Deutsche Börse's Response

(Part 1)*

to

CESR's Consultation Paper (Ref.: CESR / 04-261b)

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

*) Please note that this document covers only the first part of the response. With respect to the extended deadlines, DBAG will deliver the second part of its response by October 4th. The 2nd part will include our comments on best execution and on pre- and post-trade transparency.

Specific Remarks

In the following we would like to submit our comments on CESR's Consultation Paper. We would like to restrict ourselves to those provisions that are applicable to trading systems providers. We would like to give (a) general comments on the specific sections and (b) answers to the questions on consultation.

I. Comments on Section II - Intermediaries

Organisational requirements for investment firms (Article 13, Boxes 1 to 6)

We would like to draw CESR's attention to the fact that the organisational requirements for investment firms might become applicable to the operators of regulated markets through the application of article 5.2. In contrast to MTFs operated by investment firms or the general investment firm business, operators of regulated markets can only provide restricted access to their services (i.e. see Article 42). There could be potentially severe consequences if CESR does not take the particular characteristics of market operators into account. For example, we consider the following provisions as not appropriate for market operators:

- Compliance function (Article 13.2, Box 1): Operators of regulated markets do not advise clients on the execution of their transactions. Consequently, conflicts of interest do not arise.
- Outsourcing (Article 13.5, Box 3): The application of this provision to operators of regulated markets should not lead to any inappropriate restriction of technical cooperation between regulated markets.
- Record-keeping obligation (Article 13.6, Box 4): Transactions that arrive at the market operator do not identify the underlying client. Therefore, record-keeping should be restricted to intermediaries who execute client orders.
- Safeguarding of clients assets (Article 13.7 and 13.8, Box 5): This provision only makes sense in the case of intermediaries.
- Conflicts of interest (Article 13.3 and 18, Box 6): See compliance function.

Comments on the best execution obligation will follow in the 2nd part of Deutsche Börse's response.

II) Comments on section III - Markets

Comments on pre- and post-trade requirements will follow in the 2nd part of Deutsche Börse's response.

Admission of financial instruments to trading (Article 40) (Box 14)

Q14.1: Do consultees agree on the requirements for admission to trading? Should more (qualitative and/or quantitative) criteria for admission to regulated markets be specified in the level 2 measures? If yes which?

We appreciate the light-handed approach CESR has adopted regarding the conditions on fair and orderly trading. However, we would like to warn that excessive regulation of admission of financial instruments would endanger the level playing-field among trading venues.

Q14.2: Do consultees agree on the role proposed for RMs in order to ensure that the issuers fulfil their disclosure requirements?

With two objections, we concur with CESR on the role of market operators in the process of admission to trading. First, market operators should not be obliged to assume a quasi-authoritative role in verifying that conditions for prospectus exemptions have been met. Second, we see no basis for obliging market operators to provide links to issuers' prospectuses on their websites.

III) Comments on Section IV – Cooperation and enforcement

1) Transaction Reporting (Article 25)

a) General comments

We welcome CESR's emphasis on the need to avoid additional costs for market participants. It is therefore important to verify the extent to which existing transaction reporting systems may be used for fulfilling MiFID requirements. In addition, we believe it is of utmost importance to reduce the complexity of transaction reports. The formats should therefore be harmonised at a Europe-wide level and potential synergies with trade reporting systems should be realised.

b) Specific comments

(1) Methods and arrangements for reporting financial transactions (Box 15)

In paragraph 3, CESR foresees the possibility of a waiver of the obligation to report directly by investment firms, as provided for in Article 25.5. From the perspective of the operator of a regulated market, we support this possibility. It will help to reduce costs for investment firms. Nevertheless, we would like to draw CESR's attention to the problem of remote members without a branch in the Member State in which the regulated market is authorised. Reporting to the competent authority responsible for the regulated market will allow simple technical solutions in these cases (enabling straight-through processing, see also our comments regarding Box 19).

Q 15.1: Should competent authorities be able to waive the requirement for investment firms to report transactions in electronic format? Should such an exemption be limited to exceptional cases, and what cases would those be in your view?

Electronic formats for transaction reports should be given priority. Nevertheless, in very exceptional cases, exemptions should be allowed.

Q15.3: To what extent should CESR investigate the possibility for future convergence between national reporting systems? What are the advantages and disadvantages of harmonising at EU level the conditions (including format and standards) with which all the reporting methods and arrangements have to comply in order to be approved, instead of, as proposed by CESR, harmonising the conditions at a national level? What impact might harmonisation have on existing national reporting channels, national monitoring systems and on the industry?

Against the background of growing cross-border business harmonisation, the highest degree of convergence at EU level is necessity. Only then will low-cost provision of the respective services by reporting channels be possible.

Q15.4: Do you agree with the set of the general minimum conditions suggested? If you do not agree, what other general conditions would be more appropriate in your view? In particular, taking into consideration the responsibilities of investment firms on the one hand and third parties and other reporting channels, on the other, do you think that CESR should include the requirement of a standard-level agreement between an investment firm and a reporting channel in the list of general minimum conditions, or would this be better addressed at Level 3? What is your view on the border line as to the responsibilities for reporting if done by a third party acting on behalf of an investment firm or by a reporting channel?

We agree with the set of the general minimum conditions suggested.

(2) Criteria for assessing liquidity in order to determine the most relevant market for financial instruments in terms of liquidity (Box 16)

We feel it would be helpful if the context surrounding the stipulation of the most relevant market could be clarified in the advice presented by CESR. The objective is merely to determine the competent authority to which transaction reports should be submitted, and not to define the most liquid market by means of some sort of liquidity beauty contest.

Q16.1: Do you agree with the approach to use proxies as suggested above? If you do not agree, what other approach would be more appropriate in your view?

In any case, CESR should use a pragmatic approach and avoid measures that cement the responsibilities of authorities that are based on the initial activities of issuers and do not reflect the fact that trading activities might change over the time.

(3) Minimum content and common standard / format of transaction reports

Q17.5: What are the advantages/disadvantages of requiring the field "client identification code" in transaction reports, bearing in mind the objectives of transaction reporting? What are your views on making the client/customer identification field mandatory in transaction reports? What are your views on the idea to promote a pan-European code for client/customer identification? Do you see any legal impediment to the introduction of such a code in your Member State?

Given that standardisation in this area is extremely difficult (also in relation to third countries), we recommend not integrating the "client identification code" field in transaction reports.

2) Cooperation and exchange of information (Article 58) (Box 19)

a) General comments

Within the integrated single market, the problem arises that in certain cases, several authorities could be potential addressees for transaction reports. It might be the authority responsible for the supervision of the investment firm in its home country (CA), or it might be the authority responsible for the supervision of the regulated market (CAR) – these authorities differ in the case of remote members (without a branch in the Member State where the regulated market is based).

In our opinion, the MiFID does not provide a clear solution for this problem:

- Art. 25.3 uses only the term "competent authority" and does not expressly say competent authority "of the home Member State of the investment firm"
- The home Member State principle according to the ISD is applicable for investment firms (Art. 4(1) no. 20a) as well as for regulated markets (Article 4(1) no. 20b)

Although current practice is for remote members to report to the CAR (by using the waiver integrated in the ISD 1993), the MiFID could be interpreted differently. Since this will lead to significant changes to established processes that will involve costs, we would like to draw CESR's attention to the following interests of the players involved:

- Investment firms: Investment firms would have to change established reporting methods; this could increase complexity and costs.[1]
- Regulated markets: Transaction reporting on behalf of remote members would become impractical because the regulated market would have to comply with up to 25 potentially different specific national requirements and address the reports to many different authorities. Low-cost services provision demands the installation of processes that are as simple as possible.
- CA: Administration cost and complexity would rise because investment firms' home authority will not generally be the CA of the most relevant market in terms of liquidity. Hence, nearly every report on remote transactions received would have to be transformed and distributed to 25 national CAs.
- CAR (where the trade took place): Administration cost and complexity could rise because the procedures to integrate the data forwarded by other CAs with existing databases and algorithms could become complex; at the same time, market surveillance (insider control) might become more difficult, since the CAR would not necessarily receive all reports on transactions in its home market (or at the most less detailed reports), and surveillance of the entire national market would therefore be hindered.

To find a practical solution that reflects the legal background provided by MiFID, we recommend adopting or at least examining the following options:

[1] For the German market alone, each of the 340 EU members of Xetra and Eurex would be affected by the costs of reorganisation.

- Reporting methods would be simplified by allowing regulated markets, as reporting providers, to report to the CAR, which would forward the reports to the home authority of the investment firm (based on a common processes developed in Level 3 of the comitology procedure).
- If arrangements are put in place by a regulated market in a Member State allowing the waiver of the obligation to report directly by investment firms, as provided for in Article 25.5, responsibility for transmission of transaction reports – independent of responsibility for the reliability of contents as such that stays with the reporting entity – would pass to the regulated market. In this case, the CAR would be the appropriate addressee for the transaction reports of the remote members.

b) Specific comments

Execution of requests for cooperation and exchange of information

Q19.3: What other issues, if any, should CESR take into account when responding to the Mandate concerning the "exchange of transaction reports between competent authorities designated as contact points"?

The exchange of transaction reports between authorities should not become overly complex. For remote members, a single reporting obligation to the CAR with subsequent distribution between authorities would be more efficient than reporting to the CA.

Frankfurt am Main, 17 September 2004