Deutsche Börse Group

Deutsche Börse's Response

to

CESR's Consultation Paper
(Ref.: CESR / 04-603b)

CESR's Draft Technical Advice on Possible Implementing Measures of the Directive 2004/39/EC on Markets in Financial Instruments

1st Set of Mandates

Second Consultation Paper

General Remarks

Deutsche Börse gladly takes the opportunity to respond to CESR's Second Consultation Paper about CESR's draft technical advice on possible implementing measures of the MiFID (1^{st} set of mandates). The main issue discussed in this Consultation Paper is Transaction Reporting. Overall we welcome CESR's considerations about Transaction Reporting which would establish a well balanced solution for investment firms as well as for Regulated Markets. We especially appreciate CESR's practical approach to find a solution concerning the reporting obligation of remote members. CESR's alternative proposal on this matter (as illustrated as scenario 2 in Annex C) is fully supported by Deutsche Börse.

Transaction Reporting

I.) Methods and arrangements for reporting financial transactions (pp 11 sqq.)

We believe that CESR's proposed advice on general minimum conditions and reporting channels is very reasonable. It preserves already existing arrangements on the one hand and enables supervisory authorities on the other hand to maintain market integrity and investor protection. Again we welcome the introduction of a waiver of the obligation to report directly by investment firms, as provided for in Article 25 (5) if a Regulated Market or MTF has corresponding arrangements in place.

II.) Criteria for assessing liquidity in order to determine the most relevant market in terms of liquidity for financial instruments (pp 14 sqq.)

We agree with CESR's general considerations in order to find criteria for the assessment of liquidity (no. 4 to 6 on page 14), but we don't believe that the use of proxies is appropriate to fit these criteria. We also would like to remind CESR to take into account that the determination of liquidity is not only an issue of Article 25 MiFID. Article 27 (2) MiFID directly refers to the competent authority provided for in Art. 25 MiFID and moreover the determination of "block size" and "standard market size" for the respective instruments (as provided for in Articles 27, 44, 45 MiFID) requires an operational definition of liquidity. In this respect, we find it is essential to make use of only one consistent approach on the assessment of liquidity, which is applicable and in-line to the different provisions of the Directive.

Therefore, Deutsche Börse favors the setting of pre-determined criteria with the Market Impact approach to quantify liquidity as the first best solution. The Market Impact approach quantifies liquidity by its value to investors and intermediaries, the ability to trade fast and at lowest implicit transaction costs. This approach is best suited to allow for the objective and consistent assessment of liquidity across the different needs for an operational definition of liquidity within the MiFID. Furthermore, solely the Market Impact approach comes very close to the common understanding of liquidity as described by CESR (under no. 4 on page 14).

Nevertheless, we acknowledge that the Market Impact calculation may be computing intense and currently not every market is able to quantify liquidity on the basis of an exact methodology yet. For that reason, CESR may additionally consider -for a transitional period- a proxy approach on the basis of tradable indices or the existence of a derivative for those markets that are not able to quantify liquidity on the Market Impact methodology.

III.) Draft advice on Cooperation and Exchange of Information related to transaction reporting (pp 19 sqq.)

DBAG entirely shares CESR's view that it is essential to find a workable solution for the reporting of remote members in order to ensure that the competent authority of the market where the transaction took place also receives this information.

We are very much in favor of the efforts CESR undertook in this case and would like to recommend to make use of the alternative proposal CESR elaborated in Annex C of the Consultation Paper.

A single reporting obligation for remote members to the competent authority of the Regulated Market (CAR), where the transaction took place with subsequent distribution between authorities is the best way to provide an efficient reporting regime in accordance with the requirements of Articles 25 and 58 MiFID. In addition to the explanations given by CESR itself (no. 8 to no. 12 on page 20-21) we would like to further elaborate the benefits of this proposal:

The reporting obligation provided for in Art. 25 MiFID is mainly a tool for market supervision. Art. 25 MiFID intends to prevent insider trading and to support investigations of market manipulation. Therefore, prior addressee of the transaction reports has to be the competent authority of the national market where the transaction took place (as proposed in scenario 2 of Annex C) and not the remote members' home state authority (as proposed in scenario 1 of Annex C). For an overview about the differences of potential future reporting regimes for remote members please see Appendix.

A direct reporting to the CAR - as it is currently already in place - would foster market supervision:

- CAR remains first addressee of the transaction report and gets direct access to the transaction reports of the whole national market at the same time and in the same quality.
- Reports of remote members would also be subject to the conditions of customized transaction reports (beyond the European minimum content).
- CAR can automatically include the reports into existing data bases, since all transaction reports of the national market contain the same data format and depth of information.
- Also remote members of regulated markets could keep their systems for the submission of transaction reports.

On the contrary a reporting obligation to the remote members' home state authority (CA) would have negative effects on market supervision:

- Up to 25 national CA's would get fragmented information about transactions effected on one national market.
- CAR, as the competent authority for national market supervision, only gets these information - with a timely delay - reduced to the European minimum content which is fore-

seen for information that should be exchanged between authorities. This is clearly a step back from the high standards already in place today.

- In cases where CAR is not the competent authority of the most relevant market in terms of liquidity (CAL) it would not get any market information.
- Integration of the data forwarded by the CA's into existing data banks might cause difficulties since the content of these reports differs from the data of national market participants.
- Furthermore, for the German market alone, each of the 340 EU members of Xetra and Eurex would be affected by the costs of reorganization. We estimate that the total number of remote members in Europe is twice as big.

Taking all these arguments into consideration we strongly encourage CESR to further enable remote members to report their transactions to the CAR.

Frankfurt/Main, December 16, 2004

Appendix – Overview of potential reporting regimes for remote members