



***EACB¹'S ANSWER
TO***

***CESR'S PUBLIC CONSULTATION ON
"BEST EXECUTION UNDER MIFID"***

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¹ The European Association of Co-operative Banks represents, promotes and defends the interests of its members and co-operative banks in general. Co-operative banks are among the major players in Europe's financial and economic system: 140 million customers, approximately 720,000 staff, 60,000 outlets, 4,500 banks and a 20% market share.



I. General Remarks

The European Association of Cooperative Banks (EACB) welcomes the opportunity to answer CESR's public consultation on 'Best Execution under MiFID'. Best execution provisions do not only constitute the core of the MiFID legislation, they are also of particular importance for investment firms and represent one of the biggest challenges for banks, including cooperative banks, in terms of implementation.

Before answering the specific questions of the Consultation Paper, the EACB would like to stress four important points in relation to CESR's proposed guidelines.

1- Demonstrating best execution

Concerning the need for investment firms to demonstrate best execution upon client request, it is important that CESR clearly states in its guidelines that, in line with the formulation of art.21(5) of the MiFID Level 1 Directive, investment firms need to demonstrate compliance with their own execution policy and can by no means be requested to prove that the 'best result' was obtained for a given individual transaction.

2- Monitoring best execution

The EACB supports CESR's proposed guidelines on 'Review and Monitoring', and especially the recognition that "the monitoring methodology is at the discretion of firms". Investment firms cannot realistically check the details of each trade on a systematic basis for compliance with best execution and the monitoring of the execution policy can be done in different ways depending on the instruments, the volumes and the type of firms in question. Sampling is only one example of a possible technique that investment firms can choose to use for monitoring purposes.

3- Obtaining client consent

The EACB does not agree with CESR's current interpretation of 'prior express consent' and would like to insist that: first, the definition of what constitutes client consent is to be determined by national law ; and second, the duplication of requests for client consent should be avoided when it creates unnecessary costs without increasing investor protection.



4- Transmission of orders to intermediaries by portfolio managers and RTOs

The EACB would like CESR to make sure that no excessive burden is imposed on portfolio managers and RTOs who do not execute orders themselves but rely instead on intermediaries for providing them with best execution.

II. Detailed answers to CESR's questions

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

- **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?**
- **the execution policy being a distinct part of a firm's execution arrangements for firms covered by Article 21?**
- **the execution policy under Article 21 being a statement of the most important and / or relevant aspects of a firm's detailed execution arrangements?**

The EACB agrees with the four main issues listed by CESR as key components of an execution policy and believes that no other issue needs to be added to this list. It must however be clearly stated that the execution policy document of an investment firm must explain why the chosen approach is expected to deliver the best possible results for clients *on average*, and not at the level of every single transaction.

Regarding the relationship between execution arrangements (detailed procedures) and execution policy (general approach and principles for achieving best execution), the EACB agrees that the execution policy of an investment firm should be a **summary of the most important aspects** of the actual execution arrangements put in place by the firm. Yet we think that the word 'distinct' is unnecessary and that it would be more appropriate to simply state that the execution policy is 'a part' of the firm's execution arrangements.



Question 2: For routine orders from retail clients, Article 44(3) requires that the best possible result be determined in terms of the "total consideration" and Recital 67 reduces the importance of the Level 1 Article 21(1) factors accordingly. In what specific circumstances do respondents consider that implicit costs are likely to be relevant for retail clients and how should those implicit costs be measured?

The EACB agrees with CESR that retail client orders usually involve liquid instruments and are of average size, which means that the main factor for determining best execution for this type of orders is *likely* to be ‘total net cost’.

However, in a number of cases, **implicit costs can be highly relevant for retail clients**. When trading in illiquid instruments for example, or in volatile or falling markets, the likelihood of execution will often prevail over price considerations.

Another example of a situation in which the net cost of a transaction is likely to be secondary is when an asset manager transmits orders to an intermediary on behalf of retail clients. Asset managers and their intermediaries are usually bound by a service-level agreement which includes guarantees for the asset manager in terms of clearing, settlement, account management, and other support and advice services. In such cases, focusing primarily on net costs, instead of on the service level provided, might not be in the best interest of retail clients. Indeed, in order to offer ‘good-value-for-money’ services to the end (retail) customer, an asset manager or RTO can deliberately choose to negotiate a package of securities services with an intermediary in order to achieve costs savings. The EACB believes that this example could usefully complement paragraph 27 of CESR's Consultation Paper.

In any case, the EACB does not think that CESR should be concerned with defining and measuring ‘implicit costs’ (which are by the way often impossible to quantify precisely). It must be the responsibility of investment firms to adapt the prioritisation of best execution criteria to the instruments, market context, and unique situation of their clients.

Question 3: Do respondents agree with CESR's views on the use of a single execution venue?

The EACB, like CESR, considers that there are **a number of situations in which the use of a single execution venue is preferable** in order to reduce access costs and deliver the best possible result, especially in relation to retail domestic orders.

For example, a domestic bank offering primarily domestic securities to retail investors could choose to restrict itself to the main domestic execution venue (and main source of liquidity for the given securities) in order to minimise costs, due to the higher price of cross-border transactions in comparison with domestic ones. For example, if a purchase transaction is executed on the domestic Exchange and settled in the domestic Central Securities Depository (CSD), the cost of subsequently selling this position on another, non-domestic execution venue is likely to be considerable if the non-domestic execution venue cannot automatically settle the transaction in the domestic CSD due to the lack of STP² link. Currently, the cost of moving a securities position from one CSD to another is often such that it can definitely make sense for domestic banks to restrict themselves to a single execution venue. This venue will usually offer the most liquidity in domestic securities and is likely to offer the lowest ‘total consideration cost’ for the banks’ customers.

In this context, the EACB thinks that the third sentence in paragraph 38 of CESR’s Consultation Paper (“whenever there is more than one trading venue that offers execution relevant services, investment firms should consider their inclusion” in the execution policy) should not be interpreted as an obligation for investment firms to review systematically all execution venues on which the securities they hold are traded. This requirement is not realistically applicable considering the variety and number of securities which are traded on multiple venues around the world and would be in contraction with the spirit of Recital 66 of the MiFID Level 2 Directive³. The EACB therefore asks CESR to remove this sentence or reformulate it in a way which acknowledges the fact that investment firms cannot realistically check every single available execution venue for inclusion in their best execution policy.

² Straight-through processing.

³ « The obligation under Directive 2004/39/EC to take all reasonable steps to obtain the best possible result for the client should not be treated as requiring an investment firm to include in its execution policy all available execution venues. »

Finally, paragraph 40 of the Consultation Paper should be reformulated in a way that makes it clear that there is no duty for portfolio managers and RTOs to directly check and monitor the execution quality provided by their intermediaries when the intermediaries themselves monitor best execution for the orders they execute and transmit the outcome of their analysis to the portfolio managers/RTOs that use their services. Since portfolio managers and RTOs usually choose to use intermediaries because they trust their expertise in the execution of orders, they should be allowed to rely on them for providing their clients with best execution, as stated by CESR in paragraph 72 of its Paper, as long as the intermediaries are subject to art.21 of the MiFID Level 1 Directive. Portfolio managers and RTOs can always decide not to stay with an intermediary if they believe that they are not receiving best execution.

Question 4: Do respondents agree with CESR's views on the degree of differentiation of the execution policy?

The EACB agrees that the execution policy of an investment firm should distinguish between different asset classes and possibly between different categories of clients and types of orders. However, cooperative banks believe that investment firms should be free to decide whether they wish to publish a single document or a combination of documents (targeted at different types of clients/orders) as their execution policy. Retail banks with a limited securities offering must have the possibility to describe their execution policy **in one document**, which will not only avoid unnecessary costs but will also contribute to providing more clarity for investors.

Question 5: Do respondents agree that the 'appropriate' level of information disclosure for professional clients is at the discretion of investment firms, subject to the duty on firms to respond to reasonable and proportionate requests? On the basis of this duty, should firms be required to provide more information to clients, in particular professional clients, than is required to be provided under Article 46(2) of Level 2?



The EACB agrees with CESR that **it is up to the investment firms to determine the level of information disclosure which is ‘appropriate’ for professional clients.**

The EACB however does not think that investment firms should be requested to provide more information to professional clients than to retail clients. That is, the decision whether or not to communicate to professional clients information which is not encompassed by art.46(2) of the Level 2 Implementing Directive should be left to the discretion of each investment firm.

In any case, professional clients are allowed to send ‘reasonable and proportionate’ requests for information under Recital 44 of the Level 2 Implementing Directive should they wish to receive more detailed information than what was initially transmitted to them.

Question 6: Do respondents agree with CESR on how "prior express consent" should be expressed? If not, how should this consent be manifested? How do firms plan to evidence such consent ?

The EACB does not agree that CESR should attempt to define ‘prior express consent’ as opposed to ‘prior consent’ and insists that the definition of what constitutes client consent should be based on existing **national law**. Detailed prescriptions on this matter are beyond MiFID. As mentioned by CESR itself, the definition of ‘prior consent’ is different depending on national jurisdictions and tacit consent is a common practice in many Member States.

Besides, cooperative banks want to ensure that there is no **unnecessary duplication of procedures**, especially if they increase costs without bringing any benefits to customers. CESR’s interpretation that ‘express consent’, defined as “a signature in writing or an equivalent means⁴” could be required for each and every client, is simply unrealistic and would constitute a strong deterrence to become a systematic internaliser. Such a requirement would mean that large investment firms considering systematic internalisation would have to obtain and process more than 100,000 or, in some cases, more than 500,000 written signatures from all their clients before they can actually start with systematic internalisation.

⁴ “Equivalent means”: an electronic signature, a click on a web page or an oral confirmation, by telephone or in person.



Moreover, this legal burden would not add any value for investors. Indeed, **the execution policy** of investment firms needs to contain information on the execution venues used and **is likely to mention the possibility that client orders are executed outside of an MTF or regulated market**. When client consent has been obtained on the execution policy and when the execution policy mentions the possible use of systematic internalisation, asking investors for their consent a second time is simply too burdensome and unnecessary.

The EACB therefore insists that CESR should remove its current interpretation from its final recommendations.

Question 7: Do respondents agree with CESR's analysis of the responsibilities of investment firms involved in a chain of execution ?

The EACB agrees that the main objective, when dealing with 'chains of execution', should be to **avoid the duplication of efforts**, as stressed by Recital 75 of the MiFID Level 2 Implementing Directive.

With this objective in mind, the EACB feels that the formulation of paragraph 68 in CESR's Consultation paper introduces some confusion. The concept of 'execution approaches', which is absent from art.45 of the MiFID Level 2 Directive, is unclear and, in terms of the duties of portfolio managers and RTOs to monitor best execution in relation to the intermediaries they use, we would rather refer to paragraph 40 of the Consultation Paper and our answer to Question 3.

The EACB especially opposes the interpretation made by CESR in paragraph 87 that portfolio managers and RTOs should monitor the results of other intermediaries than the one(s) they use for executing their orders. This requirement would not only be very difficult to apply in practice, but it would also constitute a disproportionate burden imposed on portfolio managers/RTOs. Cooperative banks believe that such a 'comparative analysis' has its limits and that it should rather be used as an ultimate measure when portfolio managers/RTOs



believe that their intermediary no longer delivers the best possible results to them and when their requests for service improvements have not been satisfactorily answered.

Finally, the EACB believes that the last sentence of paragraph 87 is unclear ("All of these firms must in addition monitor the impact of their own actions on the execution quality they achieve") and should be removed.

Question 8: What core information and/or other variables do respondents consider would be relevant to evaluating execution quality for the purposes of best execution?

The EACB considers that there are a number of variables which can be used to evaluate best execution and that **there is no need for CESR to develop standards in this area**. A common set of standards could have the effect of limiting the number of possibilities to achieve best execution. What is important is that the best possible result is ultimately achieved on a 'consistent basis' and that investment firms decide which execution venue(s) to use based on their experience, the data provided by the various execution venues, as well as any other relevant information sources which contribute to an accurate evaluation of the service provided in terms of execution.

In fine, client satisfaction will constitute the best evaluation of an investment firm's execution policy. This is because investment firms, including cooperative banks, operate in a competitive market, and investors can choose a service provider which they think will offer them the best possible result.

III. Conclusion

The EACB trusts that its comments will be taken in due account by CESR. For further information or questions on this paper, please do not hesitate to contact:

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