

CESR CONSULTATION ON BEST EXECUTION UNDER MiFID February 2007

EALIC 'S REPLY 9 March 2007

EALIC refers to the CESR consultation paper "Best execution under MiFID" of February 2007 proposing guidance on best execution policy, disclosure requirement to clients, client consent, relationship between firms in chain of execution and execution quality data. CESR stated objective is to achieve, in accordance with its Level 3 responsibilities, greater supervisory convergence in respect of best execution.

EALIC has consistently been pressing for increased market transparency and greater investor protection. Given the role of best execution in promoting these objectives, EALIC has a vested interest in ensuring that investors receive all necessary information to compare execution services. EALIC therefore welcomes CESR's initiative.

Hereinafter follows our answer to CESR's specific 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 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?*

Article 21 Level 1 MiFID requires investment firms first to establish an execution policy, second to provide appropriate information about execution policy to clients, third to obtain client consent to the execution policy.

It is suggested to detail the content of the execution policy, which is not prescribed by MiFID: execution approach, execution venues, factors influencing the firm's execution approach etc...

While agreeing with the suggested outline which conforms to the provisions of Articles 21 Level 1 MiFID and article 45 of the Level 2 Directive, EALIC would like to underscore the need to implement these additional requirements in a flexible way. It should suffice for the investment firms to provide to their clients the list of criteria it uses to select the execution venue and approach.

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?*

Article 21.1 of Level 1 MiFID provides that investment firms shall take all reasonable steps to obtain the best possible result for its clients having regard to the following criteria: price, costs, speed of execution, likelihood of execution, speed of settlement, likelihood of settlement, size of order, nature of the order and any other consideration relating to the execution of the order.

Where the investment firm executes an order on behalf of a retail client, article 44.3 of Level 2 Directive requires that the execution factors be weighted in favour of the total price, representing the price of the financial instruments and the costs related to execution.

It is suggested, however, that due consideration be given to the other factors referred to in article 21.1 MiFID in specific circumstances where for example a large order is traded on a relatively illiquid market.

EALIC agrees with CESR's suggestion, which is consistent with the wording of the Level 2 Directive. Whereas article 44.3 of the Level 2 Directive gives priority to the total price, recital 67 of the same Directive provides that other criteria may be given precedence over the immediate price and cost consideration "insofar as they are instrumental in delivering the best possible result in terms of the total consideration to the retail client". For all practical purposes, the priority given to cost consideration would only be valid in a decentralised and liquid market environment, which does not necessarily apply to all orders from retail clients.

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

It is suggested that, whenever there is more than one trading venue that offers execution, investment firms should consider their inclusion in their execution policy. Furthermore, whenever only one particular venue may deliver the best possible results, due consideration should be given to indirect access to other venues (by transmitting orders to another execution intermediary, rather than executing them directly).

While nothing in the Directive mandates the use of multiple venues, it is clear that, as underlined by CESR, MiFID promotes competition between different trading venues and that, whenever more than one venue might offer execution, it should be considered for inclusion in the execution policy. In addition, as the Directive does not require direct access to venues, other venues could be accessed indirectly, as suggested by CESR.

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

Article 21.3 of Level 1 MiFID states that the execution policy shall include, in respect of each instrument, information on the different execution venues. Similarly, article 45.5 of the Level 2 Directive provides that the policy shall identify, in respect of the types of instruments, the entities with which the orders are placed.

In addition to differentiation by class of instruments, it is suggested to distinguish execution policy according to the types of clients an investment firm serves and to the relevant market structures and execution venues available for those instruments.

EALIC agrees with such an extension. While for example automated execution may be contemplated for orders of a standard size, a more specific handling may be required for major orders.

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 Directive?*

Recital 44 of Level 2 Directive provides that less stringent information requirements should be included with respect to professional clients. Professional clients should be able to identify for themselves the information that is necessary for them to make an informed decision. It is therefore suggested by CESR to leave at the discretion of investment firms the determination of the appropriate level of information disclosure for professional clients, through consultation with their clients.

EALIC agrees with this suggestion to adapt the information requirements to the client's status, which is in line with the Directive's stated objective to strike a balance between investor protection and disclosure obligations.

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?*

It is suggested that the prior express consent be provided by signature in writing or an equivalent means (electronics signature).

EALIC concurs, on the understanding that both means are considered equivalent.

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

When assessing compliance with the best execution requirement, it is suggested to consider the respective responsibilities of each firm in chains of execution. The requirement with which a firm must comply, depends on whether the service it is providing is to be categorised as ii) execution of client orders, in which case best execution applies pursuant to article 21 MiFID, or as ii) portfolio management or iii) reception and transmission of orders, in which case the article 45 Level 2 requirement to act in accordance with the clients best interests applies. In some instances the best execution responsibilities overlap, with the same firm owing execution obligations under article 21 as well as under article 45. For example, a portfolio manager which places orders with other firms for execution, will be subject to the article 45 requirement; he may also wish to specify certain aspects of the execution service and will therefore also be subject to the article 21 requirement.

EALIC agrees that when assessing compliance with best execution, competent authorities should adapt their requirements to the effective function carried out by each firm in the chain of execution. EALIC notes, however, that this would basically apply to decentralised markets.
