

December 15, 2006

By electronic mail: www.cesr.eu

The Committee of European Securities Regulators
11-13 avenue de Friedland
75008 Paris
FRANCE

Ladies and Gentlemen:

Bloomberg L.P. welcomes the opportunity to comment on the public consultation issued by CESR in October 2006, "Publication and Consolidation of MiFID Market Transparency" (Ref: CESR/06-551).

INTRODUCTION

CESR's consultation on the consolidation of MiFID market data is timely and correctly anticipates issues that must be considered and addressed if MiFID is to succeed. To that end, Bloomberg is generally in accord with CESR's objectives to:

- reduce data fragmentation;
- enhance the monitoring of data integrity;
- encourage and facilitate data consolidation; and
- facilitate best execution.

At the same time, we respectfully suggest that CESR also consider problems of data fragmentation, which may stand in the way of providing useful market data to investors and other market participants. In that regard, we respectfully suggest that CESR's proposals be tailored to avoid:

- inhibiting the growth of a European over-the-counter market;
- establishing data monopolies; or
- discouraging innovation in the collection, consolidation, display and dissemination of market data and the development of value-added data products and services.

On the whole, CESR's proposals provide useful guidance for anticipating and minimizing data fragmentation. In the comments that follow, we offer observations and

suggestions that we hope CESR finds useful in its further consideration of the technical issues raised by pre- and post-trade transparency under MiFID.

A BROADER POLICY ISSUE: MARKET DATA MONOPOLIES AND MIFID

MiFID's focus on access to timely and accurate data is not only a technical issue of the quality of the resultant data. MiFID also is committed to a free and competitive market for those data. We are concerned, however, that any effort to inject greater competition into the European markets for the provision of market data may be frustrated by the concentration of market power currently being proposed through exchange mergers, as well as the monopoly control the individual exchanges have over their market data. Best execution duties imposed by MiFID on investment firms will naturally force them to buy data. Constrained to purchase, they may well have to do so at what they may justly consider to be unfairly high prices. That suggests the need for special controls on monopoly prices the exchanges may be inclined to charge, as well as collusive behavior among exchanges in establishing uniform prices, terms of service, etc.

In July 2006, the U.K.'s Financial Services Authority (the "FSA") issued Consultation Paper No. 06/14 ("CP 06/14") regarding its proposals to implement various aspects of MiFID, in particular those proposals bearing on market transparency and transaction reporting. Bloomberg submitted comments to the FSA, in a letter dated October 30, 2006, focusing on our concerns regarding the potential for concentrations of power and monopoly control over market data that could compromise fundamental policy goals of MiFID. We believe the analysis and proposals set forth in our letter to the FSA are relevant to CESR's deliberations regarding market data under MiFID and directly responsive to CESR's call for public comment. We have therefore annexed to this letter a copy of the letter we submitted to the FSA for your consideration as an integral part of the other comments we offer in this letter.

TECHNICAL ISSUES

Section 5.26 — Publication Arrangements

CESR may wish to propose that investment firms trading over-the-counter enter into written agreements designating the publication arrangement of their choice and indentifying the entity that will assume the obligation to meet MiFID publication requirements. Where the parties to such agreements are members of an exchange or MTF, the relevant exchange or MTF can monitor and police compliance. Nevertheless, off-exchange venues will not provide such self-regulatory mechanisms. Once MiFID becomes fully effective, CESR may therefore want to gather data on the volume of OTC trading and consider issuing guidance based upon those data as to how competent authorities might require, monitor and regulate agreements between investment firms that allocate MiFID publication obligations.

Section 5.30 — Static Websites

Bloomberg supports CESR's proposed guidance that the publication of pre- or post-trade data on static websites would not meet MiFID requirements.

Section 5.34 — The Three-Minute Cap on Reporting Data

Bloomberg strongly supports CESR's proposed guidance in this area, that is, that the three-minute cap should not be interpreted as the standard time for publication of market data but rather as an exception to be justified by the entity required to publish the information. We also think it necessary, however, that CESR take into account and provide guidance regarding system failures. There will be instances in which entities are unable to print as the result of system problems. CESR can assist by providing guidance with respect to a system for marking late prints.

Sections 5.39 and 5.46 — Market Data on a "reasonable commercial basis"

We also support CESR's reiteration of the MiFID standard that published information should be accessible to all interested parties on a reasonable commercial basis and with reasonable effort. We recommend, though, that CESR provide additional guidance to address the potential abuse and market distortions in the pricing of market data by sole-source providers of data. In this respect, we consider as a constructive first step CESR's statement in Section 5.46 against conditioning the provision of pre- and post-trade information on the purchase of other bundled services and/or data. In our letter to the FSA, a copy of which is annexed, we provide a fuller analysis of this issue and offer a proposal CESR may wish to consider for ensuring truly competitive markets in market data.

Section 5.49 — Location of Market Data

We applaud CESR's proposed guidance that, if investment firms use market data publication arrangements that are relatively unknown, they should have in place a mechanism to inform the market where to collect their pre- and post-trade transparency information.

Section 5.51 — Publication Standards

We think CESR's discussion of protocols and tagging should be updated and expanded. The FIX protocol, for example, is not appropriate for handling market data because it is not designed to accommodate large volumes of data. As a result, efforts are currently underway within the securities industry to upgrade FIX to increase its speed and expand its capacity to address this deficiency. We would suggest that CESR review current and proposed industry initiatives before drafting any final guidance in this area.

CESR also should consider data recovery capability. When system lines go down and cause a break in connectivity, the flow of data is interrupted. Once connections are restored, it is necessary to reconstruct the gaps in data flow. In high-volume stocks, the gaps can be quickly. Illiquid stocks, however, may quote only once a day without a subsequent rebroadcast, and it may not be possible to fill the gap caused by the break in connectivity. CESR should consider providing guidance for managing such conditions.

Section 5.64 — Atomic Clocks

When we wrote our comment to the FSA, we had already begun a review and analysis of CESR's consultation and we included in our response to the FSA's CP 06/14 comments regarding CESR's dismissal of the use of atomic clocks (see p. 2 and footnote 1 of our letter to the FSA). In addition to those comments, we also wish to point out that competition would assist in eliminating what latency might occur in systems synchronized to an atomic clock. Clients will quickly determine which reporting entities are prone to latency and which are quickest at correcting lapses and will disfavor the one and direct their business to the other. Nor is it costly to implement atomic clocks. Every computer has a clock. All that is required is to establish a link among computers and to synchronize them to a common clock.

* * *

We hope our comments prove useful to CESR in its ongoing deliberations. If it would assist CESR in its work, we are prepared to meet with CESR to discuss the issues raised in this and related consultations.

Respectfully submitted,

Alexander Clode by R.D.B.

cc: Mr. Carlo Comporti

A BROADER POLICY ISSUE: MARKET DATA MONOPOLIES AND MIFID

Letter of Bloomberg L.P. to the FSA re: CP 06/14 dated October 30, 2006



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October 30, 2006

By electronic mail: cp06_14@fsa.gov.uk

Mr. David Manning
MiFID Implementation Office
The Financial Services Authority
25 The North Colonnade
Canary Wharf
London E14 5HS
ENGLAND

Dear Mr. Manning:

Bloomberg L.P. welcomes the opportunity to comment on the Financial Services Authority's (the "FSA's") Consultation Paper No. 06/14 (July 2006) ("CP 06/14") regarding its proposals to implement various aspects of the Markets in Financial Instruments Directive ("MiFID"), in particular those proposals bearing on market transparency and transaction reporting.

Introduction

Accurate and accessible pre- and post-trade data are fundamental goals of MiFID. The FSA's proposed guidance at section 16.61 of CP 06/14 setting minimum standards for the pre- and post-trade publication arrangements used by MiFID reporting entities is intended to provide practical measures for advancing those goals, but we think there are substantial obstacles yet to be overcome.

One key requirement for real-time data, both quotations and transaction reporting, is that the data not only be accurate as to the particulars of each data point, but that the data be sequenced properly. Smart order-routing algorithms, trading programs as well as individuals watching the "tape" in connection with making investment and trading decisions need to be assured that the data they are watching correctly reflect market trends in a given security. If the quotation changes and trades are not timely reported with reference to a common clock that measures to at least the hundredth of a second and are not placed in proper time sequence, they will seriously mislead those trying to figure out what is happening in the market and what trading or investing strategies to employ. For that reason, the data may well be worse than useless if there is not a robust and rigorous method of ensuring timely reporting and proper sequencing.

Some commenters on MiFID objected strenuously to the proposition that systematic internalisers and other reporting entities make their reports in a fashion that would facilitate consolidation. Their voices seem still to be having influence even though their evident purpose was to subvert rather than promote transparency. We respectfully submit that the FSA should take the lead in promoting data consolidation. The first step would be to require adherence to a single atomic clock on a pan-European basis in reporting data so that those attempting to produce correctly sequenced consolidated data would be able to do so. The alternative would be chaos and a subversion of MiFID's goals.¹

MiFID's fundamental purpose is to unify Europe's securities markets, making them more competitive and dynamic both within the EEA and worldwide. To that end, MiFID expands the range of trading venues in Europe to include multilateral trading facilities ("MTFs"), eliminates the concentration rule and authorizes off-exchange trading, facilitates cross-border remote access to regulated markets ("RMs") and MTFs and introduces a regime of pre- and post-trade reporting. We are concerned, however, that the concentration of market power currently being proposed through exchange mergers, as well as the monopoly control the individual exchanges have over their market data may well frustrate any effort to inject greater competition into the European markets. Best execution duties imposed by MiFID on investment firms will naturally force them to buy data. Constrained to purchase, they may well have to do so at unfairly high prices.

MiFID's focus on access to timely and accurate data is not only a technical issue of the quality of the resultant data. MiFID is also committed to a free and competitive market for those data. Article 27.3 of MiFID requires that systematic internalisers make their quotations public not only in a manner that is easily accessible to other market participants but also "on a reasonable commercial basis." This standard, whose controlling premise is market-driven competition, is reiterated in Article 28.1 (for post-trade data of investment firms), Article 29.1 (for pre-trade data of MTFs), Article 30.1 (for post-trade data of MTFs), Article 44.1 (for pre-trade data of RMs) and Article 45.1 (for post-trade data of RMs).

In discussing its proposed arrangement for the consolidation of post-trade data via Trade Data Monitors ("TDMs"), the FSA is alert to MiFID's goal of greater competition in the provision of market data. In section 16.70, the FSA states:

¹ We note that the Committee of European Securities Regulators ("CESR") dismissed the concept of using a common clock on the basis that "latency in reporting is likely to occur anyway between systems and in transmitting information cross-border, which may create discrepancies in sequencing." On that basis, CESR concluded, "Connecting to a common clock would add cost without necessarily resolving the issue." CESR, Publication and Consolidation of MiFID Market Transparency, Public Consultation (October 2006), Ref.: CESR/06-551, at 5.64. We observe in response, however, that latency — i.e., the delay in transmission due to electronic issues — is likely to be trivial, involving only a matter of milliseconds. Presumably, if all data points are time-stamped properly according to a common clock, a data consolidator can build a program to re-sequence data reports in accordance with their time of creation, rather than time of receipt. If necessary, the consolidator can hold aside any reports received too late to include without delaying the release of the consolidated trade or quotation tape and can publish those separately as late reported items.

we have been conscious that we need to strike a balance between the benefits of competition in trade publication services and the need for comprehensive, reliable and timely trade information. On this basis, we consider the best approach to facilitate our objective for greater transparency and reliability of trade information is to encourage private sector involvement and competition in the provision of trade publication services, while minimizing regulatory involvement.

We think this formulation strikes the correct ideological balance between regulation and competition in realising MiFID's objective. We believe, however, that there are practical aspects of the FSA proposals that need to be rethought and adjusted if they are to avoid precisely the adverse consequences of regulatory involvement upon competition that the FSA clearly wishes to avoid.

MTFs and Transparency

We observe that the FSA's proposal for MTF transparency seems to be overbroad in that it would apply pre-trade and post-trade transparency to securities other than shares. MiFID's transparency requirement quite deliberately is limited to shares and we respectfully suggest that the FSA's extension to other interests is not appropriate at this time. MiFID permits Member States to expand transparency to interests other than shares, but a Member State seeking to do so should bear the burden of demonstrating why such an expansion is necessary, particularly in light of the "regulatory arbitrage" that may well result if not all Member States implement the expansion.

Q35: Do these standards achieve our stated objective?

First, we reiterate our view that achieving the stated objective will likely be impossible without requiring, as a matter of regulatory compulsion, that all reporting entities employ a common clock and "time stamp" their data points to facilitate proper sequencing and consolidation.

Second, as more fully explained below, we think the proposed creation of TDMs will likely strengthen the already dominant position of the exchanges, which will be the only entities likely to qualify as TDMs.

Third, with respect to the FSA's proposed guidance in section 16.61 of CP 06/14 setting minimum standards for the pre- and post-trade publication arrangements used by MiFID reporting entities, we think it likely that the first standard will prove too costly for many reporting entities. That standard would require that MiFID reporting entities "[i]nclude a verification mechanism that is independent of the trading process. This process should be systematic and conducted in real-time." We are not sure just what this standard means to say, but it would appear to require contracting with a third-party provider, which in most cases may likely be a regulated market. If that is the result, the possibly unintended effect of the FSA's proposed standard may well be to reinforce the dominance over market data the exchanges currently enjoy, a dominance that MiFID clearly envisions investment firms should be able to challenge.

Q36 to Q40 re: Role and Function of TDMs

The same issues arise in connection with the FSA's proposed TDMs. We agree with the FSA that if, as a result of MiFID, there is a significant shift from on-exchange to over-the-counter trading, such a shift would increase the probability of data fragmentation. In response to the anticipated risk of data fragmentation, the FSA proposes that investment firms could use their choice of an FSA-approved TDM to meet their MiFID post-trade publication obligations. Investment firms also could choose, under the FSA plan, to publish their trade information through alternative arrangements, as permitted by MiFID, but they would have to undertake "appropriate and ongoing due diligence to ensure it enables them to comply with the MiFID obligations on an ongoing basis." That is, using a TDM would reduce the burden and expense of due diligence an investment firm would otherwise have to undertake.

Under the FSA's scheme, we expect that for most investment firms, the default option would be to rely upon one of the entities admitted to the FSA's official list of approved TDMs. Each approved TDM will have met certain minimum standards set by the FSA relating to security of information, data integrity, timeliness, and systems and resources. In fact, the entities with the necessary infrastructure and experience most likely to meet these standards are the current RMs. The FSA concedes in section 16.86 of CP 06/14, "[w]e considered the possibility of encouraging firms to publish their trade information to the existing UK trade reporting entities. We recognize this would be inconsistent with the MiFID objective of promoting competition in this area." We respectfully submit, however, that the proposed TDMs, to the extent their ranks are dominated by "the existing UK trade reporting entities", will thwart competition in this area.

FSA-approved TDMs would be entitled to charge for the monitoring service they provide. They also would be free to act as data publishers or consolidators. The FSA states it does not intend to regulate the fees of TDMs, but it will require the TDMs to "adopt a transparent, non-discriminatory pricing policy." In a bid to protect potential competitors in the data market from TDM dominance, the FSA proposes to extend to TDMs MiFID's prohibition against sole sources of data entering into exclusive arrangements. The FSA concludes "[t]his would allow any data consolidator, or other entity, to acquire trade data from TDMs on equally terms."

An Alternative Regulatory Scheme for TDMs

We think the proposed measures underestimate the risk that TDMs pose to competition in the market for financial data and are not adequate to ensure that MiFID's goal on this critical issue is met. FSA-approved TDMs will be in market-dominant positions with respect to the monitoring service they provide. If they also are permitted to compete as data publishers and consolidators, they will be able to leverage their position as data monitors to advance into the downstream market for data products and services. If the FSA elects to designate certain entities TDMs, we think the FSA also must take more vigorous steps to ensure that the market in data products and services is open and competitive as envisaged by MiFID.

A good way to do that would be to block any effort by a regulated market to use its privileged, monopoly access to market data to subsidize its entry to the competitive arena of value-added analytics. The U.S. Securities and Exchange Commission (the "SEC") faced a

similar problem and crafted a solution the FSA may wish to consider. On March 7, 2000, the Nasdaq Stock Market, Inc. ("Nasdaq") purchased Financial Systemware, Inc., a manufacturer of software products, and formed a wholly owned subsidiary named Nasdaq Tools, Inc. ("Nasdaq Tools"). Nasdaq Tools introduced "Tools Plus", an order-management system using Nasdaq data in the compilation of analytics that competed with those provided by independent market-data vendors.

In exempting FSI from certain requirements applicable to Nasdaq itself,² the SEC recognized the risk that, if unchecked, Nasdaq could use its privileged position as a monopoly source of data to dominate the competitive market for order-management systems. The SEC countered that risk by requiring that Nasdaq engage in the data business through an entity separate from Nasdaq, an independent and separately capitalized corporate structure with strict firewalls providing for independent operation and an arm's-length relationship with the exchange. The affiliated but operationally independent and separately capitalized entity would gain access to data and information, including notice that Nasdaq would make new data available to market-data vendors, at the same time, for the same price, and on the same terms as its competitors. The FSI case thus provides a useful model for ensuring that for-profit self-regulatory organisations do not leverage their government-conferred monopoly over data into competitive markets. In that way, the SEC encouraged competition by requiring the structural separation of the exchange from a downstream affiliate.

Equally effective protection based on the principles underlying the FSI Exemption can be applied to TDMs. For example, the FSA can require that TDMs that elect to do business as data publishers or consolidators do so through a separate and independent entity that is separately capitalized, not given any financial support by the monopoly-source market and not given any advance notice before other competitors of new data products the market will make available. To that end, TDMs should provide to all software developers and data vendors, including their own affiliates, equal access at the same time and on the same terms to the data the TDMs provide. Those measures would help to ensure a competitive market in data products and services, consistent with MiFID's goals, particularly where the entities that become designated TDMs are either exchanges or already established market data enterprises. Whilst we recognise the FSA alone may not feel empowered to achieve that objective, we would strongly suggest that FSA work with the competition authorities in the U.K. toward that end and incorporate any competition issues into the approval process for a TDM.

A Broader Policy Issue: Market Data Monopolies and MiFID

The FSA's proposed minimum standards for pre- and post-trade data publication arrangements and its proposal for TDMs raise a broader policy issue for the implementation of MiFID which CP 06/14 does not address. European exchanges have dominated the market in trade data, effectively functioning as monopolies. Members of the London Stock Exchange and possibly other exchanges must provide their trading data to their exchanges for a fee and for an additional fee their best-execution duties as a practical matter require them to purchase

² See Securities Exchange Act Release Nos. 42713 (April 24, 2000) and 44201 (April 18, 2001).

consolidated data (either directly from their exchange or through data vendors) which the exchange will have collected from all its members.

As sole sources of information that is indispensable to market participants, the exchanges can impose prices whose margins far exceed the cost of the raw data. Today, they also are beginning to impose unfairly onerous licensing terms on data vendors. The proposals regarding market data that the FSA advances in CP 06/14 anticipate the possibility of data fragmentation that may result from a significant increase in over-the-counter trading under MiFID. As the FSA notes, “[f]ragmentation would have an immediate impact on price formation and market efficiency and longer-term implications for market confidence and participation. Acting to consolidate after fragmentation has occurred would be more costly.”

The same could be said even more forcefully with regard to the potentially anticompetitive effects of the trade data monopolies of the regulated markets, including markets in the U.K., most notably the London Stock Exchange. Comprehensive implementation of MiFID requires thorough consideration of this issue. We are aware that CESR is currently considering related issues as part of its MiFID Level 3 work program. We respectfully recommend, however, that the FSA take the initiative in addressing the proper role of regulated markets as sole-source data providers within the MiFID framework and in curbing their ability to use their monopoly positions to dominate the market for value-added data products. Acting after the regulated markets have exercised their market power will be more costly for the markets and investors as well as for regulators.

Respectfully submitted,

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