

Luxembourg, 21st January 2005
SdC/BS

ABBL RESPONSE

CESR's Draft Technical Advice on Possible Implementing Measures of the Directive 2004/39/EC on Markets in Financial Instruments 2nd Set of Mandates - Ref.: CESR/04-562

Introduction

ABBL (The Luxembourg Bankers' Association) welcomes the opportunity to comment on the Consultation Paper issued by CESR for the 2nd set of mandates of the implementing measures of the Markets in Financial Instruments Directive (MIFID).

Comments

1. ABBL sees as a proof that delays are tight and that on some issues CESR refrains from answering all the questions asked by the Commission and so advises the Commission that no Level 2 measures are required. We are nonetheless pleased by the openness CESR shows in requesting more information on complex issues (i.e. Article 4 and Article 27) and asking views from the industry.
2. As other organizations, including FBE (European Banking Federation) of which ABBL is member, we plea the Commission to revise the timetable to allow enough time for both CESR and the industry getting through the legal process as well as the technical one. That is why we strongly support any extension of the MIFID implementation deadline beyond April 2006. Without a significant extension of the current implementation deadline the Directive will miss its objectives. Beside the legislative process, time to design, to implement and to test the new systems both by banks and regulators should be taken into account because of the extensive changes that this Directive introduces. This problem is further increased by the fact that no concrete thrusts of change could be taken before Level 2 measures are finalized and implementation at national level has taken place (notably due to interactions between banks and regulators positions as well as within the different subjects of Directive).
3. Therefore, along with FBE, we believe that the industry will need a minimum of eighteen months from the finalization of the rules until the transposition date instead of the mere three to four months, at the most, that would be left to industry under the current timetable. We therefore ask for CESR's support in achieving any extension of the implementation deadline preferably until the end of 2007.
4. One of our main problems was the lack of time to get through all the information and proposal. These problems were increased by the lack of data and late availability regarding trade data from exchanges. Therefore we could only device theoretical ideas regarding liquidity or SMS (below) for the purpose of the pre-trade transparency.

5. Our responses to the issues raised by the CP are as follows:
 - i. We consider investment advice should rely on the personal consideration of the client's specificities and is not dependent on his/her knowledge of financial products.
 - ii. We think that it is more than reasonable to restrict investment advice to recommendations of specific financial instruments and exclude financial planning and asset allocation moreover when delivered on a general basis.
 - iii. We were happy to receive the confirmation during the Open Hearing (as part of the FBE delegation) that the suitability obligations will not apply to eligible counterparties, and would appreciate further and formal confirmation.
6. As it was pointed out during the Open Hearing by the FBE delegation, without reopening Level 1 debate, we strongly believe that the proposed advice on execution-only (19.6) concerning the definition of non-complex instruments is based on an apparent confusion between risky and complex instruments. From a theoretical point of view: is a share a really so less complex instrument than a call option (which is only the right to buy something at a given price in the future)? Although we could understand the need to protect investors, we do not and cannot share the idea to refrain investors to buy products that are designed to protect them, when these would be allowed to investment firms without any restriction. We could agree that instruments whereby the investor could loose more than he/she has committed to his/her investment should be reserved only to experienced persons. But we think that in the vast field of derivatives products there are some less complex, less risky ones - depending on the terminology used - that are absolutely suitable for any average investor (i.e. covered warrants, covered options or long positions in these, as well as structured products that would protect investor's portfolio) and moreover when they are standardized products traded on exchanges. If CESR could also conclude that such non-complex derivatives exist, we would strongly support them being included in the scope of instruments allowed under Article 19.6.
7. We think that in the definition of "at the initiative of the client" for execution-only (19.6), the recital is sufficiently clear and accordingly no Level 2 work is necessary.
8. We do not endorse CESR's proposal to require the investment firm to inform the eligible counterparties which are in the "per se" category that they are eligible counterparties. It is not a bank's role to assume costs and responsibility of informing these entities of their rights and obligations under the law.
9. Although we understand the task is complex, we urge CESR to take Level 1 recital 53 into account when defining the systematic internalizer.
10. We would like to thanks CESR for its open approach asking the industry to contribute to the analysis and definition of article 27.

11. ABBL ideas for defining the universe of liquid shares for pre-trade transparency to the most actively traded stocks in Europe are that the focus should be on one of the following two broad approaches. The first one could be termed top-down (or proxy to use CESR terms) the second would be bottom up starting with market data. At this stage since we received data pretty late we will only describe the two approaches from a theoretical point of view.
 - i. The proxy approach would consist in taking all EU quoted companies, assuming a given percentile X (first or second percentile) constitutes the really liquid shares, this at a whole EU level. Then proceed to a country ranking according to factors like GDP, population, size of stock exchanges... and allocate a portion of the EU identified shares to each country according to this ranking. Then choosing the companies that have the highest daily average volume over a 12 months period as the most liquid (with perhaps a minimum capitalization so that too small companies are excluded). The review period should be 12 months.
 - ii. The market approach starts with exchange data and consists in defining a given number of trades per day as well as a daily average turnover that would qualify stocks as being large and liquid enough, and then multiply these two numbers and retain only the 20, 40 or 60 highest ones at a EU level independently of the country where they are located/traded.
12. Anyhow and because everything depends on one thing and another and vice versa in this article 27 it is of utmost importance that CESR decides its approach to liquidity prior to deciding its approach to SMS, block size... Again the number of classes cannot be clearly defined until the pre-trade quote obligation is defined. But from a pure conceptual perspective ABBL clearly favors a small number of classes ideally between 3 to 5 and this both for technical reasons and for understandability by the clients, the matter being complex enough not to confuse further the retail investors.
13. ABBL would of course be delighted to further participate together with the industry and/or CESR on this issue and work out more concrete proposals on liquid shares or SMS, or more generally on the issue. We would likely be supportive of CESR's efforts to carry out further work and thinking on these matters once more data are available

Concluding remarks

ABBL welcomes the openness of the process and would like to remind CESR that the goals of analyzing all the details and other open doors behind each article and sentence are to meet the Lisbon Agenda. For further comments, ABBL would like to invite CESR to refer to the FBE position paper which we contribute to elaborate.