

Bundesverband der Wertpapierfirmen an den deutschen Börsen e.V.
Börsenstraße 14, D-60313 Frankfurt am Main

CESR

The Committee of European
Securities Regulators

11-13 avenue de Friedland
75008 Paris

your reference

CESR/04-317 and 323

your message of

city_date

Frankfurt Main, 29.07.2004

Call for evidence on the second set of mandates from the European Commission on the legislative measures to implement the Markets in Financial Instruments Directive (2004/39/EC)

Ref.: CESR/04-317 and 323

Dear Sir, dear Madam,

the Bundesverband der Wertpapierfirmen an den deutschen Börsen e.V. (Federal Association of Securities Firms on the German Stock Markets – a Registered Association) is a nationwide association of securities trading firms and authorised stockbrokers in Germany.

Our members are investment firms active in securities trading and broking in equities, bonds, and derivatives, executing orders on behalf of professional clients or trading for own account as well as acting as market personnel on regulated markets or MTFs, promoting continuous trading and providing liquidity in stocks and bonds traded on floor-based and electronic trading systems.

The members of the Association are made up of the former Bundesverband der Finanzintermediäre an den deutschen Wertpapierbörsen (BFI) and the Bundesverband der Wertpapierhandelsfirmen (BWF) under which names petitions to the EU Commission and the European Parliament concerning the revised ISD (MiFiD) were sent until the end of 2003.

The bwf expressly welcomes the fact that CESR has launched a call for evidence on the second set of mandates from the European Commission on the legislative measures to implement the Markets in Financial Instruments Directive (2004/39/EC) providing the opportunity for interested parties to express their views at an early stage on technical measures with regard to the implementation of the Directive.

**Bundesverband der Wertpapierfirmen
an den deutschen Börsen e.V.**

*Federal Association of Securities Trading
Firms at the German Stock Markets –
a registered association*

Registered Seat
Fasanenstraße 3
D-10623 Berlin

Postal Address & Office
Börsenstraße 14
D-60313 Frankfurt/Main

Tel.: +49 (0) 69 92 10 16 91
Fax: +49 (0) 69 92 10 16 92
mail@bwf-verband.de
www.bwf-verband.de

Managing Board
Claus-Jürgen Diederich (Chairman)
Dr. Jörg Franke
Dirk Freitag
Kai Jordan
Klaus Mathis
Ralf Nachbauer
Rolf Voges

Secretary General
Michael H. Sterzenbach
m.sterzenbach@bwf-verband.de

Legal Adviser
Dr. Hans Mewes
Herrengarten 31, D-20459 Hamburg
Tel.: +49 (0) 40 36 80 5 - 132
Fax: +49 (0) 40 36 28 96
h.mewes@bwf-verband.de

Banking-Account
Deutsche Bank PGK Frankfurt
Swift: DEUTDEFFXXX / DEUTDEDBFRA
Bank Code: 500 700 24
Account: 0 18 32 10 00

The bwf furthermore entirely agrees with the key objectives set by the European Commission that CESR's advice should be guided by the leading principles of protection of investors, market integrity and the promotion of fair competition among different trading venues. In this context, we strongly support the European Commission's rationale that possible implementing measures should strike the "right balance", that excessive intervention in respect of the management and organisation of the investment firms should be avoided accordingly and the amount of detail included in the advice should be carefully evaluated case by case.

However, based on the recently published consultation paper (Ref.: CESR/04-261b) as a result of CESR's first set of mandates on advice on possible implementing measures on the Directive 2004/39/EC on Markets in Financial Instruments, we have considerable doubts that these goals can be achieved without giving the objective of flexibility and appropriateness significantly more attention.

Not only from the perspective of small and medium sized investment firms the proposed provisions presented in the consultation paper quite often appear to be overly detailed, to define maximum- rather than minimum standards and as a result leave almost no space for sufficiently flexible level 3 adjustments.

Therefore, while we appreciate the efforts undertaken by CESR in order to design a comprehensive framework of implementing measures, we would prefer it, if CESR, within its second set of mandates on MiFiD, would have a stronger focus on developing universally applicable *criteria* for appropriate implementation of a particular article rather than to anticipate the level 3 process in detail.

Besides this very general remark, we would like, at this early stage of consultation, to present very briefly our thoughts on some material aspects, with respect to the individual articles on which CESR is requested to give technical advice:

3.3.2.1. Suitability test (article 19(4)) and

3.3.2.2 Information about the client knowledge and experience in the investment field (article 19(5))

According to CESR's draft level 2 advice on article 19(3) (Information to clients) it should be made clear that a suitability test in the form of obtaining information regarding the client's or potential client's knowledge and experience in the investment field is neither necessary nor appropriate in the course of providing investment services to professional clients. Therefore, it should be made clear that these provisions would apply to retail clients only.

3.5. Limit orders display (article 22(2))

In this context, it should be clarified that the rule is not applicable for investment firm executing orders which they receive in the course of

acting as a market personnel on a regulated market or MTF. Respectively that routing a limit order to a regulated market or MTF, from the perspective of a market personnel, can be regarded as “expressly instructed” by the client transmitting the limit order that he wants it to be executed at this particular trading venue.

3.7.2.2 The determination of Standard Market Size/Classes of shares (article 27(1&2))

It is suggested that a revision of the calculation of the standard market size should take place on an annual basis and that the time period that should be taken into account for calculating the average size should be linked to the revision period.

In our view, since the definition of the revision period and definition of the time period to be taken into account for calculation follow different aims, the proposed link does not seem to be very convincing. While the definition of a regular revision period has to strike the balance between the objective that the definition of a standard market size in a particular class of shares reflects the prevailing market conditions on the one hand and the anticipated burden on systematic internalisers to adjust their system infrastructure on the other, the purpose of defining the time period for calculation is to set a statistical sample size.

Since the sample has to be large enough to deliver significant results but should reflect the prevailing market conditions as accurately as possible at the same time, it might be even deemed appropriate to define different timeframes with shorter observation periods for high liquid stocks and longer ones for less liquid classes.

3.7.2.5 Withdrawal, updating and protection against multiple hits (27 (3&5))

When providing technical advice on allowing systematic internalisers to withdraw or update their quotes as well as to protect them against multiple hits, it should be kept in mind that granting open access to the internalisers’ quotes for all market participants in a non discriminatory way is a central pillar of the transparency regime by opening up the systematic internalisation liquidity pools for interaction with the overall market.

Since systematic internalisers are in direct competition with regulated markets and MTFs and therefore compete with other investment firms acting as market personnel at those markets, we would like to ask CESR to ensure that those standards developed for systematic internalisers should by no means fall below comparable performance requirements

for investment firms acting as liquidity providers on regulated markets or MTFs.

Based on the arguments presented above, we respectfully ask CESR to take our considerations into account when drafting its technical advice on possible implementing measures on the Directive on Markets in Financial Instruments.

Yours faithfully

Michael H. Sterzenbach
Secretary General