

March 20, 2007

By electronic mail: www.cesr.eu

The Committee of European Securities Regulators
11-13 avenue de Friedland
75008 Paris
FRANCE

RE: Best Execution under MiFID, Ref: CESR/07-050b (February 2007)

Ladies and Gentlemen:

Bloomberg L.P. ("Bloomberg") and Bloomberg Tradebook Europe Limited ("Bloomberg Tradebook Europe") welcome the opportunity to comment on the public consultation issued by CESR in February 2007 concerning "Best Execution under MiFID".

We support CESR's initiative to place best execution as a key cornerstone of the Directive 2004/39/EC on Markets in Financial Instruments' ("MiFID") regulatory architecture, and CESR's Level 3 work program. Moreover, CESR's consultation on Best Execution is timely and correctly anticipates issues that must be considered and addressed in preparation of CESR's Level 3 guidelines and recommendations for the implementation of MiFID. On the whole, CESR's proposals provide a useful opportunity for all market actors to offer input on guidance in this key area and we further support CESR's objective to establish new standard protocols for achieving market efficiency and investor protection. We commend CESR for its work in this critical area, particularly in relation to Article 21, which has "landed on its feet" by removing any unnecessary qualifications that would prevent an investment firm from following the client's wishes to execute orders in accordance with the client's specific instructions.

We respectfully note the stated objective of CESR's Level 3 public consultation on best execution at para. 10: "supervisory convergence and not the making of new rules," as well as the fact that this paper does not address questions regarding the scope of application of the best execution requirements (and all related aspects). We understand that CESR is currently waiting for further guidance from the European Commission on some of these issues and plans to release an addendum to this consultation paper after having received a formal response from the Commission.

None of Bloomberg's or Bloomberg Tradebook Europe's trading platforms involves trading as principal for proprietary accounts. Bloomberg's systems are agency systems and Bloomberg never acts as a dealer. Nonetheless, we hope our comments on the scope of best execution responsibilities will be helpful. In our view, best execution is an agency duty, deriving from the agent's duties of loyalty and due care in handling the affairs of

its principal. A dealer, if its capacity as such is known to the client, is in a different position. It should not be held to a standard that would require it to give the best prices the client might obtain elsewhere from the dealer's competitors. Indeed, to require a dealer to check with its competitors as to their pricing might well raise competition issues. Instead, particularly if the client is a retail client, the dealer should be required to offer prices that are within a range of reasonableness in comparison to the then market in the security, to the extent known to the dealer. If the dealer has recently bought or sold the security, its mark-up or mark-down should not be excessive. We point out that, in the United States, the NASD has dealt with this issue reasonably successfully through a mark-up policy that prohibits NASD members from charging excessive mark-ups or mark-downs from prevailing market prices. Perhaps a similar regime to curb possible abuses of retail customers would be appropriate for the E.U. as well.¹

Regardless of how those issues are resolved, we think it is particularly important, as CESR recognizes in the context of investment firms acting on behalf of professional clients that it be recognized that the customer may wish to retain trading discretion and control over the timing, methods, pricing, market or markets of execution and other aspects of executing its orders. For that reason, the last sentence of Article 21(1) of the Directive and Article 44(2) of Level 2 provide, as you know, that an investment firm meets its best-execution obligation if it follows the specific directions of its client. Many electronic trading platforms permit the customer to retain such discretion and it is essential that the legal standards applicable to the investment firm operating the platform not be required to second-guess its customer and be instead permitted to do what its client asks. In that regard, we were pleased to see CESR's acknowledgment that in some contexts involving arbitrage and automated programs, speed and certainty of execution may be a paramount consideration so as to avoid "missing the market". (Para. 30.) In cases where a trading platform permits the client to control the execution, the investment firm's best-execution policy should be to follow its client's instructions faithfully and need not involve elaboration on other matters that would be relevant only if the client delegated control over the execution to the platform operator.

In the comments that follow, we offer observations and suggestions that we hope CESR finds useful in its further consideration of the practical issues for best execution, including contents of execution policy and arrangements, disclosure to clients, client consent, relationships between firms in chains of execution, review and monitoring and execution quality data. We will take each of CESR's questions in turn.

¹ NASD, Rule IM-2440, "Mark-Up Policy", NASD Manual (CCH), available at: http://nasd.complinet.com/nasd/display/display.html?rbid=1189&element_id=1159000466.

EXECUTION POLICIES AND ARRANGEMENTS: QUESTION 1

QUESTION 1: *Do respondents agree with CESR's views on:*

- *the main issues to be addressed in an (execution) policy? Are there any other major aspects or issues that should ordinarily be included in an (execution) policy?*
- *the execution policy being a distinct part of a firm's execution arrangements for firms covered by Article 21?*
- *the execution policy under Article 21 being a statement of the most important and /or relevant aspects of a firm's detailed execution arrangements?*

An investment firm subject to Article 21 of Level 1 must have an “execution policy” and effective “arrangements” for complying with the overarching “all reasonable steps” requirement in Article 21(1). An investment firm that receives and transmits orders subject to Article 45 of Level 2, on the other hand, must have a “policy” for complying with the overarching “all reasonable steps” requirement set out in Article 45(4). We agree with CESR that these requirements, although worded differently, are both intended to ensure that the firm has a comprehensive approach to meeting the requirement to take all reasonable steps to obtain the best possible result for the execution of its client orders. These requirements operate to ensure that a firm has control over its execution practices and procedures, and therefore, the requirement to have arrangements and/or a policy (depending on the role of the firm in the execution process) helps to ensure that the firm's execution practices and procedures are understood both by the relevant persons within the firm and by the competent authority. They also form the basis for disclosure requirements.

Furthermore, we commend CESR for the distinction that it has appropriately drawn between requirements for Level 1 Article 21 firms and Level 2 Article 45 firms, in that the former requires firms that execute client orders to establish an execution policy, provide appropriate information about that execution policy to clients and obtain client consent to the execution policy. In comparison, portfolio managers and firms that receive and transmit orders are required to establish and implement a policy and disclose appropriate information about that policy, but there are no requirements in Article 45 of Level 2 for client consent or demonstration of compliance to clients. We believe that this distinction appropriately allocates the burdens associated with maintaining a best execution policy, providing investor protection and promoting market efficiency by encouraging clients and potential clients to review and consider key information about a firm's execution arrangements in the form of an execution policy — and allowing supervisory authorities to consider the same.

We agree with CESR's description of how a firm's execution policy fits within its broader execution arrangements as described in para. 20; in particular, that a firm's overall execution arrangements should be left to its discretion:

CESR has not considered what specific content a firm should include in its execution arrangements, beyond what is required for the execution policy. Article 21(2) suggests that the Article 21 “execution policy” is an aspect of the firm's overall “execution arrangements”. CESR therefore considers that the

execution arrangements are the means that an investment firm employs to obtain the best possible results, including its strategy, practices and procedures, while the execution policy may be understood as a statement of the most important and/or relevant aspects of those execution arrangements.

SINGLE EXECUTION VENUE OR ENTITY: QUESTION 3

QUESTION 3: *Do respondents agree with CESR's views on the use of a single execution venue?*

We support the MiFID spirit of Article 21, that whenever there is more than a single trading venue that offers execution relevant services, investment firms should consider their inclusion in its execution policy. MiFID's fundamental purpose is to unify Europe's securities markets, making them more competitive and dynamic both within the EEA and worldwide. To that end, MiFID expands the range of trading venues in Europe to include multilateral trading facilities ("MTFs"), eliminates the concentration rule and authorizes off-exchange trading, facilitates cross-border remote access to regulated markets and MTFs and introduces a regime of pre- and post-trade reporting. We are concerned, however, that the concentration of market power currently being proposed through exchange mergers, as well as the monopoly control the individual exchanges have over their market data, may well frustrate any effort to inject greater competition into the European markets. Best execution duties imposed by MiFID on investment firms will naturally force them to buy data. Constrained to purchase, they may well have to do so at unfairly high prices.

The same could be said even more forcefully with regard to the potentially anticompetitive effects of the trade data monopolies of the regulated markets. Comprehensive implementation of MiFID requires thorough consideration of this issue. We acknowledge and appreciate that CESR is currently considering these related issues as part of its MiFID Level 3 work program. In this regard, we respectfully recommend that CESR take the initiative in addressing the proper role of regulated markets as sole-source data providers within the MiFID framework and in curbing their ability to use their monopoly positions to dominate the market for value-added data products. Acting after the regulated markets have exercised their market power will be more costly for the markets and investors as well as for regulators.

DIFFERENTIATION OF THE POLICY

QUESTION 4: *Do respondents agree with CESR's views on the degree of differentiation of the (execution) policy?*

We recognize MiFID's requirement that both the execution policy of a firm that executes client orders and the policy of a portfolio manager or firm that receives and transmits orders reflect any significant variations in its execution approach for each class of instrument, and that appropriate information about these significant variations should be included as part of the information that MiFID requires these firms to disclose to their clients.

We agree with CESR's statement in para. 44, that appropriate differentiation will depend on the types of clients a firm serves, the instruments for which it handles orders

and the relevant market structures and execution venues available for those instruments. In particular, we support CESR's position below:

CESR considers that the level of differentiation in a firm's (execution) policy should be sufficient to enable the client to make a properly informed decision about whether to utilize the execution services offered by the firm. In order to do this, the (execution) policy will need to provide a sufficiently detailed description of the execution approach that the firm takes in order to obtain the best possible result for the relevant categories of instruments, orders, clients and markets that it deals with.

The fact that the execution duty applies to fixed-income investments as well as equity investments underscores the fact that there cannot be a "one size fits all" approach. The difference in available information about the fixed-income markets, for example, mandates that different approaches be taken. The BLOOMBERG PROFESSIONAL Service provides investors with a substantial body of information in fixed income securities, equity securities, interest rate derivatives and other financial instruments to help them evaluate the fairness of pricing being offered them, and this will help the professional investor in fulfilling its best execution duty.

DISCLOSURE: QUESTION 5

QUESTION 5: Do respondents agree that the 'appropriate level of information disclosure for professional clients is at the discretion of investment firms, subject to the duty on firms to respond to reasonable and proportionate requests? On the basis of this duty, should firms be required to provide more information to clients, in particular professional clients, than is required to be provided under Article 46(2) of Level 2?

In our experience, professional clients seeking to choose between and among investment firms offering them services are quite capable of taking care of themselves without governmental intervention or assistance. They are not shy about asking for more information, presenting complaints if they are dissatisfied and moving their business if their queries and complaints are not promptly satisfied. We think it useful for CESR and the Commission to avoid overregulation in this area since private ordering among market professionals has worked well.

CONSENT: QUESTION 6

QUESTION 6: Do respondents agree with CESR on how "prior express consent" should be expressed? If not, how should this consent be manifested? How do firms plan to evidence such consent?

We commend CESR for recognizing in para. 60 of the Consultation that, at least in the context of professional clients, consent can be inferred under the circumstances by the client's use of a system that has characteristics, functionalities and capabilities the client understands and willingly uses. We think it unnecessary to establish a paper trail beyond the fact of use.

CHAINS OF EXECUTION: QUESTION 7

QUESTION 7: Do respondents agree with CESR's analysis of the responsibilities of investment firms involved in a chain of execution ?

The requirements with which a firm must comply depend on whether the service it is providing is to be characterized as execution of client orders (in which case best execution applies under Article 21), or as portfolio management (without execution) or reception and transmission of orders (in which case the Article 45 provisions apply). We agree with CESR's analysis (para. 66) that the overarching obligation under both Articles is the same – to take all reasonable steps to deliver the best possible result for their clients, although there are differences in the detailed requirements under Article 21 or Article 45. Significantly for electronic trading platforms and others handling client orders, both Article 21 and Article 44, which governs Article 45, recognize that following a client's specific instructions suffices to satisfy the duty to provide best execution.

EXECUTION QUALITY DATA: QUESTION 8

QUESTION 8: What core information and/or other variables do respondents consider would be relevant to evaluating execution quality for the purposes of best execution?

We agree with CESR's observation that because clients require different types of execution service, firms are likely to assign different priorities to the Article 21(1) factors. As a result, the concept of the "best possible result" is likely to vary between firms depending on the prioritization of the aforementioned factors (para. 92). In the final analysis, best execution is a question of obtaining best price in most instances, but particularly where large orders are involved or where a rapid execution is needed to achieve an arbitrage or to execute a program trade, speed and certainty of achieving a given execution at a particular price may well outweigh whatever benefit might be obtained by proceeding more deliberately and attempting to seek out all possible prices and execution venues.

OTHER ISSUES: CALL FOR EVIDENCE

Developments in respect of data consolidation, pre- and post trade-transparency and execution quality data will also be relevant for demonstrating compliance. CESR is interested in receiving suggestions and feedback from industry on possible implementation approaches in this area with a view to promoting supervisory convergence on these important points after implementation of MiFID.

Accurate and accessible pre- and post-trade data are fundamental goals of MiFID, and it is much easier to ascertain best execution with superior data. We think that there are substantial obstacles yet to be overcome in this area. One key requirement for real-time data, both quotations and transaction reporting, is that the data not only be accurate as to the particulars of each data point, but that the data be sequenced properly. Smart order-routing algorithms, trading programs as well as individuals watching the "tape" in connection with making investment and trading decisions need to be assured that the data they are watching correctly reflect market trends in a given security. If the quotation changes and trades are not

timely reported with reference to a common clock that measures to at least the hundredth of a second and are not placed in proper time sequence, they will seriously mislead those trying to figure out what is happening in the market and what trading or investing strategies to employ. For that reason, the data may well be worse than useless if there is not a robust and rigorous method of ensuring timely reporting and proper sequencing.

As previously submitted to you in our letter of December 15, 2006, in relation to "Publication and Consolidation of MiFID Market Transparency" (Ref: CESR/06-551), we pointed out that we agree with the UK Financial Services Authority ("FSA") that if, as a result of MiFID, there is a significant shift from on-exchange to over-the-counter trading, such a shift would increase the probability of data fragmentation. In response to the anticipated risk of data fragmentation, the FSA proposed in CP 06/14 that investment firms could use their choice of an FSA-approved Trade Data Monitor ("TDM") to meet their MiFID post-trade publication obligations. Investment firms also could choose, under the FSA plan, to publish their trade information through alternative arrangements, as permitted by MiFID, but they would have to undertake "appropriate and ongoing due diligence to ensure it enables them to comply with the MiFID obligations on an ongoing basis." That is, using a TDM would reduce the burden and expense of due diligence an investment firm would otherwise have to undertake.

Under the FSA's scheme, we expect that for most investment firms, the default option would be to rely upon one of the entities admitted to the FSA's official list of approved TDMs. Each approved TDM will have met certain minimum standards set by the FSA relating to security of information, data integrity, timeliness, and systems and resources. In fact, the entities with the necessary infrastructure and experience most likely to meet these standards are the current Regulated Markets. The FSA concedes in section 16.86 of CP 06/14, "[w]e considered the possibility of encouraging firms to publish their trade information to the existing UK trade reporting entities. We recognize this would be inconsistent with the MiFID objective of promoting competition in this area." We respectfully submit, however, that the proposed TDMs, to the extent their ranks are dominated by "the existing UK trade reporting entities", will thwart competition in this area.

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We appreciate the opportunity to provide comments to CESR and we hope our comments are helpful.

Respectfully submitted,

Alexander Clode by R.D.B.

Cc: Mr. Carlo Comporti