



HVB Group



Bank Austria
Creditanstalt



HypoVereinsbank

**Comments of HVB Group
on
CESR's Draft Technical Advice on Possible Implementation Measures of the Directive
2004/39/EC on Markets in Financial Instruments**

HVB Group welcomes the opportunity to comment on CESR's Draft Advice.

HVB Group is the second largest private-sector bank in Germany and together with Bank Austria Creditanstalt the undisputed market leader in Austria. With over 60,000 employees, 2,062 branch offices and over 9.8 million customers, we are Number One in the heart of Europe - in our core markets of Germany, Austria and in the dynamic growth region of Central and Eastern Europe where we have positioned ourselves as a leading banking network. We focus on European retail and corporate customer operations, supplemented by customer-related capital market activities.

For further information about HVB Group, see www.hvbgroup.com

Preliminary remarks

HVB Group would again like to take advantage of the opportunity offered by CESR to provide its comments and answer the relevant questions to the draft advice text on Possible Implementation Measures of the Directive 2004/39/EC on Markets in Financial Instruments.

1. Chapter: Act Fairly, Honestly and Professionally (Art.19 (1) MiFID)

Question 1: *Do you agree with the proposed advice in this area, including the proposed limitations on the scope of the obligation?*

This version of CESR's proposed advice is advocated, with the exception of the comments made to question 2.

Question 2: *Do market participants consider that investment firms have to obtain the necessary information about the retail client's investment objectives in addition to his financial situation?*

Investment firms which also offer financing products such as securities loans or act as intermediary in respect of such products should not obtain information over and beyond that envisaged by the proposal. It is important here to strictly differentiate between lending activities and the resulting review obligations and securities transactions which are regulated by the MiFID (especially Art. 19 (1), (3), (4) and (5) MiFID).

2. Chapter: Definition of Investment Advice (Art. 4 (1) MiFID)

Question 1: *Do you believe that investor protection considerations require the application of the above conduct of business requirements from the point at which generic advice is provided or do you believe that sufficient protection is provided in any event to allow the definition of investment advice to be limited to specific recommendations?*

We at HVB Group believe it is important to distinguish between investor protection, which is protection the investor actually needs, and that what is meant by "personal recommendation".

In regard to the second point we would like to state that "generic advice" does not constitute personal recommendation, as the actual decision as to what financial instrument will be acquired or sold by the investor is only taken by him in a subsequent thought process. The financial service provider does not however necessarily participate in this subsequent development of objectives by the investor, which in the end leads to an investment decision. Nor is the argument that the investor can differentiate only with great difficulty when he is still being given generic advice and when he is in the „specific recommendation“ stage sound enough to include "generic advice" in the definition of investment advice. An inclusion of "generic advice" in the definition of investment advice would only mean that the definition issue is addressed earlier than would otherwise be the case, but it would not be solved. Would the assertion of the financial service provider that for example "Internet data are worth a closer look" already be considered to represent generic advice or is the investor merely called upon to look at specific segments more closely?

HVB Group's overall position on this issue therefore remains clear. There are no sensible reasons for including "generic advice" in the definition. In addition, we deem it advantageous to have a clear understanding of what is "investment advice" with a view to clearly state that generic advice does not form part of that definition.

Question 2: *Do you believe that considerations relating to the scope of the passport and the scope of the authorisation requirements point towards the inclusion or exclusion of generic advice from the definition of investment advice?*

On this point, too, HVB Group's position is quite clear. Neither the regulation for the passport procedure nor the authorisation requirements can change the position relating to substantive law. "Generic advice" is not a securities service. For this reason, it is out of the question that the Europe passport be also applied to these services. It is moreover inappropriate to determine a definition on the basis of the subsequent impact of a definition.

3. Chapter: Best execution (Art. 19 (1) and 21 MiFID)

Question: *How do firms compare venues (or intermediaries) that offer inducements with those that do not?*

When evaluating venues or intermediaries, inducements should always be included in the evaluation process if they lead to a change in the price (commission or fee).

Question: *Please suggest situations and circumstances in which a firm might satisfy the requirements of Article 21 while using only one execution venue.*

HVB Group holds the view that Art. 21 MiFID does not require investment firms to be present at several venues. Financial service providers are also at liberty to conduct transactions at only one venue on behalf of their clients. However, it is important that the client is informed of this circumstance accordingly.

Question: *Do market participants consider that the distinction between internal and external costs is relevant? Does the investment firm have to take into account also internal costs? If so, which ones?*

The objective of best execution is to identify the most suitable venue for a client. In this context, the investment firm should consider the execution costs when it evaluates the various venues. This does not however apply to the commission or fee of the investment firm itself. In addition to the computation of a margin, it is the investment firm's internal costs which are passed on to the client through the commission or fee. The inclusion of the internal costs in the evaluation pursuant to Art. 21 MiFID is thereby already in itself precluded through the definition. This is a position which is moreover supported by CESR itself.

Question: *How do you assure that your execution arrangements reflect current market development?*

In the case of stock exchanges which offer direct access, HVB Group obtains information on current developments through circular letters, the specialised press and discussions with the stock exchanges. In Germany, HVB Group is moreover represented in various advisory committees.

Trading activities conducted via a broker are subject to intense competition, with the result that brokers regularly contact HVB Group and submit their offers. HVB Group at the same time also monitors the market with the help of lists of brokers provided by the stock exchanges, Reuters and Bloomberg. The Group in addition obtains offers.

In addition, competition among investment firms demands direct and efficient procedures for the execution of client orders (esp. competition with e.g. internet brokers), in order to offer clients competitive products and services

HVB Group is informed of important changes. In the markets in which we act as broker for retail business, we also inform our clients of developments on the German market and the consequences of the execution of an order. This is usually ensured by arranging regular meetings with clients.

Question: *Please explain what competitive disadvantage or other damage to their commercial interests firms would experience if they were to publish the percentage of their business that they direct to different execution venues and intermediaries.*

An obligation to publish such information would undoubtedly result in competitive disadvantages. Such a requirement would make it more difficult to negotiate favourable terms with a broker, and institutional investors could approach the brokers used by HVB Group and demand the terms and conditions which we as HVB Group negotiated on the basis of our volume. The percentage is however of little interest for the retail customer since he checks the quality of execution on the basis of the published stock exchange prices.

Question: *With respect to the fourth disclosure suggested by respondents, CESR requests further comment on whether investment firms that execute client orders directly or indirectly should be required to disclose information about their error correction and order handling policies.*

HVB Group is not of the opinion that the information about order correction and order handling policies should be made available to the client. We do not see the advantage for the client when an investment firm lay open this information.

Questions: *How might an investment firm gain the necessary consents required under Article 21(3) of the Directive as part of a voice telephone communication?*

After the client has been informed of the execution policy, he should be asked, in clear terms, if he agrees to the execution policy. The client should be in a position to answer this question only with yes or no.

Questions: *What impact would there be on cross-border business and distance marketing if investment firms are not permitted to obtain the client consents required by Article 21 using voice telephone?*

This would make cross border business and distance marketing much more difficult.

Questions: *How might firms evidence that they had obtained client consent if they obtained that consent via voice telephone?*

Firms could provide evidence by recording the entire conversation or only the relevant passages.

Question: *Should investment firms that do not consider speed to be an important factor in the execution of retail orders be required to highlight this judgement?*

If an investment firm for example views costs and prices as significant factors for the execution of a retail client order and consequently pays less attention to speed, this is not something which warrants particular attention.

4. Chapter: Market transparency

1. Definition of Systematic Internaliser

Questions 1.1: *Do the revised criteria for assessing 'organised, systematic and frequent' better delineate the activity of systematic internalisation? If not, what further modifications would they propose?*

The criteria have for the most part been selected in an appropriate manner and are for this reason supported by HVB Group. Merely the passages marked accordingly in the advice text should be deleted, as it is the view of HVB Group that a systematic internalisation always presupposes an automated technical system:

*„The assignment or use of personnel and/or an automated technical system **or only an automated technical system** for the purpose of carrying out internalisation, whether or not the personnel and/or systems are used ... “*

Question 1.2: *Is the proposed use of a quantitative measure as an additional indicator useful?*

The use of a quantitative measure as an additional indicator for internalisation is not advocated. The abstract criteria are sufficient to ascertain whether or not the function of a systematic internaliser is performed. The indicator does not make the checking of the criteria relating to No. 11 of the Advice obsolete. Furthermore, the inclusion of these indicators in the Level 2 Text affects the Level 3 tasks. In the opinion of HVB Group, quantitative measures should for this reason not be introduced.

2. Pre-trade Transparency requirements for Regulated Markets (Art. 44), MTFs (Art. 29) and Systematic Internalisers (Art. 27)

Question 2.1: *Does the proposed approach to identifying liquid shares establish a sound methodological approach in the context of Article 27? If not, please specify (in sufficient detail) a modified or alternative approach and explain why it would be superior*

CESR's explanatory text does not indicate the assumptions used for selecting the threshold values (e.g. 500 transactions or turnover EUR 2 mn). In the opinion of the HVB Group the threshold (free float 1 Bill Eur) was set to high because it is to be assumed that in some countries no share will fulfil this criterion.

The proposed definition takes into account neither the specific features of the respective European stock markets (size, trading volume, number of listed shares) nor the individual share.

HVB Group holds the view that CESR should use the computation methods applied by the German Stock Exchange under the "Xetra Liquiditätsmaß" system (see http://deutsche-boerse.com/dbag/dispatch/de/notescontent/qdb_navigation/trading_members/12_Xetra/50_Xetra_Liquidity_Measures/INTEGRATE/infonexetra?doc=xetraliquids).

3. Post-Trade Transparency requirements for regulated markets (Art. 45), MTFs (Art. 30) and for investment firms (Art. 28 MiFID)

Questions 5.1: *Do consultees support the method of publishing post-trade information (either trade by trade information or on the basis of one price determination)?*

The publication of information on the basis of one price determination significantly reduces the amount of data which have to be published, while the client still has all the information he needs. We therefore welcome the proposed method of publishing post-trade information.

Question 5.2: *Do consultees agree that the responsibility for publishing the post-trade information lies on the seller in case of trades made outside RMs and MTFs?*

The proposal that the responsibility for publishing the post-trade information in principle lies with the seller is acceptable. The exception made in the event that the seller is not an EU investment firm, has to be rejected by the reason no reliable data are available at the moment. In addition, the creation and maintenance of a database would involve significant costs, which would not be justified by the benefits gained. In special cases one should therefore waive the publication requirement.

In regard to the issue of "Content of post-trade transparency" HVB Group would like to add some comments to those already provided in its answers; these additional comments serve to point out some false estimations in the text of the draft advice:

The reference under lit. f) (see paragraph number 139) to paragraph number 83 is not absolutely clear. Paragraph number 83 outlines exceptions for pre-trade transparency in regulated markets and MTF. It remains unclear whether the reference merely covers the three indents under item 83. This should in any event be clarified.

In regard to lit. g) (also paragraph number 139) the reference to paragraph number 85 is also not clear. Paragraph number 85 also makes reference to stock exchange rules. In addition, a decisive question is raised here, namely why provisions for the treatment of transactions which are not settled at the current market price are governed by the provisions for regulated markets and MTFs. Such transactions are settled off the floor and not via the stock exchange.

4. Transaction large in scale compared to normal market size

Question 6.3: *Do consultees agree with the proposals for determining thresholds for deferred publication arrangements? Is the balance of proposed threshold sizes and time delays appropriate? If you consider that they should be modified, please suggest how and why.*

The Advice text envisages an arbitrary classification into three liquidity categories. Periods for permissible time delays are then set, based on specific transaction volumes. We are not clear as to how CESR made this classification. CESR does not provide any information as to why the periods of one or two hours were selected, nor does it indicate how the threshold sizes were derived. Overall, it is however evident that the selected criteria are not in conformity with the market. The periods are inappropriate precisely for large transactions.

Question 6.5: *Do consultees agree with the proposal that Competent authorities should be able to grant pre-trade waivers and/or approve deferred publication arrangements that comply with the minimum thresholds regardless of whether or not the competent authority of the lead market adopts higher standards? Would it be better to require all member states to follow the transparency arrangements adopted by the competent authority of the lead market, whether by the competent authority or the lead market operator? CESR would like to receive comments that throw more light on the pros and cons of each option?*

HVB Group believes that thresholds should be uniform within the EU. Otherwise the result will be supervisory arbitrage, which we assume would be undesirable. In this context thresholds should be set by the authority of the lead market.

5. Publications of transparency information

The proposed 3-minute period is not a significant improvement over the 1-minute period that was originally proposed. What is really necessary is to ascertain in more concrete terms the point in time at which the transaction was concluded. It would be expedient to stipulate a period of one hour after the dispatch of the trade confirmation by the seller within which the counterparty can raise objections, e.g. in the event of a hidden lack of agreement. If no objections are raised, the data may be published within three minutes following the expiry of the one hour. In this way it would be possible to ensure that the data that have been disclosed are reliable.

We also reject the proposal that the post-trade transparency obligations should apply for as long as off-the-floor trading is in progress. The attendant risk for market participants is not acceptable. The criterion should instead be the trading hours of the lead market. Transactions conducted after trading hours should be published on the next trading day, no later than 15 minutes after trading commences.