

**IBF RESPONSE TO CONSULTATION PAPER 38:
Telephone Records and Electronic Communications under the European
Communities (Markets in Financial Instruments) Regulations 2007**

18th September 2009

Irish Banking Federation is the leading representative body for the banking and financial services in Ireland, representing over 60 member institutions, including licensed domestic and foreign banks and institutions operating in the financial marketplace here.

IBF welcomes the opportunity to respond to the Financial Regulator's consultation on Telephone Records and Electronic Communications under the European Communities (Markets in Financial Instruments [MiFID]) Regulations 2007. IBF have contributed to the discussions on MiFID most notably on the Regulations and the Guidance Document, *Feedback on Discussions of Conduct of Business Industry Working Group*, published by the Financial Regulator. Thus we believe industry input is critical to the continued smooth operation of MiFID and the MiFID Regulations 2007 therein.

Regulatory Impact Analysis (RIA)

IBF believes that a Regulatory Impact Analysis (RIA) should be conducted on the impact of the proposed Regulation 40(6). As set out in the Revised RIA Guidelines issued by the Department of An Taoiseach in June 2009, an RIA should be conducted at an early stage and before a decision to regulate has been taken. Ideally, an RIA should be used as the basis for consultation and should involve a detailed analysis to ascertain whether the new Regulation will have the desired impact. It would help to identify any possible side effects or hidden costs associated with the proposed Regulation 40 (6) and to quantify the likely costs of compliance. We also note that the Consultation Paper does not give evidence of an existing regulatory gap in relation to the recording and record retention of client

communications, and thereby a reasonable basis for introducing regulation in the area.

Existing Practices

As set out in the Consultation Paper, certain MIFID firms were subject to obligations regarding telephone records prior to the implementation of the MIFID Regulations. These obligations were set out in the Irish Stock Exchange Rulebook and the Handbook for Investment and Stockbroking Firms. However, other entities subject to MIFID, including credit institutions, would be subject to these telephone recording obligations for the first time. In particular, credit institutions retail banking operations would be subject to the proposed Regulation 40 (6) in respect of situations where they arrange orders in branches for MIFID products and/or services. It is likely that significant costs will be incurred in implementing or adapting recording and retrieval systems.

Firms providing MiFID services and products generally have protocols in place regarding the recording of client communications as a matter of good business practice in the event a dispute may arise. Thus firms already have established procedures and systems in place for recording client communications that are appropriate to the firm's size and nature of their business. However, the proposed Regulation 40 (6) may require changes to these procedures and systems which may impact significantly in terms of costs.

Costs

Credit institutions have already expended notable resources in implementing the MiFID Regulations in 2007. Significant changes were required to systems, procedures, and documentation in implementing MiFID which gives investors notable added protections such as suitability and best execution.

We note also that in the current changed environment, firms are more sensitive to costs particularly where no RIA is conducted that articulates a clear rationale behind the proposed measures and that links proposed costs to perceived benefits.

Recording mobile phone calls is particularly costly. We also believe that the retention period outlined by the Financial Regulator of two years requires further examination and that six months would appear to be a more proportionate timeframe.

Conclusions

To conclude, an RIA is necessary to ascertain the precise impacts of the proposed Regulation 40 (6) on *all* firms and how these impacts can be related to the perceived benefits.

Not all firms providing MiFID products and services are ISE members and already subject to client communications recording obligations. While firms may have established communications recording systems and procedures as a matter of business practice, Regulation 40 (6) may involve costly changes to these. The significance of such costs is heightened in the current environment.

MiFID is expected to be reviewed by the European Commission in 2010. Any proposal for additional regulations at a national level should be considered fully in this context and rigorously analysed in terms of costs and perceived benefits.

Proposed Regulation 40 (6):

Effective from 1 May 2010, MiFID firms should record all telephone calls (including mobile phones) and electronic communications involving client orders. These records must be maintained for a period of at least 2 years and until the record is no longer of any relevance to any complaint, disciplinary action or investigation.