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Response to

CESR'S Call for Evidence

Formal request for Technical Advice on Possible Implementing Measures on the Directive on Markets in Financial Instruments

Ref: (CESR / 04 – 323)

In this second set of mandates from the European Commission CESR is invited to provide advice on the following issues regarding the MiFiD implementing measures: list of financial instruments (art.4), definition of investment advice (art.4), conduct of business rules (in particular suitability test and execution only, art.19), limit orders display (art.22), eligible counterparties (art.24) and pre-trade transparency requirements for investment firms (art.27)

On the occasion of this call for evidence, we would like to express hereafter a few general comments on the specific issue regarding the concepts of pre-trade and best execution, following the principle, stated in the Paper, for which "it is necessary to ensure the overall coherence between the different rules that are designed to ensure a high degree of competition and efficiency in European markets and in particular between the transparency and best execution provisions of the Directive".
In particular, we would like to comment on the concepts explained in the "Transparency" paragraph, where it is stated that "the Directive considers transparency as a fundamental mean to ensure market efficiency and investor protection in a fragmented and competitive marketplace. To this end ISD2 highlights the importance of the disclosure of price information as well as its availability to all market participants in a manner that could allow them to take their investment decisions in an informed manner and to the intermediaries to provide for effective best execution".

As regards pre-trade transparency, we share the principle of the full and consolidated disclosure of price information. We think that a wide disclosure of bid/offer prices for transactions is fundamental in order to assure the most possible complete information and to strengthen the price discovery process, as well as to assure that competition among different trading venues is carried out within rules which are the same for every operator. This means that, if transparency is considered as a mean to reach best execution, bid/offer prices that are shown on every single trading venue are to be comparable.
In particular, we think that the most effective way to assure the comparability among prices is to use net prices, that are prices which do not comprise commissions or any other type of cost and which do not take into consideration trading capacity (own account versus third party account).

Once agreed on that and in order to achieve the above mentioned Commission's goal (best execution through transparency), such prices should also be considered as the primary guide and the most important factor for determining best execution, especially when referring to retail clients.
As a matter of fact, Level I provisions regarding the obligation to execute orders on terms most favourable to the client introduce some principles which can not lead to a "common" definition of best execution, such as a "result obligation", the search for the best possible conditions within an execution policy and the consideration of different factors, some of which are subjective, qualitative and linked to execution.
This approach reduces the value of the disclosed prices and of pre-trade transparency, creates possible misunderstandings for investors and makes it also difficult the comparison and the pre- and post- verification of the compliance with the obligation itself. It also opens to potential disputes the person who has to apply the rule and be compliant with it.
In this context, execution of orders on the most "relevant" market in terms of liquidity should be considered as a proxy for best execution. Liquidity measured by the "price impact" method can assure by itself best execution.

Milan, July 30th, 2004