



BEST EXECUTION UNDER MiFID

Ref. CESR / 07-050b

We would like to thank CESR for the opportunity given to the market participants to express their views in relation to the best execution issue, which, needless to say, is of outmost importance for the effectiveness of the whole legislative framework introduced by the MiFID and in particular in relation to the principles of investor protection and competition.

Before addressing specifically the issues arising from the consultation paper, in the light of the above, we would like to stress the importance of due communication of the best execution policy by the firm (be it broker, RTO or portfolio manager) to its clients. This seems to be both a requirement of law in that all information addressed to clients ought to be “fair, clear and not misleading”, as well as a common sense prescription if the “best execution” requirement is to be given any real bite. Therefore CESR should focus not only on the content of the execution policy but also on the way it should be got across the clients, especially the retail clients.

EXECUTION POLICIES AND ARRANGEMENTS

Content of an (Execution) policy

Q 1: Do respondents agree with CESR's views on:

1.1 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?

As CESR notes, MiFID does not explicitly detail the content of the execution policy, nevertheless there are some issues that must be necessarily addressed by an execution policy; otherwise it cannot be considered compliant with the legislative requirements neither with the principles underlying the legislation, in particular the investor protection.

We agree with the factors listed and described by CESR in paragraph 22 of the document, but we believe that there other major aspects that should ordinarily be included in an execution policy.

The legislation foresees that the firm shall determine the relative importance of the factors referred to in art. 21.1 taking into account the criteria listed by art. 44 par. 1 (characteristics of the client, characteristics of the order, characteristics of financial instruments and characteristics of the venue).

Accordingly we believe that the execution policy, in order to guarantee a best result, should contain an explanation of the same criteria. As a next step, it should explain how these criteria interact with the factors delivering a best possible result and how they affect the firm's execution approach.

This being said, we would suggest to explicitly consider in the best execution policy all the criteria listed by art. 44 par. 1 and to assess the way they interact. In particular, one should consider the categorization of clients and the characteristics of the execution venues since, in our opinion, there is a direct link between these two variables.

Thus, among the matters listed by CESR in par. 22, We would stress in particular the importance of “execution quality” of an execution venue. This is an element that, in our view, should be adequately assessed in the execution policy given the significance of trade transparency and other features of a trading venue which can assume particular importance when dealing with retail client orders. (see answer to Q. 8).



1.2 the execution policy being a distinct part of a firm's execution arrangements for firms covered by Article 21?

1.3 the execution policy under Article 21 being a statement of the most important and/or relevant aspects of a firm's detailed execution arrangements?

We agree with CESR when stressing that the execution policy is only a part, even though the most important one, of some general execution arrangements to be implemented by a firm in order to obtain the best possible result.

In our view, this is an important issue since a firm focusing its efforts only on the best execution policy would be only partially compliant with art. 21. Whereas a client can only request the investment firm to be able to demonstrate that it has executed the orders in accordance with the firm's execution policy, the authority could request the firm to give evidence of its execution arrangements, in compliance with art. 21.2 of MiFID.

Given the above, we believe that it might be useful if CESR could provide some indicative examples of the execution arrangements a firm shall have in place in order to be fully compliant with the legislation.

Possibility of a Single Execution Venue or Entity

Q3: Do respondents agree with CESR's views on the use of a single execution venue?

The question of a single execution venue or entity is a very delicate issue. On the whole we share the considerations expressed by CESR in par. 38-40.

However we believe that CESR should clearly exclude the hypothesis that a firm being a systematic internaliser chooses its own internalizing system as a single trading venue in the execution policy for its clients. Another extreme hypothesis would be that of a choice of a third party internaliser as a unique venue.

First of all, it is difficult to realistically affirm that, where there is more than one venue for a financial instrument, it is more likely to obtain a best possible result on a consistent basis from a systematic internaliser than on a multilateral trading venue.

Moreover if we look at art. 22 on "client order handling rules", we see that par. 2 of the same article provides that in the case of a client limit order in respect of shares admitted to trading on a regulated market, which are not immediately executed under prevailing market conditions, investment firms are, unless the client expressly instruct otherwise, to take measures to facilitate the earliest possible execution of that order by making it public immediately in a manner which is easily accessible to other market participants. Member States have the discretion to decide that investment firms comply with this obligation by transmitting the client order to a regulated market and or an MTF.

In our view, this obligation is deeply linked with the best execution obligation, since the price, likelihood and speed of execution of the order are at stake. Therefore, if the internaliser does not intend to make public limit orders in the circumstances of art. 22 par. 2, it clearly must not limit the choice of trading venues to its own system.

The same logic, in our view, should apply in the case of limit orders for any other financial instrument placed with an internaliser since the best execution obligation and the general client order handling rules apply to all financial instruments.

Therefore we believe that CESR should clearly indicate that a correct and consistent with the underlying principle of best execution interpretation of the overall legislation, implies that the same conclusion be drawn for other financial instruments.



Q4: Do respondents agree with CESR's views on the degree of differentiation of the (execution) policy?

We understand that MiFID allows firms to create a number of execution policies to meet their respective customers' needs relating to different financial instruments, types/size of orders and/or market structures. The differentiation of the policies will be an important means from a commercial/strategic point of view but above all from the point of view of compliance.

CHAINS OF EXECUTION

Q7: Do respondents agree with CESR's analysis of the responsibilities of investment firms involved in a chain of execution?

On the whole we agree with CESR's analysis of investment firms involved in a chain of execution, but there is an issue that CESR addresses only indirectly in the consultation paper, which, in our view, should be given more importance.

Paragraph 73 of the consultation paper describes the case of a portfolio manager or an RTO which may sometimes wish to specify aspects of the execution service, for example choosing a particular venue where to execute the order. CESR gives such an example in order to clarify that the specification of aspects of the execution service must be regarded as a specific instruction under art. 21.1 with the consequence that the portfolio manager or the RTO will not be able to rely on the intermediary for such a specific aspect of the execution.

In our view, given that the best execution obligation towards the final customer in an execution chain are retained solely by the firm which owes the contractual or agency obligation to that client, the possibility to manage directly one of the most important aspect of the execution service, the choice of the venue, must not be considered as an exception but regarded as a legitimate choice by a firm. Such a choice could originate from the firm's culture of compliance or commercial strategy.

Another important issue which we believe should be addressed by CESR regards the specific aspects that should be considered in the policy of an RTO or portfolio manager.

The interpretation of art. 19 MiFID and art. 45 of Level 2 is ambiguous as to the obligations of RTOs and portfolio managers.

In particular the following matters seem raise doubts:

1. Given the possibility of an RTO to choose directly trading venues in its execution policy, does it have a duty to list such trading venues therein and give "appropriate information" on them under art .19 par. 3 to which explicitly refers art. 45 of Level 2 ?
2. In the case an RTO chooses directly venues of execution, does it thereby assume the duties under art. 21 MiFID ?
3. Even if an RTO does not choose trading venues itself, does it still have to disclose such trading venues of the broker and give "appropriate information" on them under art .19 par. 3 ?

We would like to draw CESR's attention to the fact that both the answers to the above questions and the contention that neither the client's consent nor the prove of compliance apply to RTOs and portfolio managers could lead to unjustified differentiated level of investor protection.



EXECUTION QUALITY DATA

Q8: What core information and/or other variables do respondents consider would be relevant to evaluating execution quality for the purposes of best execution?

Still operating in the regime of the concentration rule, one does not realise yet the difficulties inherent in the choice of venues of execution. The difficulty lies in the need to choose a venue that is likely to provide “a best possible result on a consistent basis”. Thus intermediaries will have to assess the existing trading venues with regard to factors such as price, execution costs, likelihood and speed of execution and of settlement and other relevant considerations (art. 21 par.1 of the MiFID). The MiFID pre- and post trade transparency with regard to shares will guarantee information on price, volumes and liquidity for such financial instruments, and – indirectly – on the likelihood and speed of execution of orders.

As of today, however, intermediaries have to draw their execution policies without general access to data of standardized quality (i.e. indicative versus firm quotes, real time versus delayed disclosure) that would permit them to effectively assess the execution performance of the existing venues. After the MiFID implementation date, the problem of lack of due transparency will persist for non-equity financial instruments.

The visibility of other factors, such as likelihood and speed of settlement and “other relevant considerations”, depends on the availability of such data on a reasonable commercial basis and the interests of the venues in retrieving, processing and making it available to end users.

Furthermore, there are other characteristics of a trading venue which add to the execution quality of a trading venue and that render it particularly appealing to e.g. retail investors, such as specific controls as to free negotiability or subordination of a debt financial instrument performed upon admission of the financial instrument to trading.

Having said all this, we invite CESR to stress that the difficulties in retrieving the relevant information does not exempt intermediaries from their best execution obligation that applies to all financial instruments.

Concluding, we believe that the execution quality of different trading venues is to be primarily assessed on the basis of availability, range and quality of relevant market data.

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