



Jean-Paul Servais
Chair, Investor Protection and Intermediaries Standing Committee
Committee for European Securities Regulators
11-13 avenue de Friedland
75008 Paris
France

By on-line submission

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Dear Jean-Paul

Consultation Paper: CESR Technical Advice to the European Commission in the Context of the MiFID Review – Investor Protection and Intermediaries (Ref: CESR/10-417)

Thank you for the opportunity to provide comments in relation to CESR's work on aspects of MiFID relating to Investor Protection and Intermediaries. We have set out below our views in relation to execution quality data (questions 13-20), in addition to our observations with respect to the best execution obligation as set out in article 21 of MiFID Level 1 Directive. We would be happy to discuss our response in more detail with CESR or provide such data as CESR may require.

By way of background, BATS Trading Limited¹ ("BATS Europe") is based in the UK and is authorised and regulated by the UK Financial Services Authority ("FSA") as the operator of a Multilateral Trading Facility ("MTF").² BATS Europe operates an Integrated Book (for displayed orders and non-displayed Large in Scale orders), a Dark Book (for non-displayed orders that match at an externally generated reference price) and an Order Routing Facility so that orders which are not filled on the BATS Europe order books may be routed to other execution venues.

Part 2: Execution quality data (Art 44(5) of the MiFID Level 2 Directive) – questions 13-20

In the Consultation Paper, CESR poses the question of whether regulatory intervention is required to ensure that necessary information is available to enable investment firms to select execution venues to include in their execution policies for the purpose of the MiFID best execution obligation.

¹ BATS Trading Limited is a fully owned subsidiary of BATS Global Markets Inc. Owners of BATS Global Markets Inc include affiliates of Citigroup, Credit Suisse, Deutsche Bank, GETCO, JPMorgan, Lime Brokerage, Morgan Stanley, Merrill Lynch and Wedbush.

² BATS Europe launched its market for the trading of pan-European equity securities on 31st October 2008 and regularly matches more than 10% of the notional value traded in FTSE 100 securities and 5-7% of other major European indices.



As trading has fragmented across multiple competing venues and become more pan-European in nature, there has been increased demand for additional types of data. We agree that it is important that tools are made available to investment firms to ensure that they can compare execution venues and make decisions on which to include in their execution policies, in addition to monitoring the effectiveness of those execution venues. Similarly, we would agree that investors require data to evidence the effective functioning of the best execution obligation.

BATS Europe, for example, has sought to improve the level of data available to market participants by making publicly available and free of charge real-time pre- and post-trade data feeds, in addition to near real-time analytical information, including in relation to market share and price improvement statistics.³ We would note that – even in the absence of specific regulatory requirements – execution venues are clearly incentivised in a competitive environment to make public information relating to execution quality and the performance of the venue. We would also note that market forces have developed solutions to provide information to market participants (for example, services provided by vendors such as Fidessa and Thomson Reuters).

Whilst standardisation would bring benefits with respect to the ease with which different execution venues can be compared, we believe that there is generally a good level of information currently provided to markets participants on which execution venue selection decisions may be made. We would also highlight the significant amount of discretion in the best execution obligation, which means that a narrowly defined comparison of execution venues would probably be inconsistent with the broader best execution policies utilised by investment firms to manage their interaction with their clients. Therefore, **whilst we can see some benefit in key metrics of execution quality data being defined for voluntary use by execution venues, we do not consider that the costs of mandating their use would outweigh the benefits.**

With respect to the proposal to replicate data currently required by SEC Rule 605, we think that it is important to take into consideration the different structure of the US equity market with respect to order protection and trade-through rules, and the mandated National Best Bid and Offer (“NBBO”) and consolidated tape (of completed trades). As an example, the lack of a single European Best Bid and Offer (“EBBO”) and consolidated European tape would complicate the provision of data relating to this reference price. We would contend that the lack of a reliable and reasonably priced consolidated view of European trading activity (against which execution quality can be measured) is a greater barrier to the comparison of execution venues than a lack of data provided by execution venues.⁴

³ See Annex for further details of information currently provided by BATS Europe. All information is provided free of charge on non-discriminatory terms.

⁴ We believe that the proposals made by CESR in the Equity Markets Consultation Paper (Ref: CESR/10-394) should go a long way to address concerns relating to the quality of post-trade data and to reduce barriers to consolidation. However, we have noted our concerns that the proposals will not necessarily address the issue of real-time costs.

Should CESR decide to define a set of execution quality data metrics for voluntary use by execution venues, we would urge CESR to do so in consultation with market participants and to ensure that such metrics are appropriate to the European market and market structure.

Operation of the best execution obligation

The best execution obligation – along with a comprehensive transparency regime that allows for the consolidation of data from multiple trading venues – is fundamental in mitigating any adverse impact arising from fragmentation. We appreciate that MiFID specifically included a review clause with respect to execution quality data and that CESR is currently conducting Level 3 work on the overall operation of the execution regime. However, in our opinion, it is not clear how broader concerns relating to the implementation and enforcement of the current MiFID best execution obligation will be resolved solely by imposing additional information publication requirements on execution venues.

The European Capital Markets Institute (“ECMI”) recently published a study entitled *The MiFID Metamorphosis*⁵ which uses data provided by Equiduct Systems⁶. This data demonstrates the proportion of trades that “missed” (or traded through) the best available price (figure 1) and the market share of the incumbent exchanges if orders were routed to achieve best execution, where best execution is defined as price only or as a combination of both price and exchange fees.

Whilst the MiFID best execution obligation is drafted to look at more factors than simply price, this – in combination with fees – will in many cases be a determining factor. A number of the new MTFs have lower fees/costs (e.g. transaction fees, membership fees, data fees, etc), lower clearing and settlement costs⁷ and increased execution speed, in addition to those MTFs representing a significant proportion of liquidity across a broad range of European securities.

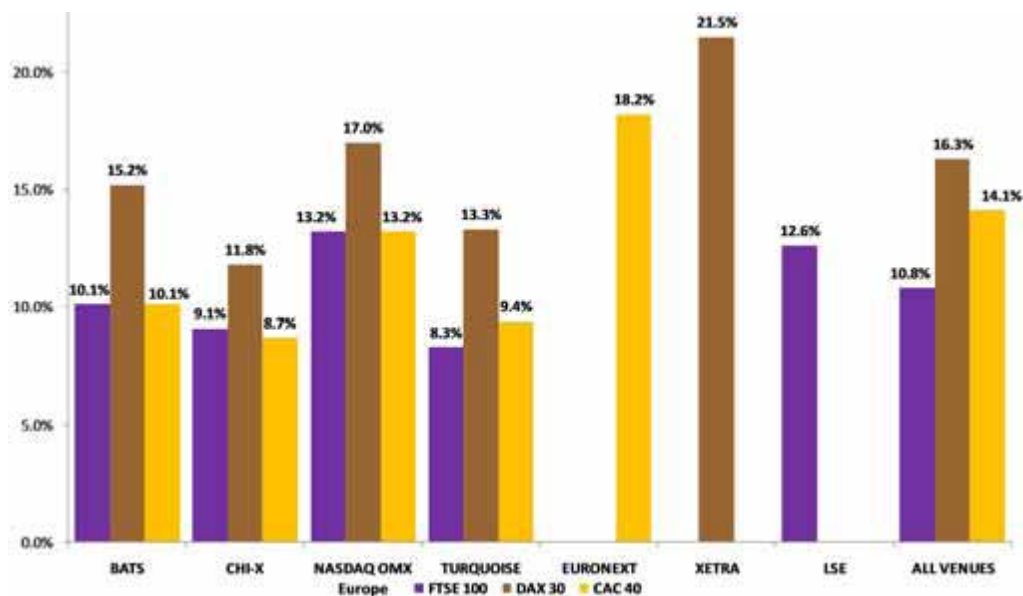
As a consequence, it is reasonable to assume that where one of these MTFs displays a better price than the incumbent exchange for a large number of orders best execution may likely be achieved by routing to the MTF. Whilst we recognise that investment firms will need to assess the nature of the order and weigh up any additional costs or benefits associated with trading on a particular venue, it seems unlikely that any other benefits associated with trading on the incumbent exchange or indeed costs associated with trading on the MTF will outweigh the price and cost improvement to the extent demonstrated by the data.

⁵ <http://www.ceps.eu/book/mifid-metamorphosis>

⁶ Description of Equiduct’s OrangeLFA product: <http://www.equiduct-trading.com/downloads/equiduct-orange-lfa-product-information-march-2009.pdf>

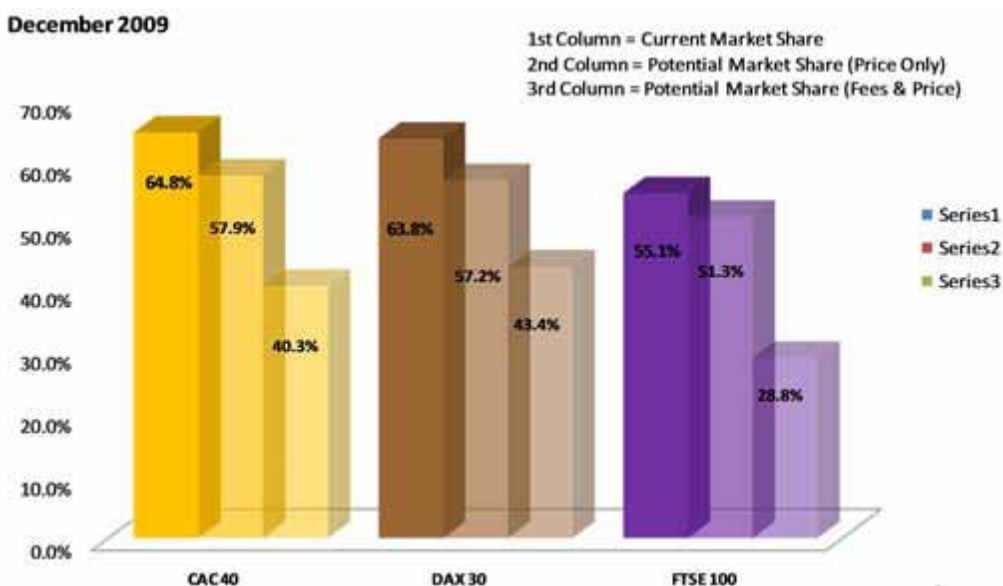
⁷ See recent Oxera report on the costs of securities trading and post-trading for UK equities (April 2010): <http://www.oxera.com/cmsDocuments/Reports/Costs%20of%20securities%20trading%20and%20post-trading%20April%202010.pdf>

Figure 1: Proportion of trades that missed the best price – December 2009



Source: ECMI study *The MiFID Metamorphosis* (original source: OrangeLFA Viewer – Equiduct Systems).

Figure 2: Incumbent market's market share under best execution routing – December 2009



Source: ECMI study *The MiFID Metamorphosis* (original source: Orange LFA Viewer – Equiduct Systems).



Based on its analysis, the ECMI concludes: “If we consider that under MiFID best execution for retail investors is mainly price and cost, this number gives evidence of the bad quality of execution for retail investors who mainly invest through systems only linked with incumbents and do not access advanced technologies.”

As noted above, there may be legitimate reasons why a firm does not route orders to the venue with the best price or best combined best price/lowest fees. However, whilst not a perfect measure, we believe that the high proportion of trades that “miss” or trade through a better price on a different venue and the current high market share of the incumbent exchanges compared with the measures of price only or price and fees combined implies that the best execution obligation is not working optimally.

We believe that this is more likely to be as a result of lack of clarity in the obligation, and inconsistent adherence to and enforcement of the MiFID best execution obligation. For example, firms basing routing decisions on historic market share. We would agree with comments made in Pierre Fleuriot’s report *The Review of the Markets in Financial Instruments Directive* (February 2010)⁸ that “[t]he MiFID provisions dealing with best execution raise interpretation difficulties that complicate its implementation and supervision of compliance”. **Given the importance of the best execution obligation in protecting investors and fostering market efficiency, we would be supportive of greater regulatory scrutiny of the way in which the best execution obligation has been implemented with a view to ensuring consistency between Member States.**

Yours sincerely

Anna Westbury
Head of Compliance and Regulatory Affairs
BATS Europe
P: +442070128914
E: awestbury@batstrading.com

BATS ... Making Markets Better

⁸ Pierre Fleuriot’s report *The Review of the Markets in Financial Instruments Directive (MiFID)* (February 2010): <http://www.eifr.eu/files/file4315653.pdf>



Annex – Data provided by BATS Europe

All data is made available free of charge on non-discriminatory terms.

MiFID transparency information (available through free market data feed)

- Real-time pre-trade transparency data
- Real-time post-trade transparency data

Market information (available on website)

- Current most active securities: http://www.batstrading.co.uk/market_data/current_most_active/
- Current book viewers: <http://www.batstrading.co.uk/book/>

Market share statistics (available on website)

- Consolidated view of trading volumes on all major European exchanges and MTFs on a 15 minute delay (updated every minute): http://www.batstrading.co.uk/market_data/
- Dark Book statistics: http://www.batstrading.co.uk/market_data/dark_pool/

Historical information (available on website)

- Daily, weekly, monthly and yearly volume reports (total and per symbol): http://www.batstrading.co.uk/market_data/volume/day/

Price improvement statistics (available on website)

- For each trade that occurs on BATS Europe, the price achieved by the aggressor is compared to the PBBO and the improvement (or disimprovement) of notional value achieved is recorded: http://www.batstrading.co.uk/market_data/price_improvement/
- This data is made available by market or index and can be viewed by notional values or bps (for the current day or historical data)
- Explanation of price improvement methodology: http://www.batstrading.co.uk/market_data/price_improvement/help/

Pricing Schedule (available on website)

- All fees and charges are contained in the Pricing Schedule: http://www.batstrading.co.uk/resources/participant_resources/BATSEuro_Pricing.pdf
- Note: BATS Europe only charges transaction fees, and does not charge for membership, order entry and market data ports or testing

System performance statistics (available on website)

- Overall latency for the system and methodology for calculating those figures: www.batstrading.co.uk/resources/participant_resources/BATSEuro_Latency.pdf