing in some member state. Therefore, we consider that ESMA should rather issue Guidelines instead of drafting binding technical standards.

ORGANISATION OF MARKETS AND TRADING

8) How appropriately do the specific requirements related to algorithmic trading, direct electronic access and co-location in Directive Articles 17, 19, 20 and 51 address the risks involved?

The EACB welcomes the European Commission's intention to regulate algorithmic trading (Article 4 para. 30, Article 17 and Article 51), as it is seeking to strengthen the supervision of high-frequency trading. This is, in our view, an understandable aim and we regard many of the requirements for algorithmic trading as reasonable.

However, the proposal that algorithmic trading strategies continuously post firm quotes during trading hours and provide liquidity to the market goes much too far. It not only ignores the fact that algorithmic trading reacts to certain market situations, but also effectively establishes an unlimited market making requirement without any compensation (which also goes beyond the obligations of real market makers). Such a requirement would mean that algorithms would no longer be used. The consequences would be less liquidity, along with bigger spreads between bid and offer prices. Moreover, the arbitrage that takes place today to overcome fragmented markets would no longer be possible leading higher prices for all market participants. The EACB would therefore ask not to pursue this approach any further.

10) How appropriate are the requirements for investment firms to keep records of all trades on own account as well as for execution of client orders, and why?

Recording of telephone conversations (Art. 16 para. 7)

The EACB would like to highlight that a clear distinction should be drawn between, on the one hand, the recording of telephone conversations among professional traders and, on the other hand, between retail clients and their advisers. While we have no objections against recording obligations of telephone conversations between trading desks, we are strictly against mandatory provisions to record telephone conversations with retail clients on a European level.

Article 51 para. 4 of the MiFID Level 2 Directive (2006/73/EC) provides Member States with the discretion to set their own national rules on the matter of recording telephone conversations and electronic communications involving client orders, which we believe should remain unchanged.

Requirements in this area already exist in the current MiFID and MAD or are planned in the new MAR and MiFID proposals (for client orders/transactions on own account as well as for investment advice).

Secondly, a mandatory obligation at the European level would be a very costly burden for many co-operative banks, which are mainly small and medium-sized banks characterised by decentralized structures. The purchase of recording facilities and the respective maintenance would imply very high costs for them. The Commissions' assumption in its Impact Assessment, that only for 4.6 to 5.8 per cent of the financial sector employees would need to be fitted with a fixed line recording, is in our view much too low. The Impact Assessment is based on the situation in the UK which differs considerably from the situation in a lot of other Member States with distinctive retail-focused businesses. Requests of our Members show that up to 55 per cent of the employees of a co-operative bank could be impacted. Even the Commission's Impact Assessment shows that especially the one-off costs for small companies would be much higher than for medium companies and once again multiple times higher than for large companies[2].

Following this line of thought, imposing mandatory provisions at the European level could lead to smaller and medium-sized and/or decentralized banks not being able to offer the reception of orders and/or investment advice via telephonic means any longer. This would then lead to a significant reduction of investment service providers, which is a development clearly against the interest of the end-investor who would have less choice in institutions he could entrust his investments with. It would further create an unlevel playing field in the financial market at the expense of smaller and medium sized and/or decentralized banks and their clients, especially in relation to the direct banking model.

We believe that the proposed measures are not proportional to the expected benefits, which are still very general and not concrete. Keeping in mind the special circumstances in each Member State – in particular the above mentioned different market structures – this decision should be left to each single Member State. We are in favour of clarifying this on the Level 1.

13) Are the provisions on non-discriminatory access to market infrastructure and to benchmarks in Title VI sufficient to provide for effective competition between providers? If not, what else is needed and why? Do the proposals fit appropriately with EMIR?

The EACB supports the notion of clearing different kinds of financial instruments at one Centralised Counterparty (CCP). Although multi-asset CCPs may be more expensive than equity-only CCPs, being able to clear more instruments at one CCP would enable its clearing members to use their disposable collateral much more efficiently and could dampen the costs of the current legislative financial reforms. We are further in favour of endorsing more competition and a level playing field between different CCPs within exchanges, which can be tackled by increasing interoperability between exchanges and clearing houses.

[2] see SEC(2011) 1226/2, page 200 ff.

INVESTOR PROTECTION

15) Are the new requirements in Directive Article 24 on independent advice and on portfolio management sufficient to protect investors from conflicts of interest in the provision of such services?

Investment Advice (Art. 24 para. 3, 24 para. 5, 25 para. 5 clause 2 and 3)

"Independent" and "restricted" investment advice

The EACB agrees with the Commission's intentions to fully disclose to the client on how his investment advice is financed. But we cannot agree with the distinction between "independent" and "restricted" advice, as investment firms always have to act "honestly, fairly and professionally in accordance with the best interests of its clients" (MiFID Art 19 para. 1 and 4). We would go further by questioning whether paid (inducement-free) advice does not foster other types of conflicts of interests. The means of financing the investment advice also does not imply whether the quality of investment advice is good or not. It should further be considered that fee-only investment advice cannot be offered in all regions and all social layers of the society, but is restricted to the wealthier parts of our society.

Furthermore, we would also like to question the connection between "independent advice" and the broad research of the market. Even "independent" advisers will not be able to cover the whole spectrum of products and therefore have to reduce the size of products in order to offer the required in-depth knowledge of the offered investment products. Here we also consider that the number of products offered to the client does not constitute the quality of its advice. A limited product portfolio which is tailored to the client's requests and needs raises the quality of investment advice much better than an undifferentiated but large selection of products. In many cases competitor's products are, in fact, already taking into consideration when providing investment advice to clients. But we are very doubtful that the current proposal is compatible to markets principles by forcing investment firms to offer competitor's products in order to receive the "independent advice" labelling.

Instead of the current "independent/restricted advice" labelling, the EACB would like to propose that investment firms declare to their clients when providing investment advice (for the first time):

1. Whether the investment advice is provided in conjunction with the reception of third-party inducements or not, and;
2. Whether restrictions or preferences in the investment advice exist with regards to recommended financial instruments and/or issuers

Requirement for periodic communication to clients

In the current proposal it is still unclear whether investment advice entails periodic communication requirements or not (see Article 24 para. 3 clause 1 and Article 25 para. 5 clause 2).

We believe that this requirement can only exist, if such a (new) investment service is offered by the investment firm and agreed upon with the client. It has to be taken into account that – different to portfolio management – in the case of investment advice the client is responsible for the composition of his portfolio, that he can deviate from the adviser's suggestion and that he can buy financial products without any advice. Therefore, the introduction of such a periodic communication would lead to completely new IT-systems and the necessity of an additional contract regarding the scope of services with the client.

The EACB therefore urges to clarify in the Level 1 Directive that – in the case of investment advice – periodic communication can only be required, if offered by the investment firm and agreed upon with the client. (for further necessary clarification at Level 1 with respect of periodic communications, please refer our answer to question 31 as well as our complementary remarks under "Detailed comments on specific articles of the draft Directive").

Specifying how the advice meets the personal characteristics of the client (Article 25 para. 5 clause 3)

We further believe that the justification of how the advice meets the personal characteristics of the client (Article 25 para. 5 clause 3) can only be required at the moment when the investment advice is provided and not on an on-going basis afterwards. This should be clarified at Level 1.

Portfolio Management (Article 24 para. 6)

It is the opinion of the EACB that instead of a total ban on inducements on portfolio management, the client should be able to freely choose between either a higher-priced and inducement-free portfolio management or a cheaper portfolio management that is partially funded by third party inducements. We therefore are against the ban of inducements, but agree to a disclosure of these inducements.

16) How appropriate is the proposal in Directive Article 25 on which products are complex and which are non-complex products, and why?

Execution-only regime (Article 25 para. 3)

This article includes a too vague definition of which financial instruments need to be provided with an assessment of the knowledge and experience of the client. The EACB are specially concerned by the expression "makes it difficult for the client to understand the risk involved" (see Article 25 para. 3 clause a) (ii) and (iii)) as it can lead to any interpretation and leaves open a high degree of uncertainty. The EACB therefore ask to remove this new addition, as the PRIPs initiative already deals with this definition. At least, both pieces of legislation should define "structured" products with exactly the same criteria.

Furthermore, all UCITS are typical non-complex financial instruments. They fulfil all relevant requirements for this classification, are in line with the current definition pursuant to Article 38 of the MiFID Implementing Directive and are all now being fitted with KIID (Key Investor Information Document) to ensure better investor protection under UCITS IV. Any differentiation on a case-by-case basis would merely create unnecessary red tape and devalue the existing UCITS brand, without any improvement to investor protection or the effectiveness thereof. The proposal to remove "structured" UCITS from the catalogue of financial instruments (Art. 25 para. 3 clause a lit iv), which are non-complex by their very nature (and hence, to restrict the execution-only sales of structured UCITS) needs to be deleted.

The EACB would also like to clarify that not all granting of credits or loans should lead to the exclusion from the execution-only regime. It should only be restricted to those loans granted directly to finance the purchase of financial instruments (so called "Lombard credit"), as only those cases would lead to a higher risk for the client. Simply put, the use of a client's current account overdraft facility should not bar him from using execution-only services. The EACB would therefore encourage clarification on this matter.

17) What if any changes are needed to the scope of the best execution requirements in Directive Article 27 or to the supporting requirements on execution quality to ensure that best execution is achieved for clients without undue cost?

Best execution (Article 27 para. 5, subpara. 2)

The EACB does not support the publication of the top five execution venues. The current best execution regime is sufficient and there is no need for additional requirements. We do not see benefit for accumulating information afterwards annually and would therefore ask for deletion of this paragraph.

18) Are the protections available to eligible counterparties, professional clients and retail clients appropriately differentiated?

The EACB cannot agree on extending obligations with respect to information or reporting requirements to eligible counterparties (see Article 30 para. 1). This is due to the fact that eligible counterparties are a set of clients that are supposed to be on par with the investment firm itself. These eligible counterparties are investment firms themselves or similar institutes. Therefore these clients do not need and require these types of information or reports which are aimed at retail clients.

19) Are any adjustments needed to the powers in the Regulation on product intervention to ensure appropriate protection of investors and market integrity without unduly damaging financial markets?

Concerning the issue of product bans at supervisory level the EACB would like to draw your attention to the establishment of the highly problematic empowerment bases in Articles 31 and 32 of the MiFIR draft.

The focus of our criticism is not on possible product bans themselves, but mainly on the endless scope of the empowerment bases. Product bans should only be imposed, if there is no less severe measure to achieve the necessary level of investor protection. We are in favour of putting the authority to issue product bans in the hands of national supervisors. Otherwise direct supervision of banks by ESMA would be established in a particular area. This would be at odds with the present system. National supervisors also have the required knowledge of markets.

TRANSPARENCY

21) Are any changes needed to the pre-trade transparency requirements in Regulation Articles 7, 8, 17 for all organised trading venues for bonds, structured products, emission allowances and derivatives to ensure they are appropriate to the different instruments? Which instruments are the highest priority for the introduction of pre-trade transparency requirements and why?

Whilst MiFID has so far contained legal consequence-related obligations for so-called systematic internalisers (SIs) for equity trading only, the scope is now to be extended considerably. It also covers, among other things, bond trading, which in some Member States, such as Germany, usually takes the form of bilateral transactions. We also assume that fixed-price transactions with private investors would also fall under the definition of systematic internalisation. These non-equity pre-trade transparency requirements for SIs would therefore be seriously detrimental to functioning of the markets.

For institutional investors active in the bond markets, Article 17 para. 1 and 2 could, in particular, prove problematic in practice: if an investor asks an SI for a firm quote, the SI shall make this firm quote available to its other clients, as we understand it, with no importance to the size of the quote. The "size specific to the instrument" is only introduced in Article 17 para. 3 as a criterion for the firmness of the quote in relation to other clients of the SI.

Investors would accordingly have to assume that their request for a quote will become known to the SI's other clients, even if the size involved is likely to have market impact. The price for the investor requesting the quote could thus deteriorate, while he thinks over the quote or obtains a quote from other SIs. Moreover, there would be scope for arbitrage, if clients of an SI are informed about quotes of any size but only quotes up to the threshold referred to in paragraph 3 explicitly have to be made public under Article 17 para. 5. Such far-reaching pre-trade transparency in bond trading is not called for either by investors or by trading banks (and thus potential future SIs), as far as we know. Because of the special characteristics of the non-equity markets, CESR too voiced its opposition to EU-wide pre-trade transparency requirements in its recommendations to the Commission[3].

With regard to fixed-price business with retail clients, it should be noted that retail clients are unlikely to compare prices quoted by several different SIs because the quoted bonds would have to be identical. This will virtually never happen in practice, however.

[3] see CESR-Technical Advice to the European Commission in the Context of the MiFID-Review – Non Equity Markets Transparency CESR/10-799 from 29 July 2010, page 6.

While creating this kind of transparency would be extremely burdensome, it would not deliver any tangible benefits. The burden would be particularly heavy for institutions that are organised in a group and where execution of a securities order very often involves a chain of fixed-price transactions. Such a chain runs, for example, from a central institution to a local institution and from it to the client, which would trigger the SI's obligations at least twice.

The EACB therefore believes that, given the disproportionate nature of a provision that also affects retail business, a limitation geared to the group of clients concerned would be advisable.

22) Are the pre-trade transparency requirements in Regulation Articles 7, 8 and 17 for trading venues for bonds, structured products, emission allowances and derivatives appropriate? How can there be appropriate calibration for each instrument? Will these proposals ensure the correct level of transparency?

Should the idea of non-equity pre-trade transparency for SI in these markets nevertheless be retained, it has be made clear that quotes only have to be made available to the SI's clients, if the size involved is below the threshold referred to in Article 17 para. 3. The functioning of bond trading in future would then depend to a crucial extent on how the "size specific to the instrument" is defined. At Level 1, it should at least be stipulated what purpose the size specific to the instrument is to serve (e.g. protecting retail clients) and which criteria are to be taken into account when fixing the details at Level 2. The size threshold must be set in such a way that the above-mentioned adverse effects on pricing for investors are avoided and the firmness of quotes up to this threshold does not become an unacceptable business risk for the SI.

In addition, it should be made clear that the rules on access to quotes under Article 16 para. 1 and 2 also apply to SIs in the non-equity sector. Since, it must be ensured that scaled pre-trade quotation is possible so as to take into account the different credit risk of investors. The same goes for trading in derivatives, especially as this involves highly specialised bilateral contracts whose transparency does not deliver any added value to the market.

25) What changes if any are needed to the post-trade transparency requirements by trading venues and investment firms to ensure that market participants can access timely, reliable information at reasonable cost, and that competent authorities receive the right data?

<u>Post-trade transparency for transactions in shares</u>

Articles 28, 30 and 45 of the existing MiFID stipulate that transactions in shares – whether they are concluded on a regulated market, an MTF or bilaterally between two contracting parties – must be made known immediately to all interested investors. Under Article 45 para 2 of MiFID in conjunction with Article 28 of Regulation (EC) no. 1287/2006, Annex II, table 4 of this Regulation defined thresholds which, if exceeded, allow for deferred publication of transactions by firms subject to transparency requirements. For this purpose, it created several classes of shares in terms of average daily turnover to determine the exact delays for publication. In the case of particularly large blocks of shares, delays until the end of the third trading day after the trade are possible.

Provision for deferred publication enables market participants to bear the risks of large trades, since they are not required to disclose these immediately. A too early publication harbours the danger of "cornering". A market participant who has entered into a position could be undermined by other market participants in his intention to close the position. That goes for anonymous publication as well, as the market can still identify the traders concerned. This would lead to the danger of market participants no longer being prepared to expose themselves to the risk of a position. Such a reduction in the number of potential counterparties affects liquidity in block trading in particular. This would be detrimental particularly to institutional investors such as insurance firms or pension funds.

Article 19 para. 2 in conjunction with Article 10 of the MiFIR draft allows for deferred post-trade transparency of transactions in shares in certain cases. This provision is, in principle, welcomed. At the same time, Article 10 para. 2 should regulate more precisely which criteria must be taken into account when fixing the details at Level 2. We are concerned that unnecessarily restrictive rules could be adopted. For example, CESR proposed in its advice to the European Commission[4] that deferred reporting should generally take place no later than the end of the trading day (or beginning of the next trading day if the transaction is concluded after 15:00). These delays do not accommodate the risks associated with some transactions. The longer delays provided for today are only applied in exceptional cases, but it is precisely then that they are needed. It must be ensured that market participants can continue to make available liquidity in block trading in the future. To enable them to do so, the associated risks need to remain acceptable through adoption of appropriate delays. We therefore recommend that the wording of Article 10 para. 2 should take this into account.

Finally, we would like to point out that the scope of Article 19 is not clear enough. We are against the inclusion of "other similar financial instruments". When putting the transparency requirements into practice, firms subject to them should be able to clearly define the financial instruments covered. This is not possible with the broad wording "other similar financial instruments". We also do not believe it is necessary to make the scope so broad to achieve the intended regulatory purpose. We therefore suggest deleting the words "or other financial instruments" from both articles.

Post-trade transparency for transactions in bonds, structured finance products and derivatives

The existing post-trade transparency requirements in relation to other market participants for transactions in shares are to apply in similar form in future also to many other financial instruments, including bonds (Article 20). In regard to bonds, we are concerned even more than in the case of equity trading that the establishment of unreasonable transparency rules will cause liquidity in bond trading to dry up.

[4] See CESR Technical Advice to the European Commission in the Context of the MiFID Review – Equity Markets (CESR/10-802) of 29 July 2010, p. 24/25, table 5.

The purchase and sale of bonds, not only in the case of transaction large in scale, usually takes place in the form of bilateral transactions. Banks provide the market with liquidity by buying and selling bonds; for this purpose, they take risks on to their own books. That goes both for transactions with private investors and for transactions with institutional investors. If banks were to be required to disclose their transactions to other market participants too early, the risk of the market moving against them and of their only being able to unwind their positions at unreasonable prices would be too high. As a consequence, banks would avoid exposing themselves to such risks, so that liquidity would dry up. This would, however, be seriously detrimental to bond issuers, be they companies, the public sector or banks.

The aim must consequently be to achieve the best possible transparency. Appropriate scope for deferred trade reporting is therefore essential. The delays applying to transactions in shares today show that differentiated transparency solutions that meet market needs in terms of each class of products are required. The existing differentiated system provides good guidance. A differentiated approach is also required for transactions in bonds. CESR, on the other hand, proposed in its advice to the European Commission[5] that deferred reporting should generally take place no later than the end of the trading day. This delay is unsuitable for many transactions because of the risks associated with these. It must instead be ensured that liquidity does not dry up in this market either in future. The wording of Article 10 para. 2 lit. b should take this into account. Instead of absolute volumes, thresholds should also be possible (above X and below Y EUR) for deferred trade reporting.

In addition to the threshold arrangements provided for bonds and derivatives in Article 20 para. 1, which we welcome, we believe that a higher threshold is required in each case to select the most liquid securities that are suitable for market transparency requirements. This additional threshold should be fixed by ESMA.

Also completely new is the planned extension of the post-trade transparency requirements in Article 20 to transactions in, among other things, structured finance products and derivatives. We must highlight that all structured finance products are individually designed and not standardised. Because of their individual structure, price information disclosed after trading is rather meaningless since completely identical instruments do not exist and conclusions about the market value of other instruments are virtually impossible. The informational value of post-trade prices for market participants is therefore very limited. Transparency, i.e. details of trades concluded, could even be harmful for the market as structured products cannot automatically be compared with each other. Slight differences in the design of products may have significant economic implications for a product. If, therefore, only market data on similar but not identical products are available under a more stringent transparency regime, interested market participants run the risk of making their decisions on an incorrect basis. It is, moreover, not clear how transparency is actually to be established for these financial instruments. The details are only to be fixed at Level 2. Given the considerable differences between the financial instruments covered by Article 20 of the MiFIR draft,

[5] see CESR Technical Advice to the European Commission in the Context of the MiFID Review – Non-Equity Markets Transparency (CESR/10-799) of 29 July 2010, p. 4/5.

we believe that a differentiated approach is advisable at Level 1 and suggest, firstly, gearing the wording of Article 20 of the MiFIR draft more strongly to the existing differences between financial instruments and, secondly, making it more concrete.

HORIZONTAL ISSUES

31) Is there an appropriate balance between Level 1 and Level 2 measures within MIFID/MIFIR 2?

The EACB deems that Level 1 measures already must include the material scope that makes the future requirements discernible for all market participants. This is clearly the responsibility of the Parliament, Council and Commission as the European legislative bodies. Only "technical standards" should be left for implementation on Level 2 and therefore to the Commission and ESMA.

Along those lines also the scope of the delegation for Level 2 measures has to be precisely drawn, meaning that it must already be clearly defined. Past experience with MiFID 1 has shown us that because of some unclear Level 1 provisions and/or far-reaching delegation for Level 2, the implementing Level 2 measures took some quite unexpected and different turns.

In many instances, the scope of requirements for MiFID 2/MiFIR is not discernible for us in the Commission's proposals. The far-reaching delegations for Level 2 aggravate this situation.

This includes the following examples:

- *Periodic Communication* (Art. 25 para. 5 clause 2): Please refer to our answer to question 15 and find our further remarks below in the section "Detailed comments on specific articles of the draft Directive"
- *Investment Advice* (Art. 25 para. 5 clause 3): Please refer to our answer to question 15.
- *Transaction Reporting*: Please find our further remarks below in the section "Detailed comments on specific articles of the draft Regulation"

We therefore are urging the Parliament to include further clarifications in the Level 1 text and to clearly define the scope of delegated acts and technical standards for the Commission and ESMA.

DETAILED COMMENTS ON SPECIFIC ARTICLES OF THE DRAFT DIRECTIVE

Article 24 para. 7 – Cross-selling practises

The EACB would like to question the wide reaching implications of ESMA's mandate to assess and supervise the cross-selling practises of individual investment firms. We regard this power as too intrusive and would therefore suggest the deletion of Article 24 para. 7.

Article 25 para. 5 clause 2 – Periodic Communications

Please see our answer to question 15 (on portfolio management) and 31 (on the balance between Level 1 and Level 2 measures).

Article 25 para. 5 clause 2 provides – in a general manner – a requirement for a periodic communication. It is not clear in which cases such a requirement should exist. The EACB is of the opinion, that such a requirement should be limited to portfolio management (without any precondition) and to investment advice (only, if investment firms offer and conclude this service with its client).

The EACB would therefore suggest clarifying in the text that periodic communication requirements are only provided in case of either portfolio management or with respect of investment advice provided that a contract was concluded between the investment firm and its client about this additional service.

Article 97 para. 1 – Implementing period

Article 97 para. 1 subpara. 3 prepares the groundwork for the date at which the new requirement will be apply, i.e. the investment firms must have implemented the new requirements, but does not yet state a definite implementing period for the investment firms. The exact period can, in the EACB's view, only be set once the content and scope of the new requirements becomes clear (see answer to Question 31).

The EACB would like to highlight that the implementing period can only start once the Level 2 implementing measures have come into force. It is further necessary that Member States transpose the directive into national law within the fixed transposition period.

Our experiences with MiFID 1 has shown us that although the implementing deadline for the application of the MiFID was two years and was then even further extended by 18 months, the investment firms were left with only a few months to implement the new provisions.

Exclusion of national gold plating

Experience with the current MiFID has shown that some Member States tend to national gold plating. Article 4 of the MiFID Implementing Directive intended to prohibit such practises has sadly proven ineffective. Member States are likely to argue that the new/previous requirements have not been regulated in MiFID and that Article 4 therefore does not apply. As far as we are able to see, there has been no progress within the Commission's proposals with regards to MiFID 2/MiFIR on this subject.

We would welcome, if Member States were obliged to report to the Commission any additions or modifications in their national provisions, including any additions intended to be retained even after MiFID/MiFIR 2 comes into force. The Commission needs to ensure that all Member States are compliant with the narrow conditions under which national gold plating is allowed (cf. Art. 4 MiFID Implementing Directive) and non-compliance with these rules leads to effective sanctions to ensure the intended level playing field within the EU. This should be therefore already regulated at Level 1.

DETAILED COMMENTS ON SPECIFIC ARTICLES OF THE DRAFT REGULATION

Art. 21 ff. – Transaction Reporting

Please see our answer to question 31 (on the balance between Level 1 and Level 2 measures).

- We believe that key terms such as "transaction" must be defined clearly at Level 1. In doing so the principle that the reporting requirements (format and content) must follow the type of transaction has to be maintained. Otherwise, established types of transactions carried out in some EU Member States (such as transactions on a commission basis) could no longer be used and therefore not be offered to the clients anymore. This would also lead to a decrease in the quality of supervision, as the reporting would not correspond to the performed transactions any longer.

  As the Commission is proposing to further harmonise the transaction reporting, we believe this clarification already to be necessary at Level 1. According to the current MiFID and its implementing Regulation (EC 1287/2006) only the data exchange between the competent (national) authorities is subject to harmonised European provisions, but not the transaction report of the investment firm to its competent authority. The latter should change in future as proposed by the Commission.

- Article 22 para. 2 deals with the relevant data relating to retained orders and refers with respect of the content of these orders to Article 23 para. 1 and 2 (content of transaction reports). Reference to paragraph 2 seems to have been an inaccuracy as this should reference to paragraph 3. Assuming this, we believe that this would be too far reaching as it would include the client's identification also with respect of the order. Currently the client-related assignment of data is only performed after the execution of a trade and not at the time of the reception and transmission of an order. The planned new obligation to supply already the order with the client's identification would interfere massively in the order execution processes of the investment firms and trading venues, although there is no visible gain. The EACB therefore asks to delete the reference to client's identification in Article 22 para. 2.

- The EACB would also like to call into question Article 23 para. 9 which enables the Commission – two years after entry into force of the regulation – to assess the changes and propose, if necessary, that "transactions to be transmitted to a systems appointed by ESMA". A high quality of supervision can only be ensured by the competent authorities due to fundamentally different transaction types in the Member States. This means that the currently used data exchange between the competent authorities should be maintained and further refined. A "central system appointed by ESMA" therefore is not suitable for this task. We further believe that the timeframe of two years for an assessment of the changed reporting requirements too early, especially taking into account that the beginning of the period should be the time, the regulation enters into force and not the time, the regulation will be apply. We therefore would suggest the deletion of Article 23 para. 9.

Article 46 – Implementing period

See our proposal for the Directive which should also apply to the Regulation.

Exclusion of national gold plating

See our proposal for the Directive which should also apply to the Regulation.

Contact

The EACB trusts that its comments will be taken into consideration. Should there be any need for further information any questions on this paper, please contact:

Ms. Marieke VAN BERKEL
Head of Retail Banking, Payments and Financial Markets
m.vanberkel@eurocoopbanks.coop

Mr. Andreas STEPNITZKA
Adviser for Financial Markets
a.stepnitzka@eurocoopbanks.coop