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Second part of our response to CESR's Advice on Possible Implementing Measures of the Directive 2004/39/EC on Markets in Financial Instruments

Dear Mr Demarigny,

The Association of German Banks welcomes the opportunity to respond to CESR's advice on possible implementing measures of the directive 2004/39/EC on markets in financial instruments. Enclosed please find the second part of our response dealing with the issues of best execution and post-trade transparency.

The Association of German Banks represents some 240 private commercial banks and 11 regional associations, as well as the special mortgage bank and ship mortgage bank associations. Measured in terms of business volume, these banks hold a share of around 40 % of the banking market as a whole. They have a total of some 180,000 employees.

The Association of German Banks is a member of the *Zentraler Kreditausschuss* (ZKA), the joint committee of the central associations of the German banking industry. We fully support the Joint Comments of the ZKA which you will find enclosed.

Should you require any further information, please do not hesitate to contact us at any time.

Yours sincerely,

Thomas Weisgerber Dorit Bockelmann

Enclosure

ZENTRALER KREDITAUSSCHUSS

MITGLIEDER: BUNDESVERBAND DER DEUTSCHEN VOLKSBANKEN UND RAIFFEISENBANKEN E.V. BERLIN • BUNDESVERBAND DEUTSCHER BANKEN E. V. BERLIN • BUNDESVERBAND ÖFFENTLICHER BANKEN DEUTSCHLANDS E. V. BERLIN • DEUTSCHER SPARKASSEN- UND GIROVERBAND E. V. BERLIN-BONN • VERBAND DEUTSCHER HYPOTHEKENBANKEN E. V. BERLIN

Comments of the Zentraler Kreditausschuss[1] on CESR's Advice on Possible Implementing Measures of the Directive 2004/39/EC on Markets in Financial Instruments Part 2 (Best Execution)

Published by the Committee of European Securities Regulators (CESR) on June, 17th, 2004

[1] The ZKA is the joint committee operated by the central associations of the German banking industry. These associations are the *Bundesverband der Deutschen Volksbanken und Raiffeisenbanken (BVR)*, for the cooperative banks, the *Bundesverband deutscher Banken (BdB)*, for the private commercial banks, the *Bundesverband Öffentlicher Banken Deutschlands (VÖB)*, for the public-sector banks, the *Deutscher Sparkassen- und Giroverband (DSGV)*, for the savings banks financial group, and the *Verband deutscher Hypothekenbanken (VdH)*, for the mortgage banks. Collectively, they represent more than 2,500 banks.

I. Introduction

On September 17, the Zentrale Kreditausschuss (ZKA) submitted the first part of its comments on the CESR Consultation Paper dated 17 June 2004. We would like to thank you for the two week extension of the deadline for comments on certain sections of said Consultation Paper. The following paragraphs contain our comments on the sections "Best Execution" and "Post-Trade Transparency". Furthermore, we would strongly welcome it if CESR found a possibility of decoupling at least the field "Best Execution" - which still contains a large number of unresolved issues - from the forthcoming Consultation Procedure on the remaining topics under the First Mandate. We feel the compelling need to subject this issue to a further, more in-depth review. Potentially, this might not be feasible within the window of time allowed for the preparation of a second Consultation Paper on the First Mandate.

II. General Comments

In part one of our response (dated 17 September 2004), we pointed out that we are under the impression that CESR believes that the quality of investment services can only be improved through tight supervisory provisions which feature a maximum degree of detail. We do not subscribe to this point of view. What is needed first and foremost in order to enhance the quality of investment services is effective competition. Yet, a regulatory "straightjacket" of supervisory rules rather aborts this very competition. Particularly for smaller investment firms, the proposed regulatory amendments are likely to drive up the costs for their services so that they will no longer be capable of providing these services at competitive rates.

In this context, let us again briefly recall item 2.3 under the European Commission mandate given to CESR on 20 January 2004 (c.f. below). Here, the Commission calls upon CESR to merely set out "*ground-rules*" i.e. *"the right balance between the objective of establishing a set of harmonised conditions... and the need to avoid excessive intervention in respect of the management and organisation of the investment firms"*. Furthermore, the Commission points out that the *"amount of detail … should be very carefully calibrated case by case"*. Last but not least, the Commission feels that the recommendations should *"avoid formulations which would lead to overprescriptive, excessively detailed legislation, adding undue burdens and unnecessary costs to the firms and hampering innovation in the field of financial services"*.

When stipulating its recommendations, we strongly call upon CESR to take into account the provisions under the MiFID and the Commission's mandate.

The deliberations presented in the Consultation Paper on technical implementing provisions for Art. 21 feature a maximum degree of complexity. We fear that this might result in requirements

which, in practice, would be unrealistic. Against this backdrop, special attention should be paid to the following facts:

MiFID lays down that the prime criterion for choosing the execution venue consists in an instruction by the client. Apparently, the Consultation Paper is inconsistent with this Level 1 precedent in that it fails to adequately reflect the fact that a client instruction shall make any further deliberations concerning the execution venue redundant. This means that the requirements with regard to a best execution should only apply on an auxiliary basis. The Level 1 precedent would already rule out excessive requirements with regard to a best execution policy.

What is more, overly stringent requirements with regard to a 'best execution' would involve excessive costs that are financially not viable. This would *de facto* lead to a situation where certain transactions would henceforth no longer be offered to retail clients.

III. Summary of the status quo in Germany

In order to provide a better understanding, the following paragraphs shall highlight the present order execution situation in Germany. In Germany, there are seven trading floor systems, one electronical trading platform (XETRA) and one futures and options exchange (Eurex). Trading covers a host of different financial instruments, i.e. shares, bonds, warrants, certificates, derivatives, to name but the most important ones. There is both exchange trading and OTC-trading.

The current market practices need to be broken down into transactions on the domestic market and on markets abroad. German investment firms are frequently direct members, i.e. they themselves are members of German stock markets. German markets are *inter alia* characterised by their Verbund-organisations, i.e. the financial network of the cooperative banks or the financial network of the savings banks. These Verbundorganisations feature liaison via central banks or transaction banks. Non-domestic transactions generally feature involvement of brokers. Yet, not in every country there will be a direct contact with a broker. Instead, the choice will frequently be a broker who has access to trading venues in several countries. In line with the nomenclature of a *global custodian* or a *general clearer*, these brokers could be referred to as *global brokers* or *general brokers.* If the investment firm is integrated into an international group, then frequently also the group structures will be used in order to gain access to trading venues abroad.

Furthermore, it needs to be noted that an investment firm will only carry out orders in those venues where it can also draw upon the services of a depositary. This will generally be the case in European countries. Outside of Europe, however, sometimes it will not be possible to grant such access. This particularly applies in the case of access to exotic venues.

Under the current market practices, in the event of client orders without an instruction as to the execution venue, the order routing decision shall be incumbent upon the investment firm; here, investment firms shall be dutybound to make a decision in the best client interest and on the basis of due diligence and care. In the absence of a specific client instruction for routing purposes, the investment firm partly looks to whether this order comes from a small-scale investor or from an institutional investor. Basically, when selecting the venue the following criteria play a role:

- Product (shares, bonds, warrants, structured securities, funds)
- Liquidity/order penetration
- Order volume
- Price
- Service at the execution venue

When choosing the broker for the order execution abroad – which, instead of being made individually, will be made a general decision – possible selection criteria are:

- Reputation
- Presence
- Care and due diligence
- Punctuality
- Technical infrastructure, integration possibilities
- Service quality
- Reporting
- Contractual terms (e.g. costs, provision of collateral)
- Structure of the client orders.

To date, already on the grounds of financial viability and due to a lack of information, for the purposes of this choice, there is no comprehensive screening of each and any existing broker across the globe. Adjustments are carried out whenever the broker fails to meet the investment firms' requirements (any longer) and/or whenever it turns out that other brokers can offer better access. If and when an investment firm decides to switch brokers, this obviously shall be subject to the contractually agreed terms and conditions.

IV. Individual questions:

Section II: Intermediaries

Best Execution (Article 21); pages 70 - 79

Page 73 questions

Q1: *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)?*

Answer: Yes, the criteria described are generally relevant in this context. In practice, however, it will be virtually impossible to translate them into an abstract, coherent decision making matrix covering most cases, let alone a 'one-size-fits-all' decision making matrix that would cover each and any case. Hence, derogations on a case-by-case basis shall and must be maintained in future. This is the only way for protecting the necessary degree of flexibility. The principles can thus not define the specific execution procedure for each individual case. Instead, these forthcoming principles must take on the character of a guideline which shall generally inform the firm's policy. Any abstract determination of the relative importance of the factors would furthermore quickly become highly susceptible to obsolete and outdated decisions that would virtually outrule the necessary flexibility. CESR should therefore refrain from preparing proposals on such a prioritisation of factors.

Q2: *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?*

Answer: Extending the list to include further factors is not necessary since all material aspects have been covered. The explanatory text provides a sufficiently clear explanation of the meaning of all the different factors.

Q3: *How might appropriate criteria for determining the relative importance of the factors in Article 21(1) differ depending on the services, clients, instruments and markets in question? Please provide specific examples.*
Q4: *Please provide specific examples of how firms apply the factors in Article 21(1) to determine the best possible result for their clients.*

Answer: A specific regime for determining the relative importance does not give firms sufficient latitude to meet the different client requirements. For instance, a large order of a professional client concerning a blue chip share would have to be treated differently than a warrant order of a small scale investor. Also based on liquidity, a differentiation might become necessary. The number of differentiation criteria are legion. This means that it would be unrealistic to attempt drawing up an exhaustive list of such criteria. Hence, based on the interests of their clients, firms need to be allowed to pursue a differentiated order placement policy.

Page 75 questions

Questions for consultation

Q.1: *What investment services does your firm provide?*

Answer: Generally speaking, the credit institutions represented by us provide the entire range of investment services. Sometimes this also takes place with the involvement of the companies belonging to the specific financial network structure (Verbund) or with the involvement of companies belonging to the group.

Q 2: *How many venues does your firm access now? Does your firm expect to access more venues after the Directive becomes effective?*

Answer: At present, German investment firms offer access to a host of different trading venues. Along with the German stock markets, this also includes access to EU stock markets. Outside of the European Union, German investment firms offer access to the world's major stock exchanges. Within Germany investment firms either have direct access or they have access through institutions that form part of the financial network structure (Verbund) or of the group structure. Abroad, there are some cases where direct access exists via the corporate group or financial network structures

(Verbund). This notwithstanding, non-domestic transactions very often feature involvement of a foreign broker.

In the context of the trading venues, we would like to specifically highlight one aspect: Already on the grounds of competition, investment firms must secure that they have access to all venues which allow best execution on a continuous basis. Yet, this does not mean that they must grant access to all trading venues worldwide; it is our understanding that this is by no means intended by the provision. For an investment firm and its clients, particularly the integration of each and any exotic trading venue is a solution that would not be financially viable. During the review, investment firms should be able draw upon the expertise of foreign brokers or *general brokers.* Hence, contractual safeguards need to be adopted in order to ensure that the verification of access is performed by the *general broker.* The obligation of careful selection of the *general broker* under due consideration of the aforementioned criteria shall remain incumbent upon the investment firm.

It is unlikely that MiFID will lead to an increase in the number of access to venues. Its coming into force might even have the opposite effect if excessive logistical demands were placed upon the firms. This would thus limit the choice available.

Q 3: *What factors does your firm consider in selecting and reviewing venues?*

Answer: A difference needs to be made whether a firm has direct access or whether it enjoys indirect access to the execution venue.

In the event of direct access, the following criteria will generally play a role: product (share, bond, warrant, structured securities, funds) liquidity/order penetration, order volume, price, service at the execution venue.

When selecting the broker, this decision will be based on e.g. the following criteria: reputation, presence, care and due diligence, punctuality/swiftness, technical infrastructure/integration possibilities, service quality, reporting, contractual terms (e.g. costs, provision of collateral), structure of the client orders.

Q 4: *Please provide specific examples of costs you consider in evaluating venues.*
Q.5: *How do costs affect your decisions about venue selection?*

Answer: For instance broker fees and currency expenses could be mentioned here.

Q 6: *Do you take account of implicit costs such as market impact? Is the question of implicit costs only relevant to firms that act as portfolio managers?*

Q.7: *What specific events have led your firm to re-evaluate venues in the past? Please provide examples of how your firm has changed the venues that it accesses as the firm, its clients, or markets have changed.*

Answer: In Germany, the introduction of the electronic trading system Xetra has been a significant milestone. On the part of investment firms, Xetra introduction has led to a major review of their execution policy. Wherever this appeared appropriate, changes have been made. This primarily applied to highly liquid titles.

Q.8: *Have we identified the key criteria?*

Answer: The key criteria have been identified. Covering this topic exhaustively right down to the last detail would not be a realistic undertaking.

Q.9: *What data is available to carry out these reviews? If no data is available, are market solutions likely to provide it?*

Answer: Already today, there is several data which exists in the market (e.g. rates or sales figures). Yet, this data is not always accessible in a consolidated format or in a very detailed form. Previously, there has never been any need for this, either. If the requirements should really change in this respect, then the market will find an appropriate solution in order to provide the requisite data.

Page 76 questions

Questions for consultation

Q.1: *What kinds of monitoring arrangements do firms use now?*
Q.2: *How frequently do firms monitor execution quality?*
Q.3: *What data is available to aid firms in their monitoring obligations? What does the data cost?*
Q.4: *In what respects does the frequency with which firms monitor execution quality depend on the types of instruments, clients, markets and investment services in question? Please provide specific examples.*
Q.5: *What, if any, market data do firms consult in order to monitor execution quality?*
Q.6: *What additional data do firms expect to use after the Directive's transparency requirements become effective?*

Answer: Since, already on the grounds of its own vested interests, an investment firm will seek to always provide the client with the best possible solutions, it will automatically also keep a constant eye on the market, i.e. monitor the latter on an ongoing basis. However, this should not be misinterpreted as a bureaucratic process for a regular review of compliance with the abstract criteria.

Furthermore, one aspect should receive particular attention: The monitoring scope shall and must be restricted to those venues which do not feature any direct access. Corresponding reviews of the execution policy of a broker are not possible. The only obligation that can be made incumbent upon investment firms consists in the need to inform themselves by drawing upon the usual sources of information in compliance with the duty of care and due diligence. Any proactive enquiry obligation beyond this would clearly be too far-reaching in scope.

Page 77 questions

Q.1: *How frequently do firms review the venues to which they direct orders on behalf of clients?*
Q.2: *Do firms re-evaluate their trading venues:*

- *whenever there is a material change at any of the trading venues ?*
- *whenever there is a material change at the firm that affects its execution arrangements?*

whenever the firm's monitoring indicates that it is not obtaining the best possible result for clients on a consistent basis?

Q.3: *What difficulties would firms face in reviewing their execution arrangements in response to each of the foregoing events?*

Answer: Generally, market monitoring will take place on an ongoing basis. Hence, no exact information can be provided concerning the frequency of *reviews.* For example, in those cases where there is either a significant change in the corporate policy of the own organisation or a significant change in the business policy of the execution venues, an investment firm will invariably carry out a review of its execution policy and will adjust the latter if needs be.

Q.4: *Do venues make firms aware of material changes in their business?*

Answer: Generally, at least in the case of significant innovations, the execution venues shall provide information on changes pertaining to the business policy.

Q.5: *Please provide examples of instances in which firms have changed the venues that they use.*

Answer: In Germany, the introduction of the electronic trading system Xetra has been of major importance and has induced many investment firms to review their execution policy. Wherever it appeared appropriate, changes have been made. This primarily applied to highly liquid titles.

Page 78/79 questions:

We invite comment on the following issues regarding information to clients and potential clients:

Q.1: *At present, how many venues do firms access directly? Indirectly?*

Answer: At present, German investment firms offer access to a host of different trading venues. Both domestically and partly also in other European countries, at least within group structures or financial network structures (Verbund), there is direct access to venues. Particularly abroad, investment firms' access is mostly of an indirect nature and is generally secured through foreign brokers. This applies both with regard to European and non-European markets. Whilst this number tends to be lower for smaller operations, large companies generally access 30 to 50 venues directly. Here, it is worth bearing in mind that one foreign broker will frequently have access to several execution venues.

Q.2: *Should an investment firm be required to provide clients and potential clients with information on the percentage of a firm's orders that have been directed to each venue?*

Q.3: *For example, should an investment firm be required to disclose to clients and potential clients what percentage of its client orders were executed in the trading venues to which the firm directed most of its client orders (to cover, at least 75% of the transactions executed)?*
Q.4: *How frequently should investment firms make this information available to clients? On a quarterly basis, for example?*
Q.5: *Should firms be required to update the information to reflect recent usage? How frequently?*
Q.6: *Are there any other categories of information that a client or potential client needs to be adequately informed about the execution services provided by firms?*

Answer: Investment firms should not be obligated to divulge information on order routing *vis à vis* (potential) clients. Whilst this information is irrelevant for the client, it would significantly increase the administrative effort in an unnecessary manner. As far as his order is concerned, the client shall receive each and any necessary information immediately after order execution (cf. also recommendations on Art. 19 (8) MiFID, Box 10). The decision as to whether a firm wishes to additionally disclose general information – e.g. for customer retention purposes or in order to achieve a USP over its competitors - should, however, be left to the investment firm's own discretion. At least under prudential supervision aspects, there appears to be no need for this. Besides, any further information lacks a legal mandate since the investment firms are merely obligated to provide the client with information or, moreover, a notice concerning their execution policy or any material changes to their order execution arrangements and their execution policy (cf. MiFID, Art. 21 (3) and (4)).

Q.7: *Should the information provided by portfolio managers and firms that receive and transmit orders be different from that provided by brokers? What are key differences?*

Answer: We can conceive of no case where there would be a need for the provision of such information.

Q.8: *Have all of the key conflicts of interest been identified?*

Answer: The issue of conflicts of interests should be dealt with exhaustively under Art. 13 paragraph 3 and 18.

Q.9: *When should firms be required to provide required disclosure to clients and potential clients?*
Q.10: *Is there any reason to impose different timing requirements for disclosure under Article 21 than are required in the Level 2 measures under Article 19(3)?*

Answer: Both under Art. 21 (6) c) MiFID and under the Commission Mandate, timing requirements as contemplated by explanatory text and by Q. 9, Q. 10 – also when such timing provisions should exclusively relate to the execution policy – lack any legal mandate. Should CESR decide to uphold its recommendations concerning the timing of information notwithstanding the fact that this would be inconsistent with the provisions contained under MiFID and the Commission's Mandate, then we, at least, recommend the following policy for first-time information of existing clients (in Germany alone, there are approximately 35 million portfolios) and any further information on material changes: The possibility of sending this information together with the annual asset statement (cf. item 8 of the recommendations on MiFID, Art. 19 (8), Box 10) should be seriously considered. This would result in considerable cost savings (postage) which otherwise would have to be borne by the client. What is more, the waiver of real-time information would appear to be justified in the foregoing cases because the execution policy only becomes a relevant issue in the absence of a client instruction. Last but not least, we would like to highlight that Art. 21 (4) MiFID equally refrains from stipulating any timing requirements for such information.

Z E N T R A L E R K R E D I T A U S S C H U S S

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Comments of the Zentraler Kreditausschuss[1] on CESR's Advice on Possible Implementing Measures of the Directive 2004/39/EC on Markets in Financial Instruments Part 3 (Post-Trade-Transparency-Requirements)

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[1] The ZKA is the joint committee operated by the central associations of the German banking industry. These associations are the *Bundesverband der Deutschen Volksbanken und Raiffeisenbanken (BVR)*, for the cooperative banks, the *Bundesverband deutscher Banken (BdB)*, for the private commercial banks, the *Bundesverband Öffentlicher Banken Deutschlands (VÖB)*, for the public-sector banks, the *Deutscher Sparkassen- und Giroverband (DSGV)*, for the savings banks financial group, and the *Verband deutscher Hypothekenbanken (VdH)*, for the mortgage banks. Collectively, they represent more than 2,500 banks.

BOX 13: Post-Trade-Transparency-Requirements for Investment Firms (Article 28)

a) Introduction

Already today, it can be perceived that for German investment firms, the post-trade-transparency-requirements under the MiFID will lead to a very high, cost intensive technical effort since to date there exist no equivalent provisions for the German market. At present, a comprehensive assessment of the CESR proposals on post-trade-transparency is not possible since the proposals made by CESR do not allow conclusions as to the complete workflow for generating a post-trade-report until its publication. This is, inter alia, due to the fact that CESR's proposals on the consolidability of the data are very vague. CESR merely stipulates the requirement that this data must be easily consolidatable (para. 26). Furthermore there is a negative definition, i.e. that it will not be sufficient if a publication takes place on the website of the reporting party (para. 40). If and within which period of time a post-trade disclosure can be presented "on a reasonable commercial basis", can however only be assessed when it is clear which specific requirements are made with regard to the consolidatability of the data. At present, it should be noted that the Level 1 Directive does not entail specific requirements concerning a sufficient degree of consolidatability. Rather, the reporting parties are explicitly given the possibility of also making public the relevant transaction data via "proprietary arrangements". In our view this includes publication on the website of the reporting party.

b) The individual recommendations

- Paragraph 26

Level 1 explicitly provides that publication may also take place through proprietary arrangements (art. 28 (3) a) iii); a consolidation of the data is neither envisaged at Level 1 nor is it called for by the Commission in its Mandate to CESR. The publication via a corporate website qualifies for proprietary arrangements; it needs to be prevented that an overinterpretation which treats "easily accessible" as a synonym for "easily consolidatable" will rule out this option. Naturally, the website where this publication takes place as such should be easily reached; in terms of navigation and usability, this implies that no unnecessary amounts of clicks will be necessary in order to reach the post-trade-transparency data.

- Paragraph 29

Transactions where the agreed price is decoupled from the current market situation should generally be exempt from the publication obligation. A labelling that the price digresses would not be sufficient in these cases. This applies for instance to package deals and back-to-back transactions. Here, prices are being generated which are independent from the market situation. A publication – even if it has a corresponding mark – could influence the market without being influenced by fundamental data. Yet, this is not the rationale behind the post-trade-transparency. For further exceptions cf. also the answer concerning question 8.

- Paragraph 32

Particular attention should be paid to the use of terms and definitions. A transaction which is above the standard market size does not necessarily qualify for a block trade. Also order volumes below the block size may have a market impact. Should CESR consider not to make any further distinctions for the purposes of Level 2, consistent use should be made of one and the same term. In this case, the threshold volume should lie below the *block size.* Any order which exceeds 10 % of the average daily turnover of a share (calculated on the basis of a certain time period) should qualify for a block trade.

- Paragraph 36

We reject the requirement that the making public of transactions outside a regulated market shall also have to take place outside of the trading hours of the relevant market. Also in these cases, the risk of disclosure of positions would be intolerable for market participants. The trading hours of those European markets which are most liquid for the respective share should be relevant. Transactions which are being conducted after market close should therefore be published on the next trading day within 15 minutes after opening of the stock exchange. This is the only way to prevent that the market will react against the respective firms.

Individual questions

Q13.1:
Do consultees support the method of post-trade transparency (trade by trade information), should some other method be chosen (which)?

Yes, if the post-trade-transparency shall enhance market efficiency at all, a trade-by-trade information is generally required. Furthermore, a summary of individual trades would unnecessarily reduce the available time period for generating the disclosure. In addition to this, further problems would result when coping with cancellations.

Q13.2:
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?

The decision on inclusion of the aggregated figures should be left to the market. Level 1 does not give rise to any immediate need, if and when there is a demand in the market, corresponding services will be offered.

Q13.3:
Do consultees support the two week period for which the post-trade information should be available?

The rationale behind the post-trade-transparency is providing the investor with information on the current market situation at any execution venue. This should facilitate investment decisions. For the investor, disclosure of all information of the past 14 days would lead to an information overkill whilst for the provider, it would turn into a cost-driver. After all, large-scale databases would have to be set up in order to handle these huge volumes of data and this would not only be a one-off investment but also require constant maintenance. Such maintenance could partly be carried out only on a manual basis. This effort would clearly be disproportionate to the actual benefit of a long-term maintenance. If and when the market sees a need for the storage of data over an extended period of time, commercial providers will come up with suitable products. Further, it is not easily understood why CESR on the one hand provides for a 1 minute publication deadline (for the reason of an urgent information need of the market) and on the other hand assumes that there will still be a considerable interest 14 days after the transaction has been finalised. This is inconsistent.

Q13.4:
Should some minor trades be excluded from publication (and if so, what should be the determining factor)?

Yes. Minor trades - at least when they are carried out on a incidental basis - are not relevant for market efficiency. Hence they should be exempt from the post-trade-transparency obligation. As a threshold for a *de minimis* clause we thus propose the following rule:

> *An OTC transaction shall be exempt from the publication obligation pursuant to Article 28 where its volume is less than 10 % of the Standard Market Size (SMS) defined under Article 27 for the respective class of shares.*

Alternatively, it may be possible to allow the reporting investment firm a publication under the deadline which is applicable for transaction reporting purposes (Art. 25). This would constitute a considerable technical facilitation for the corresponding investment firms, since they would not have to set up their own publication system for the aforementioned *de minimis* cases.

Q13.5:
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?

No. The proposal submitted by CESR under paragraph 24 features two fundamental shortcomings:

Firstly, it stipulates as the point in time as of which the 1 minute deadline begins, that moment when the OTC transaction is finalised (under civil law). This is neither realistic nor helpful. A post-trade-publication can only be generated in a meaningful way if and when the reporting seller is in possession of documented proof of reliable data on the details of the reported transaction. This is regularly that point in time where the order confirmation of the other contractual party has been submitted and when the transaction can be forwarded to the internal transaction clearing. Any CESR deadline should therefore be linked to that moment where a reporting seller receives the order confirmation of the other contractual party. It appears to make sense to grant a 60 minute deadline as of the point where the confirmation has been submitted; this will ensure unencumbered technical processing of the message. Furthermore it needs to be taken into account that block trades frequently will be carried out over a longer period of time, i.e. over several days. The publication should generally take place at the end of completion of the entire trade.

Q13.6:
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?

At Level 1 of the Directive there is no basis for the limitation of the "deferred reporting" to such block-trade-transactions in which a party enters a risk position. Neither Article 28 nor Article 45 contain a reference to such a limitation nor is a mandate given to the Commission to implement such a limitation at Level 2. The possibility of a "deferred reporting" should therefore generally exist for block trades, i.e. it should also apply to those transactions which e.g. are carried out during (own account) interbank dealings.

Q13.7:
Should the identifier of a security be harmonised and if so to what extent? What should be the applicable standard (ISIN code, other)?

The ISIN should be used in order to identify the share.

Q13.8:
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?

No; similar to the exercise of warrants, also lending and repurchase transactions should be exempt from publication (cf. paragraph 41). The rationale behind Art. 28 is the creation of post-*trade*-transparency. Hence, it makes sense to only publish transactions which are subject to an actual trading process. As far as the exercise of an option is concerned, the supplier obviously bears the buy-in risk. Potential disclosure of the exercise of his option could lead to a situation where other market players team up against him before he has had an opportunity to finalise the transaction. The same conclusions with regard to the market participants' plans could be drawn in the case of disclosure obligations for lending and Repo-transactions. Yet, disclosure of these positions is not in line with the rationale behind Art. 28.

Furthermore, allotments in share issues and transfers of securities should be exempt from the disclosure obligation since they do not give rise to prices that are relevant for the market.

Q13.9:

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

Last but not least with a view to a pan-European data dissemination, we would welcome if also the competent authorities – in competing with commercial vendors – were entitled to provide for the central publication of post-trade-data. Such a solution would, however, have to be an additional offer which shall not prejudice the possibility of publication and dissemination by private vendors or proprietary arrangements of the investment firm. For the time being CESR should refrain from initiating any further work for publication of data at a pan-European level. If and when the market features a need for such a form of publication, the market forces will ensure the emergence of suitable offers. Pre-empting market solutions, however, does not fall under CESR's remit.