BORSA ITALIANA

Response to

CESR'S CONSULTATION PAPER

Advice on Possible Implementing Measures of the Directive 2004/39/EC on Markets in Financial Instruments

Ref: (CESR / 04 – 562)

Following the Lamfalussy process, the Committee of European Securities Regulators (CESR) published, for a round of consultation, a Paper (Ref: CESR/04-562) containing the second set of implementing measures for the Directive on Markets in Financial Instruments (MiFiD). After the consultation process, CESR advice will be submitted to the European Commission by the end of April 2005.

This Consultation Paper covers different areas: Definitions, Intermediaries (section II), Markets (section III) and Cooperation and Enforcement (section IV); it mainly deals with the definition of investment advice, the list of financial instruments as regards commodity derivatives, the general obligation for the investment firm to act fairly, honestly and professionally and in accordance with the best interest of the client, the suitability and appropriateness tests, the execution only business, eligible counterparties, the display of client limit orders and the pre-trade transparency for systematic internalisers.

Being thankful for the opportunity to comment on the CESR's advice, we report below the responses to the questions that can have a major impact on the framework of the Regulated Markets and on their competitive environment.

Section II – Intermediaries

Transactions executed with eligible counterparties

Q 6.1: *Do Market Participants agree that the quantitative thresholds for undertaking to request treatment as eligible counterparties should be the same as the thresholds for professional clients?*

We agree with the approach proposed by CESR, for which an investment firm may treat an undertaking who would otherwise be a professional client as an eligible counterparty provided that the opt-out regime and two of the following criteria are satisfied:

- balance sheet total : € 20 mln
- net turnover: € 40 mln

- own funds: € 2 mln

We share CESR's decision of defining the same thresholds used in Annex II of the Directive for identifying the undertakings that are considered to be professionals, as the opt-in and opt-out regimes specifically refers to this category of clients and its definition is already provided for in the above mentioned part of the Directive.

Section III – Markets

Display of client limit orders

Q 7.1: *In your view, what types of arrangements other than RMs and MTFs could be considered as complying with article 22.2?*

We think that all the arrangements that comply with the visibility (non-executed limit orders should be displayed as to reach the largest possible audience of market participants) and accessibility (ease and speed with which the order is accessible and executable, and we furthermore suggest that CESR might specify that the definition of "accessible" entails the obligation for the subject to execute the order) tests may satisfy the requirements under article 22.2.
In any case, the display of such orders through the web-site of the investment firm can never meet the two above mentioned conditions.

Q 7.2: *Do you consider the proposal on publishing the LO in a quote driven system appropriate?*

We agree with CESR's proposal, stating that quote driven markets may in future provide an additional facility for disclosing received orders that are not immediately executable against the quote of any market maker and remain pending.

Pre-trade transparency – Systematic Internalisers

Definition of systematic internaliser

Q 8.1: *Do consultees agree with the criteria for determining systematic internalisers? Should additional/other criteria be used and if so, what should these be?*

Q 8.2: *Should the criteria be fulfilled collectively or used separately?*

We agree with the proposed criteria (business model in which internalisation has an identifiable commercial role; existence of rules, protocols, procedures, practices governing the internalisation process; assignment or use of personnel and/or automated technical system for the purpose of carrying out internalisation) but we think that this question cannot be answered with a straight yes or no. In general, a holistic view is certainly appropriate and necessary. On the one hand, strictly

separating all criteria and regarding the applicability of only one as decisive could lead to undesired results. On the other hand, failure to carry out internalisation in a way that results in a commercial role should not necessarily suffice to relieve an internaliser that fulfils the other criteria from its status as "systematic".

Q 8.3: *Should CESR set criteria for the term "frequent"? If so, do consultees support the setting of numeric criteria or do they believe that a more flexible approach would be useful? What should these criteria be?*

We do not think that CESR should establish quantitative/numeric criteria to define the term "frequent". As we do, on the other hand, not think that CESR should remain in its advice totally silent on this question, we recommend referring to availability and consistency in the text of the advice (Box 14).

Q 8.4: *Do you agree with the proposed obligation to disclose the intention to cease systematic internalisation? Should CESR propose more detailed proposals on this and if so, what should be the appropriate notice period?*

We agree with the proposal and we only suggest that the effects of the cessation of the internalisation activity should start from the trading day following the announcement.

Scope of the rule

Q 8.5: *Should liquidity be measured on an EU-wide or national basis?*

We support the concept for which a share is to be determined liquid on a national basis, but this should be valid across EU. And we presume that in the future, when a really integrated European market will be operating, it will be possible to determine a liquid share on a pan-European basis.

Q 8.6: *Do consultees have a preference in favour of setting pre-determined criteria or using a proxy approach?*

Q 8.7: *Regarding the different criteria described above, do consultees agree with the analysis of each of them, and are there other methods which should be evaluated?*

Q 8.8: *Is it possible and/or appropriate to use for the purposes of article 27 a combination of absolute and relative criteria to define shares as liquid?*

Q 8.10: *Do consultees agree with the analysis of the relative merits and drawbacks of using proxies such as indices?*

Q 8.11: *Which criteria would best accomodate the needs of different markets within the EU?*

We favour the use of pre-determined criteria and in particular we propose either turnover velocity or a criterion that considers number of trades and turnover.

Q 8.9: *Do consultees consider the proposed figures (i.e. 480 trades per day and 95% of total trading) as appropriate? If not, and where no figures are suggested, what are appropriate figures in your opinion?*

We think that the proposed figure of 480 trades per day is not appropriate: we think that such a threshold of 480 trades per day is too high and that in any case the number of trades should be calculated as an average per hour, in order to take into account the differences in trading day length. On the contrary, we agree with the other proposed figure of 95% of total trading.

The determination of the Standard Market Size / Classes of shares

Q 9.1: *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, 30, 44, 45 MiFiD on the other hand would be advisable?*

We definitely agree with the proposal of considering a unified block regime.

Q 9.2: *Would you consider a large number of SMS classes, each comprising a relatively small bandwidth of artimetic average value of orders executed, as problematic for systematic internalisers?*

We trust that CESR, on the basis of the data it has available from almost all European markets, will find an appropriate number of classes that balances the need for proper differentiation with the call for a certain practicability. In particular, we suggest the use of a calculation method that takes into account the total number of shares defined as liquid in the EU and specifically the variability of the average size of the orders referred to the shares belonging to each class. This because every class has to be sufficiently representative of the securities belonging to it. We also would assume that a number of 5 classes might achieve acceptable results.

Q 9.3: *In your opinion, would it be more appropriate to fix the SMS as monetary value or convert it into number of shares?*

We think that fixing the SMS as a monetary value is more appropriate.

Q 9.4: *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? In particular, should the time of revisions be fixed at level 2?*

We consider the annual revisions of the grouping of shares to be sufficient.

Q 9.5: *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?*

We favour the use of the second option, for which the initial SMS from the first day of trading of a share is fixed by using a proxy approach based on peer stocks.

Q 9.6: *Do you consider a two week period from publication as sufficient for systematic internalisers to adapt to new SMSs?*

We consider the proposed two week period as sufficient.

Q 9.7: *Do you agree on the proposal on publication of the classification of shares? Would you prefer the establishment of a single contact point (at level 2)?*

We share CESR's view, for which after the end of each revision period , each competent authority responsible for a particular share on the basis of article 25(2) should release an announcement at least in its web-page to make public the class to which each share belongs and for which, additionally and/or alternatively, all the information to be disclosed could be gathered into a single point (i.e. CESR's web-site) to ensure easy access for all.

Obligations of the systematic internaliser

Q 10.1: *Do consultees consider that there might be specific regulatory issues and specific provisions needed where a systematic internaliser is the trading venue with the largest turnover in a particular share falling within the scope of art. 27?*

We think that procedures should be established in order to let this trading venue be transformed into a multilateral system, such as an MTF.

Q 10.2: *Do consultees agree that the availability of quotes during 100% of normal trading hours of the firm is a reasonable and workable requirement for "on a continuous basis"?*

Yes, we agree.

Q 10.3: *Do consultees think that publication of quotes solely on the firm's own website meets the "easily accessible" test?*

We think that the publication of the quotes through the web-site of the investment firm never satisfies the "easily accessible" test, because it will lead to fragmentation of information and to difficulties in finding it.

Q 10.4: *Do you agree with the proposed general criteria for determining when a price or prices reflect market conditions or do you think that more specific criteria should be added? In the latter case, which criteria do you think should be added?*

We agree with the proposed approach and we do not recommend adding more specific criteria for determining when a price reflects market conditions. What is in our view important is the link to the firm's execution policy and its best execution obligation.
Specifically, we would also like to reaffirm here again what we already expressed in our response to the call for evidence (ref.: CESR/04-323) regarding the concepts of pre-trade transparency and 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 goal of reaching 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.

Q 10.5: *Do you prefer either of the criteria defining exceptional market conditions, and should those criteria be supplemented by an open list of exceptional market conditions?*

Q 10.6: *Are there exceptional market circumstances where a systematic internaliser should be able to withdraw its quotes even though a trading suspension has not been*

called by the regulated market? In the latter case, which market conditions should be added to an open list?

The two "options" provided by CESR as to the permission for an internaliser to withdraw its quotes are not really options but rather complementary scenarios. Level playing field considerations require permitting an internaliser to stop quoting in exceptional circumstances. Apart from circumstances that are shared by all execution venues, there is a variety of circumstances conceivable that lie only in the sphere of the internaliser (such as technical problems). In the other direction, we would argue for an automatism, namely that internalisers are obliged to stop quoting whenever trading is suspended on any Regulated Market that has admitted the share in question to trading.
Regarding possible open lists of circumstances that justify quote withdrawal, we do not see the necessity of such lists on a level II basis; CESR Members should, however, discuss such lists and procedures in their local environment as well as among themselves (level III).

Q 10.7: *Do you agree that the proposed approach to the updating of quotes is acceptable or would you prefer more specific criteria? In the latter case, which criteria could be added?*

We agree with CESR's approach and we would not suggest any further criteria.

Handling of client orders and executing the orders

Q 11.1: *Do consultees agree that it is unnecessary for CESR to provide additional advice in respect of the handling of client orders where a systematic internaliser publishes multiple quotes?*

We agree with CESR's opinion but we suggest that monitoring procedures to be carried out by Competent Authorities should be established in order not to let the contribution to price discovery given by the publication of the quotes be avoided, as the provisions referred to the matter in hand give visibility to price, but not to the market depth at each price level.

Q 11.2: *Would there be any benefit to CESR making more detailed recommendations concerning how a firm should set the number and/or volume of orders that represents the norm? If so, what form should they take?*

We do not think that CESR should produce any more detailed recommendations on how a firm should set the number and/or volume of orders that represents the norm, because such definition vary among different contexts, especially when taking into consideration the different types of IT systems used by the internalisers.

Q 11.3: *Do consultees agree with the definition of a transaction where execution in several securities is part of one transaction? In particular, is there the need to specify a minimum number of securities and if so, what should the number be?*

We do not think that there is the need to specify a minimum number of securities composing the basket, specifically because this number will vary depending on the different types of financial instruments considered (i.e. blue chips, small and mid caps…). In any case, we would suggest that the size of the order for each financial instrument composing it should at least equal the standard market size for that financial instrument.

Q 11.4: *Do consultees agree with the approach to "orders subject to conditions other than current market price"?*

Yes, we agree

Q 11.5: *Should the size be based on a EU-wide criteria or would national approaches be preferred?*

Q 11.6: *Do consultees prefer having a fixed threshold for all shares, or should the size be linked to the grouping of shares (and subsequently to the SMS of each class) or to some other factor?*

We think that the size should be based on a EU-wide criteria and linked to the grouping of shares.

Q 11.7: *If a threshold is set, how should it reflect the different sizes around the EU, i.e. should it be the highest retail size, the lowest or something in between?*

We think that the threshold should be as closest as possible to the highest retail size.

Milan, January, 28, 2005