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Comments of the Zentraler Kreditausschuss[1] on CESR's Advice on Possible Implementing Measures of the Directive 2004/39/EC on Markets in Financial Instruments Part 3 (Post-Trade-Transparency-Requirements)

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[1] The ZKA is the joint committee operated by the central associations of the German banking industry. These associations are the *Bundesverband der Deutschen Volksbanken und Raiffeisenbanken (BVR)*, for the cooperative banks, the *Bundesverband deutscher Banken (BdB)*, for the private commercial banks, the *Bundesverband Öffentlicher Banken Deutschlands (VÖB)*, for the public-sector banks, the *Deutscher Sparkassen- und Giroverband (DSGV)*, for the savings banks financial group, and the *Verband deutscher Hypothekenbanken (VdH)*, for the mortgage banks. Collectively, they represent more than 2,500 banks.

BOX 13: Post-Trade-Transparency-Requirements for Investment Firms (Article 28)

a) Introduction

Already today, it can be perceived that for German investment firms, the post-trade-transparency-requirements under the MiFID will lead to a very high, cost intensive technical effort since to date there exist no equivalent provisions for the German market. At present, a comprehensive assessment of the CESR proposals on post-trade-transparency is not possible since the proposals made by CESR do not allow conclusions as to the complete workflow for generating a post-trade-report until its publication. This is, inter alia, due to the fact that CESR's proposals on the consolidability of the data are very vague. CESR merely stipulates the requirement that this data must be easily consolidatable (para. 26). Furthermore there is a negative definition, i.e. that it will not be sufficient if a publication takes place on the website of the reporting party (para. 40). If and within which period of time a post-trade disclosure can be presented "on a reasonable commercial basis", can however only be assessed when it is clear which specific requirements are made with regard to the consolidatability of the data. At present, it should be noted that the Level 1 Directive does not entail specific requirements concerning a sufficient degree of consolidatability. Rather, the reporting parties are explicitly given the possibility of also making public the relevant transaction data via "proprietary arrangements". In our view this includes publication on the website of the reporting party.

b) The individual recommendations

- Paragraph 26

Level 1 explicitly provides that publication may also take place through proprietary arrangements (art. 28 (3) a) iii); a consolidation of the data is neither envisaged at Level 1 nor is it called for by the Commission in its Mandate to CESR. The publication via a corporate website qualifies for proprietary arrangements; it needs to be prevented that an overinterpretation which treats "easily accessible" as a synonym for "easily consolidatable" will rule out this option. Naturally, the website where this publication takes place as such should be easily reached; in terms of navigation and usability, this implies that no unnecessary amounts of clicks will be necessary in order to reach the post-trade-transparency data.

- Paragraph 29

Transactions where the agreed price is decoupled from the current market situation should generally be exempt from the publication obligation. A labelling that the price digresses would not be sufficient in these cases. This applies for instance to package deals and back-to-back transactions. Here, prices are being generated which are independent from the market situation. A publication – even if it has a corresponding mark – could influence the market without being influenced by fundamental data. Yet, this is not the rationale behind the post-trade-transparency. For further exceptions cf. also the answer concerning question 8.

- Paragraph 32

Particular attention should be paid to the use of terms and definitions. A transaction which is above the standard market size does not necessarily qualify for a block trade. Also order volumes below the block size may have a market impact. Should CESR consider not to make any further distinctions for the purposes of Level 2, consistent use should be made of one and the same term. In this case, the threshold volume should lie below the *block size.* Any order which exceeds 10 % of the average daily turnover of a share (calculated on the basis of a certain time period) should qualify for a block trade.

- Paragraph 36

We reject the requirement that the making public of transactions outside a regulated market shall also have to take place outside of the trading hours of the relevant market. Also in these cases, the risk of disclosure of positions would be intolerable for market participants. The trading hours of those European markets which are most liquid for the respective share should be relevant. Transactions which are being conducted after market close should therefore be published on the next trading day within 15 minutes after opening of the stock exchange. This is the only way to prevent that the market will react against the respective firms.

Individual questions

Q13.1:
Do consultees support the method of post-trade transparency (trade by trade information), should some other method be chosen (which)?

Yes, if the post-trade-transparency shall enhance market efficiency at all, a trade-by-trade information is generally required. Furthermore, a summary of individual trades would unnecessarily reduce the available time period for generating the disclosure. In addition to this, further problems would result when coping with cancellations.

Q13.2:
Do consultees support the inclusion of "aggregated information" in paragraph 22 or should it be left for market forces to provide on the basis of the information disclosed under paragraph 21. If it is included what should the content be?

The decision on inclusion of the aggregated figures should be left to the market. Level 1 does not give rise to any immediate need, if and when there is a demand in the market, corresponding services will be offered.

Q13.3:
Do consultees support the two week period for which the post-trade information should be available?

The rationale behind the post-trade-transparency is providing the investor with information on the current market situation at any execution venue. This should facilitate investment decisions. For the investor, disclosure of all information of the past 14 days would lead to an information overkill whilst for the provider, it would turn into a cost-driver. After all, large-scale databases would have to be set up in order to handle these huge volumes of data and this would not only be a one-off investment but also require constant maintenance. Such maintenance could partly be carried out only on a manual basis. This effort would clearly be disproportionate to the actual benefit of a long-term maintenance. If and when the market sees a need for the storage of data over an extended period of time, commercial providers will come up with suitable products. Further, it is not easily understood why CESR on the one hand provides for a 1 minute publication deadline (for the reason of an urgent information need of the market) and on the other hand assumes that there will still be a considerable interest 14 days after the transaction has been finalised. This is inconsistent.

Q13.4:
Should some minor trades be excluded from publication (and if so, what should be the determining factor)?

Yes. Minor trades - at least when they are carried out on a incidental basis - are not relevant for market efficiency. Hence they should be exempt from the post-trade-transparency obligation. As a threshold for a *de minimis* clause we thus propose the following rule:

> *An OTC transaction shall be exempt from the publication obligation pursuant to Article 28 where its volume is less than 10 % of the Standard Market Size (SMS) defined under Article 27 for the respective class of shares.*

Alternatively, it may be possible to allow the reporting investment firm a publication under the deadline which is applicable for transaction reporting purposes (Art. 25). This would constitute a considerable technical facilitation for the corresponding investment firms, since they would not have to set up their own publication system for the aforementioned *de minimis* cases.

Q13.5:
Do consultees agree on the method of defining the time limit in paragraph 24 and is the one minute limit capable of meeting the needs of occasional off-market trades?

No. The proposal submitted by CESR under paragraph 24 features two fundamental shortcomings:

Firstly, it stipulates as the point in time as of which the 1 minute deadline begins, that moment when the OTC transaction is finalised (under civil law). This is neither realistic nor helpful. A post-trade-publication can only be generated in a meaningful way if and when the reporting seller is in possession of documented proof of reliable data on the details of the reported transaction. This is regularly that point in time where the order confirmation of the other contractual party has been submitted and when the transaction can be forwarded to the internal transaction clearing. Any CESR deadline should therefore be linked to that moment where a reporting seller receives the order confirmation of the other contractual party. It appears to make sense to grant a 60 minute deadline as of the point where the confirmation has been submitted; this will ensure unencumbered technical processing of the message. Furthermore it needs to be taken into account that block trades frequently will be carried out over a longer period of time, i.e. over several days. The publication should generally take place at the end of completion of the entire trade.

Q13.6:
Do consultees support the view that only intermediaries who have created a risk position to facilitate the trade of a third party should benefit from deferred publication or should all trades which are above the block size be eligible for deferred publication?

At Level 1 of the Directive there is no basis for the limitation of the "deferred reporting" to such block-trade-transactions in which a party enters a risk position. Neither Article 28 nor Article 45 contain a reference to such a limitation nor is a mandate given to the Commission to implement such a limitation at Level 2. The possibility of a "deferred reporting" should therefore generally exist for block trades, i.e. it should also apply to those transactions which e.g. are carried out during (own account) interbank dealings.

Q13.7:
Should the identifier of a security be harmonised and if so to what extent? What should be the applicable standard (ISIN code, other)?

The ISIN should be used in order to identify the share.

Q13.8:
Should more information be available on stock lending?If so, which should be the content? Are there other similar types of activities which should be covered?

No; similar to the exercise of warrants, also lending and repurchase transactions should be exempt from publication (cf. paragraph 41). The rationale behind Art. 28 is the creation of post-*trade*-transparency. Hence, it makes sense to only publish transactions which are subject to an actual trading process. As far as the exercise of an option is concerned, the supplier obviously bears the buy-in risk. Potential disclosure of the exercise of his option could lead to a situation where other market players team up against him before he has had an opportunity to finalise the transaction. The same conclusions with regard to the market participants' plans could be drawn in the case of disclosure obligations for lending and Repo-transactions. Yet, disclosure of these positions is not in line with the rationale behind Art. 28.

Furthermore, allotments in share issues and transfers of securities should be exempt from the disclosure obligation since they do not give rise to prices that are relevant for the market.

Q13.9:

Should CESR initiate work, in collaboration with the industry and data publishers, to determine how best to ensure that post-trade transparency date be disseminated on a pan-European basis?

Last but not least with a view to a pan-European data dissemination, we would welcome if also the competent authorities – in competing with commercial vendors – were entitled to provide for the central publication of post-trade-data. Such a solution would, however, have to be an additional offer which shall not prejudice the possibility of publication and dissemination by private vendors or proprietary arrangements of the investment firm. For the time being CESR should refrain from initiating any further work for publication of data at a pan-European level. If and when the market features a need for such a form of publication, the market forces will ensure the emergence of suitable offers. Pre-empting market solutions, however, does not fall under CESR's remit.