



CESR

The Committee of European Securities Regulators

11-13, Av. Friedland

75008 Paris

FRANCE

Oslo, 16. September 2004

**CESR'S ADVICE ON POSSIBLE IMPLEMENTING MEASURES OF THE  
DIRECTIVE 2004/39/EC ON MARKETS IN FINANCIAL INSTRUMENTS –  
COMMENTS FROM NORD POOL TO THE DRAFT CONSULTATIVE PAPER  
(REF. CESR/04-261B)**

We refer to the decision to extend the deadline to comment the draft CESR technical advice on mandates concerning best-execution (mandate under Article 21 of MiFiD) and market transparency (section III.B of the consultative paper).

Nord Pool ASA has no comments to the draft in respect of these matters but comments to section III.C on admission of financial instruments to trading.

MiFiD Art. 40 (1), (2) and (4) reads as follows with relevance to derivatives:

1. Member States shall require that regulated markets have clear and transparent rules regarding the admission of financial instruments to trading.

Those rules shall ensure that any financial instruments admitted to trading in a regulated market are capable of being traded in a fair, orderly and efficient manner and, in the case of transferable securities, are freely negotiable.

2. In the case of derivatives, the rules shall ensure in particular that the design of the derivative contract allows for its orderly pricing as well as for the existence of effective settlement conditions.

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4. Member States shall ensure that regulated markets have established the necessary arrangements to review regularly the compliance with the admission requirements of the financial instruments which they admit to trading.

The DG Internal Market has requested CESR to provide technical advice on possible implementing measures by 31 January 2005 on i.e. the following matter:

- (1) specify the characteristics of different classes of instruments to be taken into account by the regulated market when assessing whether an instrument is issued in a manner that allows it to be traded on a fair, orderly and efficient manner; in the case of transferable securities, define the conditions under which financial instruments are freely negotiable.

Cf. also MiFiD Article 40 (6) where these implementing measures are limited to (1) second paragraph) and consequently shall not relate to Article 40 (2).

The CESR draft advice provides however as follows:

**Requirements for instrument to be admitted to trading:**

1. The admission requirements cover transferable securities and derivatives.
2. Minimum conditions for admission to trading on an RM include the following requirements:
  - a. An RM shall be responsible for maintaining fair and orderly trading of instruments admitted to trading on its market, taking into account:
    - i. (if an equity) the free float;
    - ii. the expected trading activity of the instrument and (if a security) expected holders;
    - iii. the appropriate trading mechanism for the instrument.
  - b. Transferable securities (both equity and non-equity) shall be freely negotiable (i.e. freely transferable) and fungible.
3. For derivatives, minimum conditions for admission to trading on an RM include the following requirements:
  - a. *The terms of the derivative contract should be unambiguous and allow for a correlation between the price of the derivative and the price of the underlying asset (or the value measure of the underlying factor);*
  - b. *The price (or other value measure) of the underlying can be considered reliable and is publicly available;*
  - c. There is sufficient information typically needed to value the derivative;
  - d. *The arrangements for determining the settlement price of the contract should ensure that the price properly reflects the price (or other value) of the underlying asset (or factor) and minimises the potential for manipulation or distortion;*
  - e. Where the derivative requires the delivery of an underlying asset rather than cash settlement
    - i. there shall be adequate settlement and delivery procedures for the underlying asset;
    - ii. there are adequate arrangements to obtain relevant information about the underlying asset (e.g. quality grade).

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Our initial and more formal comment is that measures related to the structure of the derivative product and the relation between the derivative product and a possible underlying asset market may fall outside the scope of the implementing measures under Article 40 (6). This goes in principle to all advices under Item 3.

Our comment as to the content of the draft advice, and in particular with respect to Item 3 letters a), b) and d) (in italics), is that CESR may wish to take into consideration that the derivative financial instruments markets falling within the scope of MiFiD may have different structures. In the security markets, derivatives contracts are typically introduced following the development of a liquid and well-functioning spot market in the underlying instrument. In respect of commodities, a forward contract markets with physical settlement may be the first financial market to develop in respect of a trading commodity and become the most liquid trading market in this commodity and thus the key price reference.

An illustration may be the forthcoming EU Allowances and Green Certificate markets. Here we expect physical forward trading for settlement prior to the relevant reconciliation deadlines (cf. the Greenhouse Gas Directive Article 16) to become a key trading instrument, possibly the most important market price reference.

A too extensive focus in MiFiD implementing measures on i.e. the liquidity of (primary) underlying spot markets and the correlation between spot prices and derivative prices may introduce to strict requirements on commodity derivatives exchanges. It may hamper the development of relevant product structures and derivatives markets by preventing regulated markets from offering trading facilities in forwards and other physical derivatives contracts called for by the market participants. Here, we suggest that no implementing measures are provided for in respect of these matters.

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