



CESR's PUBLIC CONSULTATION

BEST EXECUTION UNDER MiFID **REF. CESR/07-050B (FEBRUARY 2007)**

COMMENTS OF EURONEXT

Euronext appreciates the public consultation held by CESR and the opportunity given to comment on some important aspects of the MiFID's best execution obligation. The implementation issues identified by CESR are indeed key and CESR's objectives to ensure clarity and supervisory convergence in this field are most welcome. It is indeed crucial that MiFID's best execution requirements are interpreted and applied in a consistent manner in all Member States to ensure a level playing field and avoid diverging treatments for firms operating in the various jurisdictions as well as for investors.

Among the issues tackled by CESR in this consultation paper, we would like to highlight in particular the importance of the "total consideration" among the factors to be taken into account to comply with the MiFID's best execution requirements; the need to identify individually in the execution policy the execution venues on which orders may be executed by the firm; and the rigorous care to be ensured in the definition and comparison of execution quality data.

Furthermore, we would like to insist on the need for CESR to establish guidelines as to the implementation of best execution for derivative instruments. The current rules are indeed designed for transferable securities. The treatment of derivatives remains unclear and would deserve guidance as these instruments have specificities making comparison less straightforward. Although these products may be economically comparable, they are not fungible and their characteristics (e.g. in terms of product design, maturity, market model, location of centralised clearing) are crucial (together with the standard criteria, such as price, cost etc) in choosing the venue. It will therefore not be possible to define a simplistic rule for derivatives which applies the best execution standard across competing venues. There is hence a need for a clear guidance from the regulators as to how to apply best execution principles to derivatives.

Execution Policies and Arrangements

Question 1: *Do respondents agree with CESR's views on:*

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

Question 2: *For routine orders from retail clients, Article 44(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?*

With respect to the relative importance of the factors listed by MiFID to comply with best execution requirements (Article 21.1), we support CESR’s statements regarding the principle of the total consideration (i.e. price and costs) and its relevance for retail and professional investors respectively. Indeed, whereas investment firms are fully responsible for determining the weight they attribute to the execution factors in case of orders from professional clients, in most circumstances price and costs will merit a high relative importance in obtaining the best possible result for such clients as well, “although there will be circumstances where other factors will be more important”.

MiFID requires “total consideration” to be heavily weighted in the case of orders from retail investors. In taking into account the total consideration for retail clients, both implicit and explicit costs may potentially be relevant; as an example, market impact costs might be significant in some cases for illiquid instruments.

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

In relation to transferable securities, we concur to CESR’s view that it is in the spirit of MiFID Article 21, whenever there is more than one trading venue that offers execution relevant services, investment firms should consider their inclusion in their execution policy.

We also agree in principle on the possibility that, after the entry into force of MiFID, there may be circumstances in which only one particular execution venue or entity will deliver the best possible result on a consistent basis for some instruments and orders. Nevertheless, we would like to insist on the need to remain strict in this approach and to ensure that, in such cases, the aim of MiFID to develop and maintain competition between venues is not challenged. In any case, it should be justified and investment firms should be able to demonstrate how this satisfies the requirement for taking “all reasonable steps” to obtain the best result for their clients. Furthermore, when the most liquid trading venue for a certain instrument is not included in the execution policy, it should be clearly justifiable to the clients.

In relation to derivatives, it is not possible to answer this question until we receive further clarity from the regulators/CESR on the treatment of derivatives (please see our introductory statements).

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

Level 1 of MiFID precises that an execution policy should “include, in respect of each class of instruments, information on the different execution venues where the investment firm executes its client orders”. It is now a common understanding that an execution policy should exist for all types of financial instruments.

We agree with CESR’s approach on the degree of differentiation of the execution policy, based on the types of clients a firm serves, the instruments for which it handles orders and the order types and relevant market structures/execution venues available for those instruments.

In any case, whereas such execution policy could propose different execution venues depending on the type/size of orders, we believe that the execution venue(s) offering the best “total consideration” on a consistent basis should always be included in the execution policy in particular in respect of retail investors.

Disclosure

Question 5: *Do respondents agree that the ‘appropriate’ level of information disclosure for professional clients is at the 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 Article 46(2) of Level 2?*

Regarding the obligation imposed by MiFID on investment firms to disclose “appropriate information” about their execution policy to their clients, we share CESR’s opinion that this implies that such policy must - among other things - “provide a sufficiently detailed description of the execution approach” and set out the execution venues or entities the firm uses.

Furthermore, the provision of Article 19.3 of MiFID, requiring all firms to provide appropriate information about “execution venues” to their clients imply that this information should be sufficient for the clients’ consent to the firm’s execution policy to be valid. We agree that the client should hence be able to identify individually the execution venues listed in the execution policy (a “generic” statement, e.g. “regulated markets”, “MTFs”, “systematic internalisers” would not ensure this “appropriate” information of the clients allowing the latter to select a firm on the basis of its execution policy).

Finally, MiFID foresees the review of an execution policy in case of material changes (e.g. a new important entrant among execution venues). This also implies that the execution venues should be listed by name in the execution policy.

Consent

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

As concerns the notion of the client’s “consent” contained in MiFID, we believe that it is important to ensure consistent interpretations across Member States even though there may currently exist divergences in the various jurisdictions in this respect.

Furthermore, Articles 21.3 and 21.4 of MiFID, requiring respectively the client’s “prior consent” to the execution policy and his “prior express consent” to execute his orders outside a regulated market or an MTF aim at ensuring that the client is well informed to be able to approve the execution service offered by the firm. In this sense, we are concerned about CESR’s interpretation that a “prior consent” may be tacit which may not always ensure that the client has been properly informed and has well taken this information into consideration.

In addition, concerning the distinction done by MiFID between these two types of consents, our view is that the “prior express consent” to the execution outside a regulated market or an MTF

should be obtained in a separate/distinct manner from the general consent given to the execution policy.

Chains of Execution

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

Trying to define the different levels of responsibility in a chain of execution may indeed be difficult and we support CESR's approach for practicable and simple guidelines in that respect.

We would nevertheless like to underline that it is crucial that the responsibility for the execution of the client's order does not disappear in such a "chain of execution" and that clarification regarding the respective responsibilities within the chain is important.

Execution Quality Data

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?*

With respect to the core information and/or other variables that competent authorities should expect firms to consider when evaluating their own execution performance and the execution quality of the venues to which they have recourse, we would like to highlight the following issues.

First of all and in light of the many uncertainties around execution quality statistics as underlined by CESR, we consider that any "execution quality indicator" should be very cautiously and rigorously defined. This will indeed be crucial to ensure that such quality indicators are calculated along the same methods for all execution venues, hence that the related data are comparable on a fair and consistent basis. We believe that it would be useful that regulators define a clear framework in this respect; it will be even more important as the data on the basis of which quality indicators are calculated will not be public for all execution venues.

Moreover, the relevance of such quality indicators may be limited as they will only be able to be calculated periodically (e.g. once a month), which will only allow to assess best execution on a periodical basis and not in real time.

It will also be necessary to define precisely the "basket of reference" (i.e. asset class and volume) on which calculations of the "quality data" will be based. In this respect, a strict methodology should be set up in order to ensure true comparability hence fair competition between execution venues.

Finally, execution quality criteria should be defined and applied at all levels in a chain of execution.