Answer to consultation CESR/10-417 on CESR Technical Advice to the European Commission in the Context of the MiFID Review - Investor Protection and Intermediaries

1. **The Association française des marchés financiers (AMAFI)** has more than 120 members representing over 10,000 professionals who operate in the cash and derivatives markets for equities, fixed-income products and commodities. Nearly one-third of the members are subsidiaries or branches of non-French institutions.

2. AMAFI welcomes the opportunity provided by CESR to answer its consultation on investor protection and intermediaries. In the present document, AMAFI wishes to make the general observations set out below (I) and provides some specific answers to the questions raised by CESR (II).

I. – *General Observations*

CESR pursues three objectives with its proposal to harmonise communication recording– but the harmonization at EU level of the recording requirement is only truly useful for the fight against market abuse

3. CESR lists three objectives that a communication recording requirement would meet:

- to ensure that there is evidence to resolve disputes between an investment firm and its clients over the terms of transactions;
- to assist with supervisory work in relation to conduct of business rules; and
- to help deter and detect market abuse and to facilitate enforcement in this area

4. As far as the first objective is concerned, it is true that firms use recording to help resolve client disputes or differences with counterparties most of the time shortly after a transaction has been executed but sometimes also as a proof in courts (when such proof is acceptable). Firms who operate mainly through the Internet or the telephone use also recordings as part of their audit trail.

From this observation, it results that firms should indeed be allowed to record communications, especially since data privacy issues need to be considered and data protection laws can hinder the firms' ability to implement such recording.

5. However, the objective at stake here relates to the personal sphere, i.e. there is no rationale for an harmonization at the European level of such a matter. Firms should be free to decide how they want to protect themselves against litigation risk and whether/how long they need for this purpose to record communications with their clients (and their counterparties).

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The resolution of client disputes is indeed a matter that is intimately linked to a firm's risk tolerance and its business model. Firms should be free to decide what should constitute this element of proof (communication recordings and/or written materials), depending on their organisation and business model. This is especially so in a regulatory context where they generally have other recordings available as a result of the application of the general recording requirement of five years. For example, telephone conversations are often most useful at the time when the trade has not been confirmed and settled yet to answer client queries; when a litigation arises, reference to written transaction records is often more powerful.

Firms should also be free to decide what retention period is the best suited to their activities and their risk profile. Firms' assessments of their business risks will vary significantly depending on their complaints' history and the lifecycle of their businesses (activities with a shorter lifecycle – e.g. the cash equity business - need not rely on records older than six months to one year, as trades are settled rapidly and clients in these markets react quickly to any inconsistency). Hence this is not a matter that would benefit from a harmonisation at EU level.

This position is reinforced by the fact that the various statutes of limitations a firm is submitted to are not harmonised at EU level and, even at national level, are different among them depending on the matter concerned (tax, civil, commercial, etc.). It would be ambitious to try and harmonise a recording duration for the purpose of resolving client disputes without harmonising first these.

6. As regard the usefulness of a recording requirement to check compliance with conduct of business rules, there are some reasons to question whether the benefits it would bring in this area would be commensurate with the costs involved. This is especially so since there are often other ways, more valuable and efficient (such as written materials which are more easily retrievable) to check compliance of a firm with the conduct of business rules, as firms are subject to a general recording requirement of five years that allows for the constitution of an audit trail of the orders transmitted/executed for clients.

In addition, as far as high street branches are concerned, the provision of investment services (and especially investment advice, which in any case is out of scope of the proposal) is essentially performed in situ and not over the phone (and when it is the case, most of the time it is not exclusively over the phone). AMAFI is therefore concerned that a wide recording requirement would not serve efficiently the second objective stated by CESR (checking compliance with conduct of business rules).

7. Harmonisation of the regulatory requirement on conversation recording would therefore be useful only as far as deterrence of market abuse is concerned. The European financial markets being integrated, there is a strong argument for using consistent tools across the EEA to protect their integrity, and hence to submit firms to identical recording requirements for the purpose of deterring market abuse. Experience has shown that these conversations can actually be helpful to competent authorities in this respect. AMAFI thus supports harmonization for the purpose of fighting market abuse and considers that recording to facilitate resolution of client disputes should be authorized but left to the firms' appreciations.

- ***The introduction of further technical constraints that require commitment of additional resources from firms contribute to the concentration of the industry, leading to a market model deprived of smaller actors***

8. The extension of a recording requirement to firms who receive and transmit orders will require commitment of additional resources from firms, some of which can be of a small size with limited resources. This creates another barrier to entry in the industry, participating to further concentration and could come in addition to submitting these firms to transaction reporting as suggested by CESR in its consultation paper 10-292.

The joint impact of these new measures on small firms should be looked at and their consequences on the structure of the EU financial market considered.

II. – *Questions*

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

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

9. AMAFI agrees that there should be a harmonized recording requirement in the EEA. As explained above, this harmonization will serve the fight against market abuse, even though the requirement itself, if it is flexible enough, will also serve resolution of client disputes.

- **Question 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.**

10. AMAFI is of the view that the requirement should be of maximum harmonization while providing flexibility at firms' level (see our proposal § 23), as the current various requirements across EEA is a source of headache and inconsistencies within firms and among regulators.

11. From the point of view of groups, these various requirements create issues as regards both branches and subsidiaries. As the requirement is an organisational rule in MiFID, the recording duration for a branch's communications is set following its parent's home state's rules, which may differ from the ones of the Member State in which the branch is established. In such a situation, the local regulator is sometimes of the opinion that the home state's requirements are inadequate (generally as regards duration) and insists on the branch applying local rules, leading to compromises which are difficult to reach and to organisational inconsistencies within groups.

As regards subsidiaries, they are subject to the rules of the local competent authority, which can be different from the ones of the parent company's competent authority, here again leading to organisational inconsistencies within groups.

12. These differing requirements are also a source of questions from clients who do not understand why a firm that is a branch of another Member State's firm applies a recording duration that is different to other local firms (who are subject to the local recording requirements). It creates inconsistencies within each Member State that clients have hard time understanding and accepting.

Hence, for the sake of simplicity and a level playing field, all competent authorities should impose the same requirement as far as record duration is concerned.

- **Questions 3 and 4:**

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

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

13. To help answer these questions, an impact assessment is necessary and we hope that CESR will conduct one. One way of approaching it is to dig further into the objective pursued by the proposal and the nature of the firms impacted by the proposed requirement.

14. There is no doubt that staff in trading rooms involved in the activities listed by CESR should have their conversations recorded. This is because they are at the forefront of the fight against market abuse and they deal with transactions that can be significant from a market point of view. In practice, such recording is already common practice anyway, hence the impact of the proposal on trading rooms for staff involved in the activities in scope of CESR's proposal would be limited (provided the recording duration remains unchanged of course).

15. On the opposite, the proposal is questionable regarding staff outside of trading rooms who are only involved in reception and transmission of orders from retail clients. Such recording would be very onerous considering the number of lines that could have to be recorded and the small size of some of the firms impacted (see our comment on further concentration of the industry § 8).

Considering that the harmonisation of communication recording would serve the fight against market abuse, an analysis of the benefits of the proposal as regard market abuse would be welcome, distinguishing between trading rooms and other "locations" where the activities in scope take place. It seems unlikely that many additional cases of market abuses pertaining to the activities listed by CESR that are conducted outside of trading rooms could be sued thanks alone to this new requirement, let alone high-profile cases of market abuses. This statement is further reinforced by the observation that in high street branches, many conversations related to investments do not take place over the phone or electronically. AMAFI is therefore not supportive of requiring the recording of reception of orders outside of trading rooms because it would not generate benefits commensurate with the costs involved.

Having said that, and as already mentioned above (see § 4), firms who operate mainly over the phone or the Internet with retail clients should have the choice to record reception and transmission of orders as it serves as an audit trail.

16. Finally, one possible way to make the change less onerous for a number of firms is to authorise contractual reliance on the recording made by other firms they are dealing with, be it for transmission of orders or for execution. This would not work as an exemption but could significantly lower the costs involved in implementing the new measure.

- **Question 5: Do you agree that firms should be restricted to engaging in conversations and communications that fall to be recorded on equipment provided to employees by the firm?**

17. AMAFI believes that firms should record any means of communication that they use for the activities in scope of the recording requirement. But they should not be required to record equipment that are not to be used for such purpose, especially since firms have policies in place to ensure this equipment is not used, the term equipment covering the means of communication provided by the firm and the personal ones of employees.

To the extent that firms are properly organised to make sure non recorded equipment is not used to carry out the activities falling in scope of the recording requirement, there is no advantage in requiring from them that they record this equipment. An employee who deliberately wants to have a conversation on a non recorded means of communication will always find a way with today's technology. A wide ranging recording requirement would almost certainly create issue with protecting the employees' rights to privacy and not meet the objective at stake whereas policies, training, controls and sanctions, i.e. a firm's own organisation, can.

It follows that mobile phones or other electronic devices provided to employees should not be automatically recorded unless they are authorised by the firm to be used for the activities in scope of the recording requirement.

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

18. This is not a matter that regards AMAFI directly but to the extent that it involves a firm that is subject to the recording requirement, the activity of transmission of orders should not enter in the scope of the proposal. One issue that CESR may want to consider is the one when an asset manager is dealing on own account with another firm that is not subject to recording requirements.

- **Question 7: Do you think that there should be an exemption from a recording requirement 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.**

19. In principle, AMAFI is not keen on introducing such exemptions that would distort the level playing field.

On a practical basis, these exemptions would be difficult to use anyway:

- As for the exemption of transmission of orders to entities subject to MiFID, it is not workable for firms transmitting orders to firms in the EEA as well as in the rest of the world: because the anchor point of the recording is a person's phone number/email box, when this person transmits orders to many different firms, there is no way the recording could be switched on or off depending on the entity the order is transmitted to.

- For the same reason, the exemption based on the size of the order will be difficult to implement as the recording cannot be triggered depending on the size of the order.
- An exemption based on the number of employees is not adequate because firms that are small in terms of number of employees can nonetheless have significant trading activities.

20. Having said that, the possibility for firms to rely on the recording of another firm (see proposal above § 17) could provide similar benefits as those provided by an exemption and could alleviate a little of the burden on firms (especially if the recording of receipt of orders is not mandatory). Such a possibility is essential in AMAFI's view and we hope CESR will consider it carefully.

21. In addition, one important feature that CESR could introduce is a staged implementation process, whereby firms, providing they meet certain characteristics, which would need to be defined, could be given more time to implement the new requirement, enabling them to get organised and budget the costs and additional resources needed.

- **Question 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.**

22. The perfect recording duration is difficult to set because it meets different needs and is dependent on a firm's organisation and risk assessment:

- Firms are subject to various statutes of limitations (tax, civil, commercial, etc.): it is ambitious to harmonise a recording duration without harmonising first these (see § 4).
- Communication recording serves as an element of proof in client's disputes and to answer supervisory requests from regulators, tax authorities, etc.; they also serve in the fight against fraud and market abuse. These various utilisations do not necessarily converge towards a single recording timeframe.
- Firms balance the usefulness and cost of communication recording against the use of other records they have of an order received, transmitted or executed, i.e. issues (especially litigations) are not generally resolved thanks to communication recording, there are other proofs, often of lot more valuable, that can be used (termsheets, written orders, trade advices and confirmations, etc.). Also, five years after the facts, communication recordings can be very difficult to make sense of because people do not remember elements of context that are essential to the understanding of the recording.
- Depending on their assessment of their businesses' risks and their complaints history, firms make a trade-off between the legal risk of not keeping the tapes over a given period of time and the probability of a query received after that. The result of this trade-off varies among firms since they have different businesses (with a shorter or longer lifecycle): some keep phone conversations longer (5 years) than others (the minimum is 6 months in France).
- The extraction of data from records is time and resource consuming and difficult to achieve when the data is spanned across a long period of time. Firms need to have in place a good archiving process with indexation to be able to find the information needed among 5 years of data[1]. There exist tools that some regulators use that can help search for some specific words – these tools are not used by firms today.

[1] It is questionable whether all firms subject to a 5 year recording requirement would have such organisation in place, and therefore whether their records would be usable.

- Phone conversations may contain personal information (from clients and employees) and may not relate exclusively to the transaction at stake; there are therefore some privacy issues to consider in keeping them for a long period. Firms are under the strict obligation to be able to justify their recording durations to the authority enforcing data privacy laws (in France, CNIL); any recording duration above a minimum set by law would have to be thoroughly justified by a purpose that is not excessive and arbitrary but is adequate, legitimate and explicit.
- As for requests received from competent authorities for market surveillance, they generally take place within 6 months of the trade and, as mentioned by CESR, competent authorities can request that the data be recorded indefinitely. In addition, the competent authority in France is limited by law in its investigation of potential market abuse to facts no older than three years (*Code monétaire et financier, art. L. 621.15 I*). Two years of recording out of the five years required would therefore be of no use for the competent authority.

23. Considering these various aspects and the need for harmonization across the EEA, AMAFI's view is that the recording retention should be set at 6 months with the possibility for firms to extend it to 5 years depending on their business model and risk assessment.

This would allow firms with activities of a shorter life-cycle or that are rarely exposed to client disputes to rely on a recording duration of six months, while enabling other firms with a longer business life-cycle (for e.g. structured financing) or that are more exposed to client disputes to set the duration at five years. Firms could also retain a record, initially planned to be kept for six months, five years if warranted (by an outstanding client dispute for e.g.).

This requirement should be worded in such a way though that firms who would decide to keep records for five years could not be subject to sanctions by data privacy authorities who could have a different interpretation of the legitimacy of the purpose of the recording (see penultimate bullet of § 22).

- **Question 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.**

24. No further clarification is requested from CESR.

- **Question 10: In your view, what are the benefits of a recording requirement?**

25. Recording can be part of the audit trail (especially for firms conducting their business over the phone or the Internet) and harmonization of recording rules at EU level is of special importance to help deter market abuse as explained in § 4 to 7.

- **Question 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 costs.**

26. One-off installation costs for fixed line telephones, for a mid-size firm is EUR 300 per user, and for a small firm EUR 500 per user. For electronic communication, it amounts also to EUR 500 per user for a small firm.

Ongoing costs are not always easy to distinguish from bundled price offers. One estimate, for a small firm is EUR 250 per user for a retention period of one year.

However, please note that these costs may differ dramatically depending on the number of lines/desks recorded. In addition, the figures provided represent only partially the costs incurred since they do not include the costs of the personnel involved for maintenance, indexing, data retrieval and record destruction. It does not include the redundant costs that are sometimes incurred to maintain an old technology afloat to be able to read old records nor the cost of the compliance personnel needed to deal with privacy issues, to authorise the listening/viewing of the records and to find the relevant data.

Costs per user (in €)	One-off installation costs	Ongoing annual costs
- Fixed line telephones	300-500	250
- mobile phones	n.a.	n.a.
- electronic communications	500	

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

27. The extension of the retention period from six months (as is actually the case in France) to five years would create an additional cost of EUR 1,000 per user for a large firm, without including the maintenance costs.

Please also note that the ability to find data in five years of recording requires the use of resources both on the part of firms but also competent authorities, as it is a very time-consuming task.

Part 2: Execution quality data (Art 44(5) of the MiFID Level 2 Directive)

- **Question 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?**

28. AMAFI is of the opinion that all of these data are useful. There are other criteria though that are of importance as well to select a trading venue (like post trade costs associated to a venue), hence the list set by CESR should not result in restricting the criteria that firms can consider.

29. Also, each firm is free, in its execution policy, to select and sort the criteria it considers to assess best execution, which may not include all the criteria listed by CESR, because some may be of little importance (and others, not mentioned, of greater importance) depending on the clients and businesses of the firm. Hence, the list of criteria set by CESR should not become of mandatory use by firms.

- **Questions 14 and 15:**
  - **14. How frequently do investment firms need data on execution quality: monthly, quarterly, annually**
  - **15. Do you believe that investment firms have adequate information on the basis of which to make decisions about venue selection for shares?**

30. AMAFI considers that firms obtain adequate information to enable them to make effective decisions about venue selection but some of the data are not harmonized across venues making the comparison more difficult.
Also, AMAFI does not believe that taking the US Rule 605 as an example is adequate as the EEA market structure is very different.

Firms should have data available at least annually but could obviously monitor the appropriateness of their venue selection more regularly if they wish to.

- **Question 16: Do you believe investment firms have adequate information on the basis of which to make decisions about venue selection for classes of financial instruments other than shares?**

31. The venue selection is not an issue for other instruments traded OTC. For listed derivatives, there is generally only one venue for the type of derivative concerned, hence the venue selection is not an issue either.

- **Questions 17, 18 and 19**

  - **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?**

  - **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 requirement to produce the reports on a quarterly basis?**

  - **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.**

32. AMAFI is in favour of the first option proposed by CESR whereby it would identify a set of criteria that it would define precisely. By harmonising the definition of some of the data used today, it would remedy to the lack of consistency across data published by different data providers and venues and would ease the comparison between venues.

The publication of such standard will certainly constitute a natural incentive for venues to use them.

- **Question 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? If not, why not?**

33. AMAFI agrees with CESR, especially since, for other financial instruments, the volume dealt with by execution venues is not commensurate or representative of the market on theses instruments.

Part 3: MiFID complex vs non complex financial instruments for the purposes of the Directive's appropriateness requirements

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

34. One general comment is that the definition of complex financial instruments seems to build both on the notion of complexity as such and on the one of risk. These two notions are not interchangeable though, as some very simple products can be risky and some complex products can be low risk. This is disturbing since firms have to interpret the complexity of some financial instruments (article 38 of MIFID level 2 and, with CESR's proposal, bonds or money market instruments "*that incorporate a structure that make it difficult for the client to understand the risk involved*"). It would be useful for CESR to clarify its position on this.

- **Questions 22 and 23 :**
  - **22. Do you have any comments on the proposal from some CESR members that ESMA should work towards the production of binding Level 3 standards to distinguish which UCITS should be complex for the purpose of the appropriateness test?**
  - **23. What impact do you think CESR's proposals for change would have on your firm and its activities? Can you indicate the scale or quantify of any impact you identify?**

35. AMAFI has no comment, asset management being outside of its scope.

Part 4: Definition of personal recommendation

- **Question 24: Do you agree with the deletion of the words 'through distribution channels or' from Article 52 of the MiFID Level 2 Directive?**

36. AMAFI agrees that the communication channel used to communicate information to clients cannot determine alone that this information is not a personal recommendation. However, the terms "distribution channels" are not used in article 52 to refer only to a communication channel.

Actually, this notion is first used in MiFID in relation to investment research in article 24-1 of MiFID Level 2 : "*For the purposes of Article 25, 'investment research' means research or other information recommending or suggesting an investment strategy, explicitly or implicitly, concerning one or several financial instruments or the issuers of financial instruments, including any opinion as to the present or future value or price of such instruments, intended for distribution channels or for the public (…)*"

Recital (28) of MiFID Level II indicates that investment research is a sub-category of the type of information defined as a recommendation in Commission Directive 2003/125/EC, which in turns defines distribution channels in its article 1(7) as "*a channel through which information is, or is likely to become, publicly available. 'Likely to become publicly available information' shall mean information to which a large number of persons have access*".

Hence, the terms "distribution channels" should not be equated to a means of communication (like the Internet); it also involves the targeting of a large number of persons. In other terms, the exemption as it is today can not result, as CESR seems to fear, in placing out of the scope of investment advice a recommendation that is sent via the Internet and is based on the consideration of the personal circumstances of the targeted client(s) (even when it is sent to a number of clients).

Also, the use of this exemption does not mean that further discussions that could result form the initial communication via a distribution channel could not fall within the definition of a personal recommendation.

As already mentioned in AMAFI's answer to consultation CESR/09-665 (see *AMAFI/09-62*), the onus should be put on whether or not the communication is based on the analysis of an individual's (or a group of individuals') investment needs.

If not, the consequence is that the difference between personal recommendation, other type of recommendation (like investment advice), information and advertising is blurred. As a result, firms find it difficult to set up procedures governing their communication with clients that can provide some legal and regulatory security. Also, the service of investment advice is denatured, as it could be provided incidentally, with no intention, and is then more akin to a general duty of advice to clients.

AMAFI therefore suggests that either the definition of "distribution channels" be added to MiFID, using the definition set in Directive 2003/125/EC, or that a mention be added at the end of the exemption such as: "A recommendation is not a personal recommendation if it is issued exclusively through distribution channels or to the public, **and is not based on consideration of the criteria used to assess suitability**".

37. Also, such deletion could have a knock-on effect on investment research, because it is defined as a recommendation that is intended to distribution channels and therefore falls rightly out of scope of investment advice thanks to the current exemption. Removing the exemption would create concerns among firms that investment research could then be considered as a personal recommendation, whereas the current exemption makes it clear that it is not.

If CESR were to maintain its proposal to delete the exemption, then AMAFI suggests that it should be added that "A recommendation is not a personal recommendation if it is issued exclusively to the public **or if it is investment research as defined in article 24-1**".

Part 5: Supervision of tied agents and related issues

- **Questions 25, 26 and 27:**
  - **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?**
  - **Do you agree with the proposed amendments to Articles 23, 31 and 32 of MiFID?**
  - **Could you provide information on the likely impacts of the deletion of the ability of tied agents to handle client money and financial instruments?**

38. AMAFI has no comment on the actual use of tied agents which is not widespread in France.

Having said that, the Association had in the past (notably in its response to CESR's consultation on the passport under MiFID in February 2007) pointed out certain difficulties resulting from the fact that the use of tied agents was not necessarily authorised in all member States. The main difficulty was with respect to the fulfilment of the publicity obligations and the access to information on the use of tied agents for the clients. Therefore it welcomes CESR's proposals which aim at harmonizing further the rules on the use of tied agents.

Part 6: MiFID Options and Discretions

- **Question 28: Do you agree with the suggested deletions and amendments to the MiFID texts proposed in this chapter?**

39. AMAFI agrees.