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via Internet

Mr Fabrice Demarigny
CESR
Secretary General

Draft Technical Advice on Possible Implementing Measures of the Directive 2004/39/EC on Markets in Financial Instruments CESR 05-164

Response by Verband der Finanzdienstleistungsinstitute

Dear Mr Demarigny,

The Verband der Finanzdienstleistungsinstitute (Association of Financial Services Firms) is a German Association in which mostly small to medium sized investment firms are organized.

In the following, the association responds only to those issues in the draft technical advice which are of interest to its membership.

Chapter 2 – Definition of “investment advice”: specific or generic.

In the opinion of the Association, the distinction between specific or generic investment advice is rather theoretical. In our experience, it is very rare that generic investment advice will not be followed by specific investment advice. Therefore, we think, it is sufficient to regulate specific investment advice. In those rare instances in which there will be given generic investment advice not followed by specific investment advice (e.g overall family planning), no regulation is necessary. If any generic investment advice is followed by specific investment advice or services leading to the execution of specific investments, a customer is protected in due course by the conduct of business obligations of the firm(s) providing the services for specific investments.

Response to Question 1: We believe that sufficient protection is provided in any event to allow the definition of investment advice to be limited to specific recommendations?

Response to Question 2: We believe that considerations relating to the scope of the passport and the scope of the authorisation requirements point towards the exclusion of generic advice from the definition of investment advice.

Chapter 3: Best execution

The requirement of „best execution“ in the MiFiD is programmatic. Since it contains so many parameters which must be assessed and given weight according to individual circumstances, it defies a further definition and generalization on the lower levels of legislation.

If, after all, CESR attempts to shoulder such definition and further specification it should be restricted to the „execution“ as defined in MIFID and not enlarge this concept into an „indirect best execution“. It goes without saying that customers remain protected by the general requirement addressed also to investment firms not themselves „executing“ customer orders to act honestly, fairly and professionally in the „best interest“ of the client.

If small or medium sized intermediaries or portfolio managers are required to scout „best execution“ it would drive many of these small or medium sized firms out of business because it would require that they maintain information systems beyond their financial abilities. Furthermore, it would complicate their activities in manner that it would drive up their commissions or other fees. In addition, if intermediaries are tied by agreements to one or two execution firms only, they cannot steer their clients to other firms.

Small and medium sized intermediaries and portfolio managers must be able to rely on the „best execution“ policy of the firms executing their clients' orders. The former's obligation vis-à-vis their clients is to steer the client to another executing firm when and if the intermediary or portfolio manager realizes that the executing firm breaches consistently the duty of „best execution“.

Question for consultation: 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?

Response:

We believe that the distinction between internal and external costs is not relevant. All costs relating to the client transaction have an impact on the client's interests. The costs of several investment firms involved in a client transaction are working like communicating tubes. If costs and services are cut on one level, such cutting will be compensated on another level. For the client, the total counts in relation to all connected services. Internal costs are those which are charged to the client.

Question for Comment: 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 the venues and intermediaries that you do use?

Response:

We believe that the executing firms which are willing to serve a certain clientele represented by intermediaries and portfolio managers advertise their services with all the parameters of „execution“ to those intermediaries and portfolio managers. „Best execution“ understood as a policy is best enforced by competition, not by regulation.

Question for Comment: Are intermediaries likely to inform investment firms that manage

portfolios or receive and transmit orders about material changes to their business?

Response: Yes, they do if they want to stay competitive.

Question for Comment: 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.

Reponse: From the point of view of intermediaries or portfolio managers and their clients, it is helpful, if the policies of the executing firm regarding error correction and order handling are disclosed.