



*European Association of Co-operative Banks
Groupement Européen des Banques Coopératives
Europäische Vereinigung der Genossenschaftsbanken*

***THE EUROPEAN ASSOCIATION OF CO-OPERATIVE BANKS ANSWER TO
CESR'S DRAFT TECHNICAL ADVICE ON POSSIBLE IMPLEMENTING MEASURES
OF THE DIRECTIVE 2004/39/EC ON MARKETS IN FINANCIAL INSTRUMENTS***

- **ASPECTS OF THE DEFINITION OF INVESTMENT ADVICE AND OF THE
GENERAL OBLIGATION TO ACT FAIRLY, HONESTLY AND PROFESSIONALLY
IN THE BEST INTERESTS OF CLIENTS**
- **BEST EXECUTION**
- **MARKET TRANSPARENCY**

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Introduction

The European Association of Co-operative Banks (EACB)¹ welcomes the opportunity to provide comments on CESR's Draft Technical Advice on Possible Implementing Measures of the Directive 2004/39/EC on Markets in Financial Instruments - Aspects of the Definition of Investment Advice and of the General Obligation to Act Fairly, Honestly and Professionally in the Best Interests of Clients, Best Execution and Market Transparency. Our general remarks and specific answers to the questions put forward by CESR are outlined below.

I. General Remarks

The EACB appreciates the iterative consultation process carried forward by CESR and the multiple consultation rounds launched on issues of relevance such as best execution and market transparency. Nevertheless, this Association has some concerns on the procedural approach undertaken by CESR and consequentially on the deadline allocated to the consultation this time. It should be noted that in the current round, CESR has introduced many of its proposals for the very first time. This particularly applies to the areas "best execution" and "lending to retail clients" which are entirely new. Moreover large areas of the section on "market transparency" have seen material changes in terms of scope and amendments when compared to the previous draft.

In this respect, it is our view that this consultation round, which is formally treated as a second consultation round, should rather be seen as a *de facto* first consultation round. As a consequence the one month deadline set by CESR, which would be appropriate for a second consultation, appears too tight in this context. This is further compounded by the fact that "best execution" and "market transparency" involve highly complex areas which have a huge impact on the practices of every day business. There appears to be a risk that the forthcoming advice may have an extremely negative impact on existing business models or innovations – last but not least as a result of insufficient consultation. In fact, due to time constraints, market participants did not have the opportunity to come to a conclusive assessment of CESR's advice. This is particularly the case where CESR asks for a detailed justification for the proposed amendments as well as for practical examples on the implications of the proposals (notably but not limited to an assessment of the costs incurred by this). What has, however, already become clear is that the proposed provisions will lead to a significant cost burden notably for small and medium sized institutes. Given the foregoing remarks, we are of the opinion that CESR has this time especially the duty to impose on investment firms only those requirements whose impact can be clearly assessed and which can be justified by cost-benefit-analyses.

¹ The EACB represents, promotes and defends the interests of its members and co-operative banks in general. Co-operative banks are among the major players in Europe's financial and economic system: 130 million customers, approximately 700.000 staff members, 60.000 branches or outlets, 4.700 banks and a 17% share of the deposit's market.

II. Lending to retail clients

Question 1

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

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?

Answer:

The EACB rejects the idea of conducting a mandatory suitability test before lending credit to a client in connection with an investment service. This would blur the fundamental distinction drawn at Level 1 of the MiFID between cases which require suitability tests (Art.19 (4)) and all those cases which only require information.

At Level 2, CESR cannot exceed the scope of Level 1. It would not be legally possible to fall back on a general rule such as Article 19 (1) if a situation is already covered by specific rules (Article 19 (4) to (6)).

Moreover, the restrictions in the exemptions (Box 1, item 2) seem inappropriate. The examples describe cases in which the client has failed to fulfil his contractual obligations. In these cases, there is no room for a suitability test at all. It is also unclear what a retrospective suitability test is intended to achieve.

In conclusion the EACB suggests that CESR advice on lending to retail clients should be omitted (i.e. Box 1 should be deleted)

III. The definition of investment advice - generic and specific advice

1. Answer to the question put forward by CESR

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?

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?

Answers

CESR asks whether it would be reasonable to restrict investment advice to advice of specific financial instruments or whether it would be appropriate to cover generic advice. The directive defines investment advice as “personal advice, in respect of one or more transactions relating to financial instruments”. The wording of this article is clear. The definition refers to (specific) transactions and therefore it should not be read to cover generic advice. As a consequence, the EACB believes that this interpretation is appropriate not only for investment firms but also with regard to client protection. Sufficient client protection is provided because, on the basis of generic advice, the client does not know which concrete investment decision to take. The generic advice to invest, for example, in European shares opens usually more than 100 possibilities to invest. Generic advice does not empower the client to select a specific share, so there is no need for client protection at this stage. It is not necessary to trigger the conduct of business requirements. If the client really wants to invest, it will be necessary to go into more details leading at the end into a specific share. This means “specific advice” and at this stage client protection has to be guaranteed and the conduct of business requirements have to be applied for the purpose of the client. Advice that appear to be generic but do include implicit specific advice should be treated as specific advice.

III. Best Execution

1. Preliminary comments

In the present consultation paper, CESR has for the first time issued advice on the details involved in the best execution provision. This applies particularly, but not exclusively, to potential requirements concerning investment firms which execute their client orders through an intermediary. In this regard, we welcome CESR’s goal “to draft its Level 2 advice in such a way that it does not impose unreasonable burdens on firms that choose to use other investment firms to execute their client orders” (cf. item 13). Unfortunately, to date, this goal does not appear sufficiently reflected in the consultation paper.

Today it is common market practice that investment firms cooperate with other investment firms, in terms of order execution. Usually, this cooperation is regulated by the respective outsourcing rules and regulations and maximises efficiency, establishing a division of labour in order execution. Such a policy is in the interest of the client, due to the fact that the bundling of similar client orders generates economies of scale and thus more favourable terms for the clients. At the same time the quality of order execution is ensured by the involvement of an investment firm with access to various execution venues. For cost reasons, the cooperation is generally limited to one insourcer. Often, this insourcer is simultaneously acting for several investment firms. In this framework, the existing outsourcing rules and regulations pursue the same goal that CESR seeks to achieve by including under the scope of its provisions portfolio managers and investment firms that accept and transmit orders. The essential goal for both CESR provisions and the outsourcing provisions is to prevent that the outsourcing firm would shirk its obligations under the prudential supervision law by involving a further company (for best execution, cf. item 21 of the Consultation Paper). The outsourcing rules and regulations, however, reflect more adequately the various business models; thus in many cases they better fit the purpose than the advice proposed by CESR concerning

involvement of an intermediary. As a consequence, the EACB judges it important that investment firms which cooperate on the basis of a division of labour could do so according to the provisions under the respective outsourcing rules and regulations and this also for the purposes of meeting the requirements under Art. 21 MiFID. This would not prejudice the outsourcer's obligation to select a suitable insourcer nor would it prejudice his absolute responsibility for meeting the obligations under Art. 21 MiFID. Both requirements already result from the applicable outsourcing rules and regulations.

One further source of concerns consists in CESR's plans to postpone regulation of issues that are still unresolved to a later stage at Level 3; according to CESR this would be due to time constraints. The EACB fears that this might lead to a situation where Level 3 would see the establishment of completely new provisions. This should not happen. Furthermore, Level 2 has already created a certain degree of flexibility. This flexibility shall not be sacrificed at Level 3. On the contrary: these provisions should rather be interpreted in a consistent manner.

The last point on which the EACB would like to raise CESR attention is on the envisaged information obligations. These provisions partly lack any legal mandate and/or are not backed by cost-benefit analyses.

2. Detailed comments

2.1 Involvement of another investment firm (Insourcer) (Box 1)

As mentioned above, in its present form, the Consultation Paper fails to reflect the widespread division of labour which is one of the hallmarks of today's cooperation between investment firms when it comes to order execution subject to corresponding outsourcing rules and regulations.

On the basis of applicable outsourcing provisions, smaller and medium-sized investment firms in particular, have outsourced the execution of orders as well as the clearing, settlement, custody and further services in connection with financial instruments to another investment firm (insourcer). The following paragraphs are meant to clarify the potential scope of outsourcing in respect of the execution of client orders.

The insourcer is in possession of the necessary technical and subject-matter know-how. The insourcer is also the provider and developer of the IT for each and any process related to the security transaction. In this regard, the insourcer verifies the needs and requests of the outsourcing investment firms and improves the technical capabilities of all his clients through the implementation of these requirements.

Frequently and in consultation with the outsourcing investment firms, the insourcer also selects the suitable access routes to the markets; this can either be through creation of direct market access (by assuming stock exchange memberships in markets for securities or by acquiring trading licenses in derivative exchanges) or by involving one or several intermediaries. Due to the proximity to the execution venues and due to its special expertise, the insourcer also monitors whether an execution venue still meets today's existing legal

requirements with regard to an execution that is in line with the best interests of the (end) client. Investment firms that do not have any direct access to the execution venues would not be in the position to do so.

During the process, the insourcer assumes the bundling and quality assurance functions. This division of labour generates cost and quality benefits for the outsourcing investment firms due to the economies of scale deriving from bundling and the facilitation of quality assurance with regard to order execution. As a consequence clients of an outsourcing investment firm enjoy the benefits of the outsourcing decision.

This is further substantiated by statements from large trading partners of insourcers who confirm their preference for a cooperation with one central bundling firm compared to a dispersed cooperation with several smaller and medium sized investment firms as clients and that they are generally prepared to offer more favourable terms as an incentive for such a kind of cooperation with a central bundling firm.

Moreover, it should be taken into account that it is this very model which allows smaller and medium sized investment firms to compete with global players. Therefore, the outsourcing process is also a contribution towards competition. In this respect as well, the system of central bundling firms is in the best interest of the investor.

In the future, the preparation of the order execution policy would take place through the outsourcing investment firms in cooperation with the insourcer. The insourcer would continue to monitor whether the selected execution venues would enable to obtain best execution on a consistent basis.

In summary, the EACB believes that the inclusion of the insourcer as defined above, under the term "intermediary" would fail to reflect real market practices.

The examples quoted above illustrate that CESR's present proposal seems to fail in providing a true and fair view of existing business models as approved by supervision law. Therefore the EACB judges it important that a division of labour or cooperation on the basis of the applicable *outsourcing rules* and regulations will be ensured as an option also in future. The outsourcing rules and regulations are currently being harmonised both at a European level (CESR, CEBS) and also at an international level (joint forum of the Basel Committee for Banking Supervision, IOSCO and IAIS). Their ultimate goal is identical to the one of CESR. The essential goal for both CESR provisions and the outsourcing provisions is to prevent that an outsourcing firm shirks its obligations under the prudential supervision law by involving a further company (for best execution cf. item 21 of the Consultation Paper). The existing outsourcing rules and regulations, however, reflect more adequately the various business models; thus, in many cases, they better fit the purpose than the advice proposed by CESR concerning involvement of an intermediary (cf. notably item 23 of the explanatory text). Therefore the EACB urges CESR to allow investment firms which cooperate on the basis of a division of labour to meet the provisions of Art. 21 MiFID by complying with respective outsourcing rules and regulations. This does not prejudice the outsourcer's obligation to select a suitable insourcer nor does it prejudice his absolute responsibility for meeting the

obligations under Art. 21 MiFID. Both of these goals are already covered by existing outsourcing rules and regulations.

We would therefore propose adding the following new item 3 under Box 1:

"By way of derogation from paragraph 1 and 2, Member States shall allow investment firms to meet their obligations under Articles 21 and 22 (1) of the Directive also on the basis of the applicable outsourcing rules and regulations."

2.2 Cases where a comparison of the execution venues is not possible

The EACB should like to highlight the fact that in certain cases contemplated by MiFID, a comparison of execution venues and thus the drafting of an execution policy is not possible. This applies to more complex structures such as, for instance, OTC transactions involving swaps, OTC bond options or OTC currency options. In these cases, the terms for order execution depend on various individual factors (e.g. creditworthiness of the client, type and scope of collateral, contractual terms that shall be applicable). This means that the price indicators available in the market are very piecemeal and do not allow any generalisation.

2.3 No new requirements at Level 3

EACB has also concerns over CESR's plans to reserve regulation of pending issues for a later point at Level 3; CESR quotes time constraints as a reason for this. This must not lead to a situation where Level 3 will see the emergence of entirely new provisions. Furthermore, Level 2 has already created a certain degree of flexibility which shall and must not be sacrificed at Level 3. On the contrary: these provisions should rather be interpreted in a consistent manner.

2.4 Information obligations (Box 4)

– Timing of the information, item 1

The EACB would like to highlight that neither MiFID (cf. Art. 21 (6) c)) nor the Commission mandate contain any authorisation for a specification of the information timeline. Moreover Art. 21 (4) MiFID does not contain any provisions concerning the timing of the information. In this context, CESR seems to digress from the provisions set out by MiFID as well as by the Commission mandate. Should CESR decide to maintain those provisions, despite the digression, then the EACB urges that a derogation for existing clients should be provided for. Any such provision should generally include the possibility of providing information together with the statement of client assets (cf. CESR-Advice 10 to Art. 19 (8) MiFID). This would allow considerable cost savings; costs which otherwise would have to be borne by the client. Additionally, there is one further reason which would justify a waiver from providing near real-time information: the investment firm is anyway under the obligation of adjusting its execution policy in a timely manner. This obligation exists regardless of the information

obligation. Hence, for the purposes of client order execution there are already sufficient safeguards.

– ***Prominent warning concerning instructions, item 1 (a) iii)***

The envisaged duty to make a warning with regard to client instructions is not only unsubstantiated by any legal basis, it is also a contradiction with regard to the European legislator's (i.e. Parliament and Council) intention expressed in Article 21 (1) (2) MiFID. Pursuant to the foregoing provision, any client instruction shall always have priority, i.e. it shall override any obligations pursuant to Art. 21 MiFID which exist in the absence of a client instruction.

– ***Information on the execution venues, item 1 (a) v)***

Given our fundamental concerns over this issue, we object to an information obligation on each and any execution venue to which an investment firm may have direct access. Our main concern is that such an information obligation might lead to a situation where any change of an execution venue even if it is not accompanied by a concurrent change in the criteria of the execution policy could already be construed as a material change of which clients should have to be informed pursuant to Art. 21 (4) MiFID. Given the fact that the investment firms possess up to 50 direct accesses, an indiscriminate information obligation concerning such accesses could lead to a sharp rise in the frequency of change notices as contemplated by Article 21 (4) MiFID. Since such change notices would also have to be made *vis-à-vis* all existing clients cost-benefit analysis would prove that such an inflationary rise in change notices would be completely out of proportion. In conclusion the EACB believes that it should be sufficient to have a general description (e.g. "On the basis of the foregoing criteria we offer you access to all/major/individual/domestic/European/worldwide stock markets...").

– ***Description of the approach for meeting the requirements under Art. 21 MiFID, item 1 (b) and (e)***

Item 1 (b) and (e) stipulates the need for a description of the approach for meeting the requirements under Art. 21 MiFID. This provision appears to lack any legal mandate. Art. 21 MiFID only stipulates the need to provide information on the execution policy and any material changes thereof; it does not stipulate any obligation to inform on further requirements which have to be met in the context of Art. 21. Such a far-reaching information obligation would equally fail to meet the requirement set forth under Art. 21 MiFID, i.e. it would not qualify for 'appropriate information' requested thereunder. The EACB is of the opinion that it would be sufficient that such information are given in an oral form if a client wishes it.

– ***Explanation of specific practices for managing conflicts resulting from this, item 1 (d)***

The scope of application of this provision appears not yet completely clear. This issue appears out of context under Art. 21, on the opposite, it seems to belong to the provisions concerning

conflicts of interests. In this respect it would result similar to the provisions on inducements, the EACB would therefore propose deleting this advice.

3. Answers to the questions put by CESR

Question 30

- a) *How do firms compare venues (or intermediaries) that offer inducements with those that do not?*
- b) *Where the fees and commissions that firms pay to execution venues or intermediaries include payment for goods or services other than execution, please indicate the circumstances in which firms might determine how much of these commissions represents payment for goods or services other than execution? Under what circumstances do firms consider the entire commission as payment for execution?*

Answer

In EACB view, CESR has already provided an appropriate description of the requirements that need to be taken into account in the context of inducements under item 28 (“...must be a secondary consideration/...should not be the primary consideration”).

Question 56

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

Answer

In practice, those cases where there is a business relation to **one single insourcer or intermediary** only (cases of indirect access) would be particularly relevant. Investment firms will automatically seek to confine themselves to one business partner, due to the prohibitive costs which would otherwise incur². For the same reasons, it should also be permissible to open access to one execution venue only.

For more detailed comments on the bundling and quality assurance function which a confinement to one single insourcer, intermediary or execution venue has, cf. also the foregoing presentations under II. 2.1.

Question 65

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?

Answer

This question seems to present a terminological issue: neither in the question itself nor in the explanatory text is it made clear CESR’s meaning of internal costs. If and when this should

² E.g. additional technical interfaces in order to guarantee immediate transaction transmission, additional interfaces to the existing back-office (clearing, settlement, custody and further services in connection with financial instruments) or establishment of a further back-office.

exclusively relate to the costs which may arise with the access and the creation of technical interfaces to an execution venue (including the follow-up costs for the back-office, cf. answer concerning question 56) then the answer is that such costs are of major importance for the decision on and any adjustment of the execution policy and execution arrangements and that it therefore is necessary that these costs can be taken into account when selecting or changing the execution venue. The same applies to the question concerning the choice or change of an intermediary or insourcer.

On the other hand, should the nomenclature ‘internal costs’ refer to the commissions which an investment firm charges to its clients, then such internal costs do not play any role in the choice of the execution venue. The level of corresponding commissions should rather be left to competition (cf. item 62 of the Consultation Paper).

Question 82

How do you assure that your execution arrangements reflect current market developments? For example, if you do not use a particular execution intermediary or venue, how would you know whether they have started to offer "better execution" than venues and intermediaries that do use?

Answer

The question contains as an implicit hypothesis that investment firms are duty bound to keep up to date on all intermediaries and on all execution venues. Yet, it should be sufficient if investment firms obtain information from generally available sources and/or sources made available to them by execution venues/intermediaries. Any forthcoming obligation to carry out enquiries or investigations, however, would not seem acceptable. This would impose an impossible obligation and lead to a considerable cost increase for the execution of a client order.

Question 87

Are intermediaries likely to inform investment firms that manage portfolios or receive and transmit orders about material changes to their business?

Answer

The change of their business alone cannot give rise to an information obligation of the intermediary. Such an information obligation would only be triggered if and when an intermediary is no longer prepared to execute the orders of the investment firms in line with the respectively applicable execution policy.

Question 110

- a) *Please identify and estimate the specific costs that investment firms will incur to identify the execution venues and intermediaries that have executed or received and transmitted their client orders and to collect historical information about what portion of their client order they directed to each such venue or intermediary. For example, what costs would be associated with determining what percentage of client orders an investment firm directed to each venue or intermediary it used in the last 12 months, on both the number of trades and the value of trades?*

- b) *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.*
- c) *If firms are required only to make this information available upon request, would that address respondents' concerns about overwhelming clients with too much information?*
- d) *Please suggest approaches to focus this information. For example, should this information be disclosed for each execution venue, for different types of instrument, country-by-country, etc.? Should firms break out this disclosure for different business lines (e.g. retail versus institutional). How?*
- e) *Should there be information for execution venues that investment firms access indirectly? And, if so, should it be on the main intermediaries to whom the firms usually entrust the execution of their orders?*
- f) *Please provide specific information about why, in less liquid markets, this sort of disclosure actually might be misleading. Is such disclosure about equity transactions more meaningful or useful than disclosure about transactions in other types of instruments?*

Answer

The EACB and its members are opposed to an information obligation regarding the individual execution venues for fundamental considerations. Under such an information obligation, any change of the execution venue – even in the absence of an associated change in the criteria for the execution policy (because the new execution venue meets the existing criteria and because these criteria continue to allow best execution) – could potentially be regarded as a material change; in turn, this would mean that this change might trigger a mandatory information obligation pursuant to Art. 21 paragraph 4 MiFID. We should like to highlight that investment firms may have up to 50 direct accesses and that the envisaged information policy would mean that change notices would also have to be issued to existing clients. In other words a mandatory information obligation on every single execution venue runs the risk of creating an inflationary increase of change notifications which would not be mitigated if such obligation were to remain limited to cases of direct access only. As far as a cost-benefit analysis is concerned, this would seem utterly unjustifiable.

Moreover the EACB believes that it would be inappropriate to impose on firms an obligation to publish the percentage of the order that they have directed to an execution venue within a specific window of time. Firstly, in our view, there is no legal basis for such a provision. Secondly, there seems to be no explanation as to why and how this should provide meaningful information. The publication of a specific percentage does not allow any conclusion as to whether the execution venue in question was generally suited for the purposes of best execution or whether any given case of order execution was in line with the execution policy.

Furthermore, we should like to point out that this information would be historical data. Since information could only be requested at the beginning and subsequently only in the event of a

material change of the execution policy (cf. Art. 21 MiFID)³, clients would have to be given historical data together with the information on material changes to the execution policy affecting the future. In the extreme case this could even mean that percentage information would have to be given on an execution venue which in future would no longer form part of the execution policy. We would therefore oppose any obligation to publish what percentage of client orders have been directed to each venue because, also from the client's point of view, such an exercise would not be meaningful.

We also strongly oppose any disclosure of order percentages that have been executed via an intermediary. This information would appear to be misleading since it would blank out that the intermediary allows access to various execution venues.

Presentations on the costs which this would respectively incur would have required comprehensive surveys which could not be carried out in the brief time made available.

The option of providing such information only upon request (cf. question c) would not lead to any tangible relief, either. The reason is that this would not pre-empt the firm from having to keep this information on record for potential later request.

Question 115

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.

Answer

This requirement lacks any legal basis. Pursuant to Art. 21 MiFID, investment firms are only under the obligation of informing their clients on their execution policy and material change thereto. Only **upon request** investment firms are obligated to demonstrate to their clients that they have executed their orders in line with the firm's execution policy (cf. Art. 21 (5) MiFID).

Question 126

- a) *How might an investment firm gain the necessary consents required under Article 21 (3) of the Directive as part of a voice telephone communication?*
- b) *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's using voice telephone?*
- c) *Can respondents suggest a different approach than one used in paragraph 5 of the advice under Article 19 (3) that would permit investment firms operating via voice telephone to satisfy the objectives of Article 21's consent requirements?*

³ A periodic information obligation discussed in the hearing held on 23 March 2005 is hence devoid of any legal basis.

- d) *How might firms evidence that they had obtained client consent if they obtained that consent via voice telephone?*

Answer

The EACB has difficulties in fully comprehending the rationale behind this question. Even in cases where there is a need for an explicit consent, there is nothing that prevents the client from giving such an explicit consent. Even when using voice telephone communication, this would not prevent the client from giving his explicit consent. The requirement of an explicit consent does not mean that such consent must be given in written form. The client consent may be recorded by the investment firm. Potentially, the issue was created because CESR, contrary to the provisions under MiFID, requests that the information be given in written form and/or in a durable medium (for a critical appraisal of this matter cf. also our comments on the CESR proposals concerning Art. 19 (3) MiFID).

Question 129

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?

Answer

Given the presentations concerning items 39 and 128 and the advice in Box 4, item 1 (a) ii), the rationale behind this question appears not immediately obvious. Said items/advice spells out that the priority for retail clients should be cost and price while the question focuses on speed. Again, there appears to be no legal mandate for an interference with the prioritisation of these aspects. Pursuant to Art. 21 (1) (1) MiFID, this prioritisation is incumbent upon investment firms. Whilst referring to the Commission mandate in its concept paper dated June 2004, CESR advocated for precisely that position (cf. page 73 of said paper). Hence, at this juncture we have difficulties in comprehending the reason for deviating from this previous stance.

III. Market transparency

1. Detailed Comments

1.1 Timeliness and availability of post-trade information (Box 7)

– Trade reporting within 3 minutes (Item 195)

Real time publication meant originally 1 minute, now it is 3 minutes. One could interpret the term “completed transaction” as having a trade confirmation already received. As far as we know this is not part of CESR’s thoughts. The 3 minutes are in fact relating to the trade itself, therefore OTC trades reporting should be done 3 minutes after the transaction is completed by telephone.

This should not fit for OTC-trade done by telephone where a confirmation is in all cases necessary because of the high risk of faults. It is evident that telephone trading has not been thought of. In this case there is no trading venue the text in item 195 is speaking of. But OTC-

trade is done typically by telephone. There is no institutional arrangement comparable to trading venues which could facilitate the trade reporting. We regret to note that CESR has not taken into account our views in this respect as per our previous position paper and would like to put forward again our proposal of having a trade confirmation first and afterwards a publication (with a longer period) to avoid false price signals which will immediately affect the market without any chance of corrections because they will be in any case too late. By way of compromise it might be opportune to have a confirmation phase of one hour after sending the trade confirmation to the counterparty. If there is no contradiction within this phase the trade has to be published after 3 minutes. This will mean a higher degree of reliability of data on the screens as a result.

– ***Deferred publication arrangements (table 2, p. 73)***

We do not share the proposals for deferred publication arrangements in table 2, p. 73. The short time limits in combination with very high thresholds will deeply affect the trading. But it is not in the sense of the concept of price transparency that the prescriptions of price transparency will have an influence on the prices themselves. There is also missing a combination of the criteria for deferred publication with the so called unwinding of risk affected positions which is in our view absolutely necessary.

With regard to the concept of ADV CESR did not take into account that the trading in Europe does not follow a linear timeline. The opening of the NYSE in the afternoon has an important impact on the European market. The turnover in the late afternoon trade at the stock exchanges seems to be mostly equal to the volume of the rest of the day. The consequence is that the time window of table 2 will have a different meaning intraday.

The deferred publication arrangements are of heavy importance for the European capital markets. The technical advice of CESR should be based on a sound statistical basis which is still to be prepared. We cannot deliver in the short timeframe of the consultation an own proposal but offer our help for a further consultation round which is in our view necessary for this problem.

– ***Content of post-trade-information: The name of the investment firm published (item 139 a)***

There should be no name of the investment firm to be mentioned in the trade reporting in the case of OTC-trade. There is no “neutral” venue like the stock exchange or MTF involved, only the two counterparties. Being mentioned the investment firm would be at the stake of the interest of the market participants with regard to possible risk positions in the hand of the trade reporting entity. Therefore the reported trade should stay anonymous. This is also the requirement of the MiFID.

– ***Publication (Item 186)***

The EACB fears that the efforts of CESR with regard to a consolidation of data to be published should not lead to a standardisation through the backdoor in parallel to transaction reporting with very costly duties as a consequence.

1.2 Display of clients limit orders (Box 4)

– Item 130

The EACB has doubts with regard to the arrangements used for limit orders displayed being part of the order execution policy relating to art. 21 (2). There appears to be no legal basis for this requirement in the MiFID. As a consequence Level 2 demands here more than level 1. The treatment of client orders could be different depending on the wishes of the client as well as the character of the order. The client must be asked because of the possible waiver for the publication. This obligation should it do instead of an inflexible rule lasting for the time of a written agreement.

2. Answers to the questions put by CESR

Questions Box 1, p. 40

Q 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?

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

Q. 1.3: Has the quantitative test been appropriately structured? If not, how should it be improved?

Answer

The EACB has no further proposals with regard to definitions. Since the quantitative measurement of definition is problematic, the EACB suggests that it should be avoided.

Questions Box 3, p. 57

Q 3.1. Do consultees agree with the specific proposals as presented or would they prefer to see more general proposals?

Q 3.2. Is the content of the pre-trade transparency information appropriate?

Q 3.3: Do consultees agree on the proposed exemptions to pre-trade transparency? Are there other types of order/transaction or market models which should be exempted?

Q 3.4: Do consultees agree on the proposal in the second subparagraph of paragraph 84? Would it cause difficulties for firms trading in several capacity (systematic internalisation, crossing client orders etc.)? Are there alternative ways to address the potential loophole between Article 27 and Article 44?

Q 3.5: Do you agree with CESR's approach of proposing a unified block regime for the relevant provisions in the Directive or do you see reasons why a differentiation between Art.27 MiFID on the one hand and Art.29, 44 MiFID on the other hand would be advisable?

Q 3.6: Would you consider a large number of SMSs in order to reflect a large number of classes each comprising a relatively small bandwidth of arithmetic average value of orders executed as problematic for systematic internalisers?

Q 3.7: In your opinion, would it be more appropriate to fix the SMS as monetary value or convert it into number of shares?

Q 3.8: Do you consider subsequent annual revisions of the grouping of shares as sufficient or would you prefer them to be more frequent? Should CESR make more concrete proposals on revision ,especially, should the time of revision be fixed at level 2?

Q 3.9: Do you support the determination of an initial SMS by grouping the share into a class, once a newly issued share is traded for three months or do you consider it reasonable to fix an initial SMS from the first day of trading of a share by using a proxy based on peer stocks to determine which class the share should belong to?

Answers

Q 3.1: OK.

Q 3.2: OK.

Q 3.3: Facilitation should not be considered as internalisation : when investment enterprises execute large clients orders, they may need to keep part of the transaction on their books because the market depth is not sufficient.

Q 3.5: The EACB agrees.

Q 3.6: This question has been already raised in the first consultation round. In line with the EACB previous answer, we would prefer a small number of SMS-classes for reasons of practicability as well as transparency.

Q 3.7: This question has been already raised in the first consultation round. In line with its previous answer, the EACB believes that the SMS should be expressed as a value, not as a number of shares, because the number of shares fluctuates with corporate events (such as splits) without affecting the market capitalisation.

Q 3.8: According to our association, a yearly revision of the classes appears sufficient.

Questions Box 6, p. 73

It would be particularly useful if consultees to this section who wish to propose modifications or different approaches to CESR's proposal could supply statistical or other relevant information to demonstrate the need for modification or how their alternative proposals would work.

Q6.3: 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.

Answer

We do not share the proposals for deferred publication arrangements in table 2, p. 73. The short time limits in combination with very high thresholds will deeply affect the trading. But it is not in the sense of the concept of price transparency that the prescriptions of price transparency will have an influence on the prices themselves. A combination of the criteria for deferred publication with the so called unwinding of risk affected positions, which is in our view absolutely necessary, is also missing.

With regard to the concept of ADV, CESR did not take into account that the trading in Europe does not follow a linear timeline. The opening of the NYSE in the afternoon has an important impact on the European market. The turnover in the late afternoon trade at the stock exchanges seems to be mostly equal to the volume of the rest of the day. The consequence is that the time window of table 2 will have a different meaning intraday.



The deferred publication arrangements are of heavy importance for the European capital markets. The technical advice of CESR should be based on a sound statistical basis which is still to be prepared. We cannot deliver in the short timeframe of the consultation an own proposal but offer our help for a further consultation round which is in our view necessary for this problem. In any case SMS should be calculated by computing “orders executed” (MIFID article 27), not by computing central order books.

IV. Conclusions

The EACB trusts that its comments will be taken in due account by the CESR. For further information or questions on the paper, please do not hesitate to contact:

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