



October 1, 2004

**Via CESR's website:** [www.cesr-eu.org](http://www.cesr-eu.org)

The Committee of European Securities Regulators  
17 Place de la Bourse  
75082 Paris Cedex 02  
France

**Re: CESR's Advice on Possible Implementing Measures of the  
Directive 2004/39/EC on Markets in Financial Instruments  
Ref: CESR/04-261b (17 June 2004)**

Ladies and Gentlemen:

Bloomberg L.P. ("Bloomberg") and Bloomberg Tradebook Europe Limited ("Bloomberg Tradebook Europe") appreciate the opportunity to comment on CESR's Consultation Paper presenting its advice to the EU Commission (the "Commission") on possible implementing measures of the Directive 2004/39/EC on Markets in Financial Instruments (the "MiFID Directive").<sup>1</sup> Following upon our letter to CESR of September 16, 2004 commenting on the Consultation Paper, this letter offers our comments on CESR's draft technical advice to the Commission regarding best execution and market transparency.

## **INTRODUCTION**

We believe CESR made the correct decision in extending the original comment period for the Consultation Paper on CESR's separate consultation on best execution and its proposals on market transparency.<sup>2</sup> We agree with CESR that best execution and order handling are interrelated. We have accordingly chosen to combine our comments regarding Article 22 with those regarding Article 21.

As a prelude to our responses to CESR's specific questions in the Consultation Paper, we briefly discuss below Bloomberg's position on certain key issues with respect to best execution and order handling.

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<sup>1</sup> Ref: CESR/04-261b (17 June 2004).

<sup>2</sup> Ref: CESR/04-300 (17 June 2004).

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Level 1 Principles regarding Best Execution and Order Handling. Bloomberg supports the fundamental principles and the objectives set forth in Articles 19, 21 and 22 of the MiFID Directive. In defining best execution, Article 21 emphasizes process rather than price and correctly identifies the key elements of that process: (i) establishing and implementing an order execution policy; (ii) informing clients about that policy; (iii) reviewing the performance of execution venues; (iv) monitoring the performance of execution venues; and (v) keeping clients informed. That process is consistent with the increased number of trading venues and increased competition among market centers that will accompany the decision of the Commission, the Council and the Parliament to establish a comprehensive regulatory framework governing the organised execution of investor transactions by exchanges, other trading systems and investment firms.<sup>3</sup>

We think Article 21 correctly balances the issues. As important as defining best execution, for example, is the need to recognize, as Article 21 does, that an investment firm meets its duty of best execution when it correctly follows execution instructions given it by a professional investor customer.

Article 22 of the MiFID Directive, identifies the key principles, avoiding conflicts of interest and placing the investor's order first. We point out, though, that achieving best execution requires ready access to accurate, comparable, consolidated real-time data from all market centers as well as ready access to the markets themselves to execute trades and post-trade information to track and monitor execution performance. For that reason, the standards for best execution are necessarily linked to achievement of the MiFID Directive's key objectives of pre-trade transparency and open market access.

The application of Article 21 and Article 22 to investment firms receiving and transmitting orders. We agree with CESR's analysis that the requirements concerning best execution and the prompt, fair and expeditious execution of client orders under Articles 21 and 22(1) are more specific applications of the requirements under the general principle of Article 19(1). We note, however, that the requirements of Articles 21 and 22(1) attach specifically to investment firms which "execute orders". The MiFID Directive also draws a clear distinction between investment firms that execute orders and those that receive and transmit them. Indeed, these are separate and distinct investment services in Annex I, Section A to the MiFID Directive. The distinction is reflected in business practice. Many investment firms passported under the current ISD are authorized to receive and transmit orders without being authorized to execute orders.

Applying Articles 21 and 22 to investment firms that receive and transmit orders also would raise the issue of duplication of regulation. In cases where several

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<sup>3</sup> See IP/02/1706 (19 November 2002).

investment firms are involved in processing a client order, we think the duty of best execution should be tailored so that the intermediate firms that handle the client's order should not have any duty beyond monitoring the quality of execution achieved by the investment firm that executes the order.

*The distinction between retail and professional clients.* In the mandates addressing both Article 21 and Article 22, DG Internal Market has requested that CESR take into account the retail or professional nature of the client. In response, CESR has invited comments on the levels of regulatory intervention appropriate for addressing the needs of retail and professional clients. We agree with CESR that its regulation should be stratified in a way that takes account of the differing sizes of investment firms and different types of financial instruments, as well as the nature and sophistication of an investment firm's clients. We therefore support, for example, CESR's current approach in its draft advice to the Commission, which is to recognize the difference between retail and professional clients in articulating the best execution duty.

*Grandfathering and transitional provisions.* We think CESR's solicitation of comments on grandfathering and transitional provisions for Level 2 is appropriate. Grandfathering ought to be considered, in our view, wherever the MiFID Directive differs significantly from the current ISD. That is particularly the case where the differences might disrupt an investment firm's settled business practices and relationships or its customer agreements, or would require significant changes to its business model.

*Level 3 under the Lamfalussy process.* We note that concurrently with its work on the MiFID mandates, CESR also issued for comment its consultation paper on the role of CESR at Level 3 under the Lamfalussy process.<sup>4</sup> We support CESR's decision to include in its Consultation Paper discussion and consideration of the scope and application of Level 3 analysis to aspects of the MiFID mandates. As CESR has recognized, more detailed consideration is properly the work of Level 3. It is at Level 3 that the CESR Review Panel will consider consistent transposition by Member State regulators and CESR will seek to embody common approaches into guidelines, recommendations or standards.

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<sup>4</sup> See *The Role of CESR at "Level 3" Under the Lamfalussy Process*, Consultation Paper (Ref: CESR/04-104b, April 2004).

## COMMENTS

### **3.4.1. Criteria For Determining The Relative Importance Of The Different Factors To Be Taken Into Account For Best Execution (Article 21(1))**

#### QUESTION 1

Are the criteria described above relevant in determining the relative importance of the factors in Article 21(1)? How do you think the advice should determine the relative importance of the factors included under Article 21(1)?

#### RESPONSE

CESR has identified the appropriate criteria. Best execution is a process and the elements that contribute to that process are subject to considerable fluctuation that requires the judgment of experienced executing brokers. CESR's advice provides reasonable guidelines for assisting executing brokers in exercising their judgment with respect to achieving the best possible result for their clients.

#### QUESTION 2

Are there other criteria that firms might wish to consider in determining the relative importance of the factors? Do you think that the explanatory text clearly explains the meaning of all the different factors in respect of the different financial instruments?

#### RESPONSE

We believe the explanatory text is as clear as it can reasonably be.

### **Questions Regarding 3.4.2. Trading Venues To Be Included In The Order Execution Policy (Article 21(2))**

**And**

### **3.4.4. Obligation To Monitor And Update The Order Execution Policy (Article 21(3))**

#### QUESTION 1

What investment services does your firm provide?

#### RESPONSE

Bloomberg Tradebook Europe is an investment firm authorized to receive and transmit orders by the U.K. Financial Services Authority. Bloomberg Tradebook Europe does not offer or provide any execution services and does not access market venues.

**Questions Regarding 3.4.3 Information To Clients On The Execution Policy  
Of The Firm (Article 21(2))**

QUESTION 7

Should the information provided by portfolio managers and firms that receive and transmit orders be different from that provided by brokers? What are the key differences?

RESPONSE

With respect to firms that receive and transmit orders and that do not provide execution services to their clients, we would respectfully suggest that compliance with CESR's proposed implementing measures under Article 19(2) and 19(3) and the proposed reporting requirements under Article 19(8) — requiring investment firms that receive and transmit orders to make clear to their clients the scope of their service — would be appropriate and sufficient.

**Questions With Regard To Client Order Handling -- Article 22**

QUESTION 1

Do you agree with the definition of prompt, fair and expeditious execution of an order from a client? Do you think that it is exhaustive? If not, can you suggest any elements to complete this concept?

RESPONSE

The best execution duty grows out of any situation in which an investment firm has fiduciary or similar duties in relation to the execution of a client's order. The duty should require an investment firm to use commercially reasonable efforts to achieve best overall price for its customers. In the case of large orders, for example, the techniques used may well differ from those that a small order would call for. Introducing firms should evaluate what order-routing alternatives are available and should make sensible choices in obtaining access to those alternatives. Where a professional client has given specific and/or detailed instructions as to how or where its order is to be executed, an investment firm should follow those instructions faithfully.

**Questions Regarding Section III.B — Market Transparency**

Q.12.1.

Do consultees agree with the specific proposals as presented or would they prefer to see more general proposals?

RESPONSE

Setting standards for market transparency requires specific and even detailed proposals of the kind CESR has offered. This is an area of regulation in which it is necessary to ensure that market participants provide essential and timely data in a format sufficiently standardized to facilitate “comparison shopping” by investors.

Q 12.2.

Is the content of the pre-trade transparency information appropriate?

RESPONSE

We believe it is. And we particularly wish to commend CESR for introducing measures that reduce or eliminate the incidence of hidden liquidity. Specifically, with respect to a regulated market or multi-lateral trading facility that runs a floor trading system, CESR’s proposals that “the bids and offers (quotes) of the market personnel should be displayed electronically on the floor” will help ensure transparency in floor-based order-driven markets.

Q 12.3.

Do consultees agree on the proposal regarding the depth of trading interest and access to pre-trade information?

RESPONSE

Again, we wish to commend CESR for proposals that we believe are essential for ensuring market transparency, in particular, proposals 7 and 10 in Box 12. Proposal 7 requires that a regulatee market or multi-lateral trading facility operating an electronic book “make available all bids and offers in the order-book, updated on a continuous basis.” That proposal will do for electronic order-driven systems what proposal 3 will do for manual order-driven markets. Proposal 10 further ensures transparency by requiring that “[a]n RM or an MTF should make available the same degree of pre-trade information to all its members, participants, investors or other interested parties.”

Q 12.4.

Do consultees agree on the proposed exemptions to pre-trade transparency?  
Are there other market models which should be exempted?

RESPONSE

We agree with CESR that it is appropriate to exempt crossing systems and iceberg orders from pre-trade transparency requirements.

Q 12.5.

Do consultees support the waiver for “crossing systems” as defined in paragraph 13? Could pre-trade transparency for crossing systems have a negative impact on liquidity or create the potential for abusive behaviour?

RESPONSE

The purpose of crossing systems is to facilitate the execution of block orders anonymously, thereby avoiding signaling to the markets the presence of a large order and increasing the risk of having the market move against the order. That purpose would be defeated if pre-trade transparency were extended to crossing networks. Accordingly, we support a waiver for crossing systems.

Q 12.7.

Do consultees have a preference for one of the options proposed for defining the block size, are there other methods which should be evaluated?

RESPONSE

Block size, for purposes of the ISD, should refer to a quantity of stock that exceeds the available, immediately executable liquidity on the contra side. Blocks typically require skillful handling to minimize market impact. Observed market impact, though, would be a difficult standard by which to determine block size since in a given case market impact depends in large measure on the techniques used to assemble the “other side” of a large transaction. It may well be that a sliding scale should be used, based on the average daily trading volume in all reporting markets, so that there would not a “one size fits all” definition. That would take into account the widely disparate amounts of liquidity that are available for different stocks. As we noted in our response to CESR’s Call for Evidence (Ref. CESR/04-323), block size should exceed standard market size. We are not able to determine at this point whether grossing up standard market size by some percentage would be appropriate in determining block size. If it would be useful to CESR, we stand ready to continue to provide technical support to CESR in developing models that could be used to determine block size.

Q 13.1.

Do consultees support the method of post-trade transparency (trade by trade information), should some other method be chosen (which)?

RESPONSE

Bloomberg supports the trade-by-trade provision of post-trade data.

Q 13.2.

Do consultees support the inclusion of “aggregated information” in paragraph 22 or should it be left for market forces to provide on the basis of the information disclosed under paragraph 21? If it is included what should the content be?

RESPONSE

Aggregated data is essential information that is important to investors in analyzing the market and making trading decisions. Provision of the data in elementary form should be required. CESR may leave to the markets the provision of more sophisticated variants.

Q 13.3.

Do consultees support the two week period for which the post-trade information should be available?

RESPONSE

It is not clear why CESR would set a two-week limit on the availability of post-trade data. Such data can be readily stored in electronic format and provide valuable inputs for analytics based upon historical data.

Q 13.4.

Should some minor trades be excluded from publication (and if so, what should be the determining factor)?

RESPONSE

Unless there is some technological barrier to providing the data, we do not believe there is any reason to exclude any trade from publication.

Q 13.5.

Do consultees agree on the method of defining the time limit in paragraph 24 and is the one minute limit capable of meeting the needs of occasional off-market trades?

RESPONSE

One minute in active trading market is a long interval, but we recognize there are practical limitations on reporting more swiftly. We believe nonetheless that CESR should look to whether a shorter interval could be mandated in the near future. Developments in technology should provide an opportunity to shorten the one-minute maximum considerably. Perhaps CESR should revisit the one-minute standard on a periodic basis.



Q 13.6.

Do consultees support the view that only intermediaries who have created a risk position to facilitate the trade of a third party should benefit from deferred publication or should all trades which are above the block size be eligible for deferred publication?

RESPONSE

The correct criterion for deferring publication of trade data is the risk that the market will become aware of the order and move against it. The fact that an order is facilitated by an intermediary does not by itself make it more likely that the market will move against it.

Q 13.7.

Should the identifier of a security be harmonized and if so to what extent? What should be the applicable standard (ISIN code, other)?

RESPONSE

To facilitate consolidation and comparison of prices prevailing in different trading venues, CESR should seek to establish as much standardization as possible of both pre-trade and post-trade data.

Q 13.8.

Should more information be available on stock lending? If so, which should be the content? Are there other similar types of activities which should be covered?

RESPONSE

To facilitate short sales, it would be useful to have readily available easy-to-borrow and hard-to-borrow lists of securities regularly posted and updated by investment firms that engage in securities lending.

Q 13.9.

Should CESR initiate work, in collaboration with the industry and data publishers, to determine how best to ensure that post-trade transparency data be disseminated on a pan-European basis?

RESPONSE

We recommend that CESR appoint an expert group to study how best to ensure that post-trade transparency data be disseminated on a pan-European basis. Pan European dissemination of post-trade transparency data would not only enhance the regulatory function,

but also would further unify the securities markets, increase access and, ultimately, liquidity and market efficiency. Based upon the findings of the expert group, we believe CESR should implement the initiative at Level 3.

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### **CONCLUDING REMARKS**

In closing, we wish to reiterate our support for the Lamfalussy process and the CESR's procedures for facilitating participation by interested parties in the Level 2 process. We hope our responses to CESR's Consultation Paper prove useful in its deliberations. If you should have any questions or would like additional information, please let me know.

Respectfully submitted,

*Stephen G. Baker* by R.D.B.