ASOCIACIÓN ESPAÑOLA DE BANCA

SPANISH BANKING ASOCIATION (AEB) FEEDBACK ON RTS BEST EXECUTION

Q1: Do you agree with the proposed categorisation of classes of financial instruments? And could the methodology based on, inter alia, the classification of financial instruments in the MiFID II RTSs 1 and 2 be used in the context of MiFID II transparency reporting be an alternative? Please state the reasons for your answers.

We believe that the proposal to categorise instruments based on the first digits of the CFI code is too granular and does not reflect the reality of the business. A similar issue arises with the proposal to classify instruments according to the transparency RTS (RTS 1 and RTS 2), although this would be slightly preferable to the former.

In both cases, differentiating instruments by country of first listing introduces unnecessary detail for equity products, and does not align with the homogenization goals outlined in the Capital Markets Union.

Based on our experience, clients of execution services do not require so much granular policies. In fact, excessive breakdown could create a significant cost of maintenance for entities and complicate transparency for the client (especially for retail clients), as they may not clearly understand which policy applies among all the options.

Therefore, any modification that leads to greater fragmentation without a real and practical justification should be rejected.

In practice, entities will seek to group order execution policies by type of security or financial instrument (stocks, bonds, derivatives, investment funds, etc.) according to the reality of their execution desks, which implies a considerable workload to justify this grouping, without translating into tangible benefits for the client.

Q2: Do you believe that the current wording of the RTS is clear and sufficient with regard to the content of the order execution policy where an investment firm selects only one execution venue to execute all client orders? Or should the RTS provide for specific criteria to be taken into account when assessing if the selected venue achieves the best possible result in the execution of client orders? Please also state the reasons for your answer.

Both ESMA, through the guidelines issued on investor protection (On MiFID II and MiFIR investor protection and intermediaries' topics), and the competent national authority have already clarified the criteria for assessing compliance with the best execution obligation for the client. It is considered unnecessary to elaborate on these criteria at the EU level.

Q3: Do you agree with the proposed factor of "order sizes" respectively for retail and professional clients, to be considered in investment firms' selection of eligible execution venues in their order execution policy and internal execution arrangements (see Article 4(1)(d)(i) and ii) of the draft RTS)? If not, what alternative factor would you propose?

In our opinion, art. 4 does not explain which execution factors from art. 27 MiFID are actually being developed. Consequently, we recommend deleting the references in art. 4.1.a) as these

are duplicated and do not add clarification. Also, as indicated in art. 4.1.g) "*for the criterion of price*", we consider that each of the considerations listed in art. 4.1 should specifically indicate the factor developed. Moreover, we recommend clarification on letters b), c) and d) in art. 4.1.

Additionally, it should be considered that not all of the factors are relevant for all products. Therefore, we understand that the RTS should give room to the firms to determine whether certain factors are not applicable to a specific product or flow. Finally, the order size referred to in art. 4.1.d i) is not, by itself, a determining factor for choosing the execution venue, it may be applicable when routing the order, but it seems too granular for the initial selection of venues.

Proposed factor of order sizes for retail and professional clients is too granular and detailed. This assessment shouldn't belong in order execution policy, it relates more to algo policy as is closer to smart order router behaviour.

We consider that there is an excessive description in some cases which increase complexity for firms in their initial assessment without adding real value.

The key factor for best execution is its proper management and how it is introduced into the market

Q4: Do you agree with ESMA's proposals for the specification of the criteria for establishing and assessing the effectiveness of investment firms' order execution policies? Please also state the reasons for your answer.

In general, the RTS is too prescriptive regarding the criteria to be used for selecting execution venues. We observe that many of the required criteria may not be applicable to all types of instruments, or there may even be a lack of market information.

For example, execution speed may not be as relevant a factor for bond orders, and the ability to assess the existence of new technologies or execution venues is a criterion that is difficult to implement in practice.

In this sense, the proposal introduces a new control threshold as an indicator of execution quality, the deviation from which would require a review of the execution policy. Establishing and maintaining such an indicator is deemed inadequate for the following reasons:

- Disproportionate burdensome: The need to check and compare a so high volume of data demands greater material and human resources to monitor the execution. Developing these systems represents a disproportionate burden, with administrative costs far exceeding the minimal benefits it would provide to the client.
- Ambiguity: The draft RTS does not provide sufficient clarity on how the indicator should be designed.
- Frequency: The quarterly frequency for monitoring is overly burdensome, especially considering that the project tightens the elements to be considered for evaluating execution quality. The dynamics of the markets make it unreasonable to require such frequency, as changes occur gradually and need time to consolidate.

Art 7 criteria, to evaluate the policy, are repetitive. We suggest deleting all of the factors in article 7 that are already covered in art.6, keeping those included in art.7.2.e), f) and g)

We believe that information from the Consolidated Tape providers could address some of the above issues, so it would make sense for the implementation of these requirements to align with the launch of the CTP regime.

This should include a transitional period of 12 months, as it is essential to know the specific information that the Consolidated Tape will contain, its granularity, and the format in which it will be published (it is necessary for the information to be machine-readable).

Despite the above, we believe that the RTS needs to adopt a more flexible approach regarding which criteria should be used for selecting execution venues.

Q5: Do you agree with ESMA's proposal that investment firms may rely on monitoring and assessments performed by third parties, such as independent data providers, as long as firms assess the processes of these third parties? Please also state the reasons for your answer.

We agree that entities should be allowed to outsource the service of monitoring and assessment of the effectiveness of their order execution policies.

Q6: Concerning the specific client instruction, should it be possible for an investment firm to pre-select an execution venue in the order screen, where the firm invites its clients to choose an executing venue out of multiple options? And if so, do you agree that only if the client chooses a different venue than the one pre-selected by the firm, the choice of execution venue does constitute a specific instruction? Please also state the reasons for your answer.

This possibility is deemed inappropriate for the following reasons:

- It would require personalized handling of each client's order, resulting in higher costs for them.
- Retail clients do not always know or are interested in understanding the factors involved in choosing the execution venue. An interface that facilitates directing instructions could complicate the process and especially discourage this type of client. The risks to which retail clients are exposed would increase, and it could even place a burden on entities to evaluate whether these clients have the necessary knowledge to issue instructions.

On the other hand, we observe a contradiction in the provisions of the RTS. In particular, Article 8.4(c) allows entities to execute specific client orders after providing a selection of execution venues, as long as it is accompanied by a corresponding warning that the best execution result may not be achieved. However, Article 8.5 prohibits entities from executing specific orders after offering a selection of the execution venue if they cannot guarantee the best result for them.

The final wording should clarify whether it is possible to offer a selection of execution venues in cases where the best possible outcome cannot be guaranteed.

Q7: Where an investment firm executes client orders by dealing on own account (including back-to-back trading), in light of the specificity of this execution model and since it is bound by the rules governing best execution, do you believe the current

text is clear with regard to what kind of obligations investment firm applying such model should comply with? Or do you believe it would be useful to provide in the RTS list and explanations of information that should be included in the order execution policy, such as related to the method and steps to be taken by the firm to establish the price of client transactions in back-to-back trading, or the methodology for the firm's application of mark-ups or mark-downs in such order executions? Please also state the reasons for your answer.

We are very concerned that the RTS does not adequately distinguish between order execution services and proprietary trading in response to a request for quote (RFQ). The latter is an activity that, for the reasons outlined below, should not be subject to best execution requirements.

In the context of this RTS, we understand that its purpose should be clearly limited to cases where an entity receives an order from a client and decides at its discretion to execute it against its own account, competing with other execution venues.

We believe that in such activity, for the purposes of periodic best execution analyses, the entity should consider itself as just another execution venue, competing with other alternatives for that order, meaning that the "fairness of the price" that applies to OTC proprietary trading should not apply.

In this regard, it is important to highlight that in the ESC-07-2007 Working Document, attached to the Q&A on best execution, the European Commission states that transactions conducted on a proprietary basis in response to a request for quote generally do not involve the execution of a client order but rather proprietary trading.

Notwithstanding this, the European Commission states that proprietary trading may also entail a best execution obligation when the client legitimately places their trust in the entity to determine the price or other elements of the transaction.

For this purpose, the European Commission establishes the "fourfold cumulative test" as a criterion to analyse whether a client could be legitimately placing their trust in the entity when trading on a proprietary basis, and thus, best execution obligations (in this case, the obligation to verify the fairness of the price as introduced with MiFID II) could apply.

However, in trading under the RFQ method, it is difficult to argue that the client places their legitimate trust in the firm, as it is usually not the firm that initiates the transaction; clients participating in such operations are generally highly experienced professional clients and tend to compare prices among different entities. Moreover, the prices of financial instruments subject to the request for quotation are usually transparent and public, as they typically relate to standardized instruments.

In this sense, we identify the following inconsistencies:

- Recital 19 includes the execution of orders in the scope of the RTS when an RFQ is involved, without any clarification or mention of the "fourfold" test.
- Paragraph 3 of Article 9 makes a very generic reference to proprietary trading. Despite being within a specific article on client order execution, it would be advisable to specify that activities such as trading based on a request for quotation are not included. An alternative wording could be: "When executing client orders on own account in OTC products...".

Additionally, for greater regulatory coherence and clarity, we suggest including a definition of what constitutes order execution activity against one's own account for the purposes of Article 9. A possible definition could be:

"For the purposes of this Article 9, an investment firm shall be dealing on own account when executing client orders, where the firm is making decisions on how the order is executed such as when a firm chooses to execute a client order by means of matched principal trading or against the firm's own proprietary position...".

Q8: Are there any additional comments that you would like to raise and/or information that you would like to provide (for example, relevant information in relation to any expected costs and benefits arising from the proposals)?

We appreciate the opportunity to respond to this consultation and fully share the regulator's goal of ensuring that financial entities have robust processes in place to secure the best possible outcomes in the execution of client orders.

In this regard, we welcome the recent MiFIR reform (MiFIR Review) which has eliminated certain best execution-related requirements, such as the reports associated with RTS 27 and RTS 28, which have proven to be excessively burdensome and of limited practical utility.

However, we understand that ESMA's proposal goes in the opposite direction, as it forces entities to develop very costly processes to offer execution or reception and transmission of orders services, without significantly improving quality for clients.

Additionally, due to the fragmentation of the European market, where entities do not benefit from the economies of scale seen in other regions, we have observed in recent years that some European entities, unable to bear the costs associated with connecting to multiple execution venues and monitoring orders, have been pushed out of the market and replaced by entities from outside the EU.

Thus, ESMA's proposal will require entities to develop new information-gathering capabilities and implement more exhaustive continuous evaluation processes, leading to notable expenses and increased fixed costs, exacerbating the previously mentioned negative effects. It is also worth noting that the proposal itself acknowledges that no impact analysis has been conducted, which we consider essential given the significance of the proposed measures.

The format of the policy and the annex includes internal information of the entity that does not need to be public, as it does not contribute to the transparency sought with the publication, such as, for example, Article 3.2, letter c).

From our perspective, if the regulator's goal is to improve the transparency of client order execution services, ESMA's proposal would be more coherent if it were fully supported by the "Consolidated Tape" initiative, which we wholeheartedly endorse.

In any case, if we were compelled to adopt ESMA's proposed approach, it would be essential to provide greater clarity and flexibility in order to mitigate the economic impact on entities.

For example, it would be necessary for ESMA to establish a list of execution venues that must be scrutinized by the entities, as it is unfeasible to evaluate all existing infrastructures. Furthermore, we believe that entities should have greater freedom to define the selection and

evaluation criteria for execution venues and order routing that best suit their business realities, which, in our opinion, would be more appropriately regulated through Guidelines or Q&A.

Finally, we consider it inappropriate for these requirements to come into effect before the launch of the "Consolidated Tape," as much of the necessary information will be obtainable from that source. For this, it is essential to have a greater level of detail regarding the format, content, and granularity of the information provided by the tape.

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