Per web-link http://www.cesr-eu.org/index.php?page=to_respond&id=86 sent to the Committee of European Security Regulators

CESR/ 07-050b

Dear Ladies and Gentlemen,

we take the opportunity to participate at the public consultation about “Best execution under MIFID”.

As a licensed non-profit institution who supports claimants of dubious investment consultants and finds specialised lawyers for the claimants the Deutsche Anlegerschutz Bund e. V. (DASB - the German Investor Protection Association) has the mainly intended purpose to clarify aspects of the “grey” capital market to the public, the police, justice and supervisory institutions. Further financial services and asset managers are tested for investors according their reliability. We consult aggrieved investors and fight nuisances. Besides the DASB co-operates with supervisory institutions and justice and comments on developments in the financial policy and pleads for investors rights.

From the point of view of DASB the best execution principle creates one of the crucial regulations of MIFID concerning investor protection. Although the best execution principle is also a cost factor being probably fully shifted to the client the effort taken for implementation of this principle should be adequate to its importance. As a consequence its implementation in detail should guarantee a fair relationship between the investment firm and the client being aware of its investment decision concerning chances, risks as well as alternative investment options.

Question 1: Do respondents agree with CESR’s views on:

a) **the main issues to be addressed in an (execution) policy? Are there any major aspects or issues that should ordinarily be included in an (execution) policy?**
b) **the execution policy being a distinct part of a firm’s execution arrangements for firms covered by Article 21?**
c) **the execution policy under Article 21 being a statement of the most important and / or relevant aspects of a firm’s detailed execution arrangements?**

ad a)

DASB agrees on the main issues to be mentioned in the execution policy. As price and costs are considered as the most important aspects concerning the evaluation of execution options for retail clients as well as for professional clients the relationship between price/cost and other aspects concerning the quality of the execution and the choice of the execution venue should be made clear (at least to the retail client).

ad b) / c)

It is also our understanding that the execution policy should be understood as a general description or characterisation of the execution arrangements to be initiated by the investment firm in executing the clients orders. This consideration finds its affirmation in the wording of Article 21 of the Directive 2004/39/EC. As the word "policy" describes a more global approach of the implementation of client orders the word "arrangement" means the measures to be taken to realise the best execution principle in every singular case. Additionally the investment firm is not able to cover all possible measures to be taken within the client's information to give him a background for his choice of the investment firm.

According this understanding the execution policy is a distinct part of the execution arrangements. But as a matter of fact both terms are closely bound as the general approach of the policy can go that far that it has an direct effect on the execution itself. Correspondingly Art. 21 par. 3 of Directive 2004/39/EG requires to name the execution venues in the execution policy.

From the investors point of view it is necessary to remark that the differentiation of "execution policy" and "execution arrangements" should not have any consequences on the obligation regulated in Art. 21 par. 5 of Directive 2004/39/EC. According this regulation the investment firm has to prove to the client that his order has been executed in accordance with the firm's execution policy. As the client order always creates a singular case of execution of the execution arrangements are part of this information to be delivered to the client. Otherwise it would not be consistent that Art. 21 par. 4 of Directive 2004/39/EC establishes the obligation to inform the client about changes of execution arrangements. According this regulation he has access to such information anyway. Consequently he should get this information also on his request after Art. 21 par. 5 of Directive 2004/39/EC.

Question 2: For routine orders from retail clients, Art. 44 par. 3 requires that the best possible result be determined in terms of the "total consideration" and Recital 67 reduces the importance of the Level 1 Article 21 (1) factors accordingly. In what specific circumstances do respondents consider that implicit costs are likely to be relevant for retail clients and how should those implicit costs be measured?

DASB fully agrees that price and costs are major aspects of the retail clients interest in relation to the speed and likelihood of execution and settlement, nature and size of the order and other considerations. Indeed the amount of money to be invested is the decisive aspect for the retail client concerning his order. Aspects, when he becomes owner of the security and when the money has to be paid are of less interest. The same applies for the nature and the size of the order which will mostly have a limited extent. Nonetheless as soon as these aspects have a relevant influence on the price and the costs they should be beard in mind.

Contrary to Art. 44 par. 4 and Recital 71 of Directive 2006/73/EC the DASB is of the opinion that provisions and fees of the assigned investment firm itself should in every case be considered as implicit costs. These costs mostly cover a big proportion of the costs and are from the clients point of view caused by the execution of a clients order. Although the reason to exclude these costs is that investment firms should not be inhibited to fulfil orders because of their own provisions and fees the requirement for cost transparency should lead to an information of the client about provisions and fees in any case.

Question 3: Do respondents agree with CESR's views on the use of a single execution venue?

DASB agrees. In case of a single execution venue it should be outlined why this one single venue creates the best execution venue concerning all aspects of Art. 21 par. 1 of Directive 2004/39 /EC and in how far the weighing of these criteria lead to this choice. Also the factor and the influence of provisions and fees should be mentioned to avoid dishonest practices. Additionally a more frequent revision of other execution venues as options to execute client orders there should be considered.

Question 4: Do respondents agree with CESR's views on the degree of differentiation of the (execution) policy?

DASB fully agrees that types of clients, types of securities and their place of listing as well as the size of the order and other relevant aspects have an important influence on the best execution policy. Although price and costs stay one of the main aspects in best execution as described sub Question 1 ad a) a differentiation is absolutely necessary. For example the size of the order has a very big influence on the likelihood of execution at different execution venues dependant on liquidity of the ordered shares. As a consequence the execution policy should be sufficiently detailed concerning different types of orders and situations.

To have a broader perception of the clients the information about execution policy should consist of two parts: a concise description of the execution policy and a broader second part which relates to the different situations of orders to be executed. The choice of the investment firm should not be avoided by overloading the client with information he is not able to perceive and understand. On the other hand the interested client should be able to foresee how his order will be executed and by which process. Consequently a differentiated two-part information about the execution policy is appreciated.

Question 5: Do respondents agree that the appropriate level of information disclosure for professional clients is at discretion of investment firms, subject to the duty on firms to respond to reasonable and proportionate requests? On the basis of this duty, should firms be required to provide more information to clients, in particular professional clients, than is required to be provided under Art. 46 par. 2 of Level 2?

DASB agrees. The investor firm is not able to cover all interests and needs of professional clients related to their orders. As a consequence DASB follows CESR's attitude that professional clients should be informed on their request. This seems adequate as the professional client is considered to know which information is necessary to choose the right investment firm for his planned order.

Moreover the information of clients, i. e. retail and professional clients, should go that far that from an objective point of view the client is able to evaluate adequately how and under which preferred criteria according Art. 21 par. 1 of Directive 2004/39/EC the investment firm is executing his order dependant on the type of client, the type of the financial interest and the place where it is listed as well as the size of the order.

Question 6: Do respondents agree with CESR on how "prior express consent" should be expressed? If not, how should this consent be expressed? How do firms plan to evidence such consent?

DASB expressly contradicts to the understanding of CESR concerning the interpretation of the terms of "prior consent" and "prior express consent". Even though the wording of Art. 21 par. 3 and par. 4 seems to implicate a difference in the character of the consent of the client DASB sees the necessity to require a written consent of the clients in any case. Investments mostly involve sizeable sums from the clients point of view. To promote investor protection and to avoid unjustified claims against the investment firm a provable consent is necessary. Tacit consent as a result of behaviour is a circumstance which is not consistently interpretable. It requires an evaluation which also should bear in mind the information of the client about the consequences of his investment decision. As execution policy is a crucial information for the investment decision the consent should be given expressly in written form.

Litigation experience in lawsuits about liability because of incorrect investment consulting shows that even the signature of a legal significant declaration does not fully prove the circumstance that the declaration is in accordance with the real facts. A lot of investment firms require and get of clients a signature under the declaration to have received the prospectus although this has not been the case. This circumstance already shows that even written declarations are not a sufficient incident that the consent of the declaration is in accordance with the true course of events.

Question 7: Do respondents agree with CESR's analysis of the responsibilities of investment firms involved in a chain of execution?

DASB agrees to the CESR analysis of the responsibilities. As Recital 75 states a duplication of best execution efforts should be avoided. This would also lead to unnecessary further costs of execution which are passed down to the client.

Question 8: What core information and/or other variables do respondents consider would be relevant to evaluating execution quality for the purposes of best execution?

DASB considers a lot of variables as important as all those can have different impacts on the execution policy dependant on the concerned case of investment (criteria according Art. 21 par. 1 of Directive 2004/39/EC; quality of price formation, liquidity at the execution venue, details of the process of orders, mistrade-regulations, independence of trading survey etc.) who all have influence on best execution policy. To enable a suitable analysis for the order execution DASB suggests to establish a rating system which allows an adequate evaluation of the different execution venues concerning different characteristics.

We would welcome to see our views incorporated.

Best regards,

Klaus Nieding
Lawyer and President of the D.A.S.B. e. V.