Bundesverband der Wertpapierfirmen an den deutschen Börsen e.V.
Börsenstrasse 14, 60313 Frankfurt/Main, Germany

CESR

The Committee of European
Securities Regulators
11-13 avenue de Friedland
F-75008 Paris/France

Your reference
CESR 04-562

Your message dated

City_Date
Frankfurt/Main, 20.01.2005

Consultation on the CESR's Draft Technical Advice on Possible Implementing Measures of the Directive 2004/39/EC on Markets in Financial Instruments under the 2nd Set of Mandates of the EU Commission
Ref: CESR 04-562

Dear Sir/Madam,

The Bundesverband der Wertpapierfirmen an den deutschen Börsen e.V. (bwf) is a nationwide association of securities trading firms and authorised stockbrokers in Germany. The bwf expressly welcomes the opportunity to participate in the consultation on CESR's draft advice to the European Commission in regards to the second set of mandates on the formulation of possible implementing measures of the Directive on Markets in Financial Instruments and respectfully requests that the following considerations be taken into account when finalising the draft:

1. Making Public Non-immediately Executable Client Limit Orders

(Article 22, paragraph 2 MiFID, CESR Consultation Paper pp. 58 et seq.)

Article 22, paragraph 2 MiFID regulates the treatment of client limit orders in respect of shares that are admitted for trading on a regulated market in cases when such orders cannot be immediately executed under prevailing market conditions by the commissioned investment firm. Unless otherwise instructed by the client (which is the case with, e.g., carefully at market orders or iceberg orders), an immediate making public of the pertinent order is required (sentence 1). Subject to corresponding regulations of the member states (implementation proviso), publication is ensured in particular by the commissioned investment firm's transmission of the order to a regulated market and/or an MTF (sentence 2).

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It can be assumed in this context that the legislator has already sufficiently substantiated in the text of the directive (level 1) what should be understood as the obligation *of "making public that [non-immediately executable] client limit order in a manner which is easily accessible to other market participants"* in the case that Article 22, paragraph 2, sentence 2 MiFID is applied and that the respective investment firm already extensively and invariably meets its obligations arising from Article 22, paragraph 2, sentence 1 MiFID by transmitting the non-executable order to a regulated market and/or an MTF.

CESR's suggested approach of also subjecting such client limit orders that are transmitted to regulated markets and/or MTFs to a *"visibility and accessibility test"* thus already appears misguided due to the fact that the pre-trade transparency regulations applying to regulated markets and MTFs, including the option of allowing for exemptions from the pre-trade transparency obligation under certain circumstances, are already extensively and conclusively regulated in Articles 44 and 29 MiFID.

CESR's exemplary expressed assessment that the transmission of a limit order to a regulated market and/or MTF with a quote-driven market model — provided the limit order is not immediately executable against the quotation of a market maker — would not fulfil the publication obligations arising from Article 22, paragraph 2 MiFID because the order as such would not be *"visible"* to other market participants due to the market model (CESR Consultation Paper p. 59) is thus to be rejected.

Conversely, homogeneous application of the *"visibility and accessibility test"* would contradict the option of differentiating the pre-trade transparency regulations (Article 29, paragraph 3, sentence 2 MiFID) as is obviously desired by the regulator in regards to possible specific characteristics of individual MTFs, even with largely congruent regulations in Articles 29 and 44 MiFID, and it would also involve the inherent risk of different pre-trade transparency regulations existing on the same market, depending on whether a limit order does or does not reach the market based on the obligations stipulated in Article 22, paragraph 2. Apart from the practical problem that this would require the transmitting investment firm to appropriately identify the order to the regulated market or MTF, it is obvious that such unequal treatment cannot be desirable in terms of market transparency and investor protection.

Finally, CESR's reference to a *"public order book"* (Consultation Paper p. 59) requires clarification insofar as that the "public nature" of an order book has nothing to do with the differentiation between open and closed order books. Rather, both open order books and closed order books are to be considered as public order books if they — and this is the key criterion — are used as a market model of an extensively monitored regulated market or an MTF; thus, a reference to the "public" character of order books on regulated markets and MTFs appears dispensable. Article 22, paragraph 2, sentence 2 MiFID only requires the transmission of pertinent orders to such a market. A different in-

terpretation or other subordinate technical implementation regulations would overstretch the content of this regulation.

Therefore, we suggest changing the technical implementation measure (Consultation Paper p. 59, box 13 no. 2) proposed by CESR as follows:

> *"... 2. Notwithstanding the provisions under no. 1, the obligation would be met where the limit order is sent to a regulated market (RM) or a multilateral trading facility (MTF)."*

2. Definition and Scope of Systematic Internalisation

(Articles 4 and 27 MiFID, CESR Consultation Paper pp. 61 et seq.)

In the explanatory text to the proposed technical implementation measures for Articles 4 and 27 MiFID, CESR correctly points out that wholesale transactions should not be included in the scope of regulations in regards to systematic internalisation. This must apply to all trading techniques used in this connection.

In order to preclude any cases of doubt and ensure appropriate legal certainty, we suggest supplementing Box 14 (Consultation Paper p. 62) with a third point that expressly excludes off-exchange wholesale order executions from the scope of systematic internalisation. It appears practical to incorporate the explanatory text given in brackets as no. 3 of the technical implementation regulations: "*The obligations under Article 27 will not apply to firms which deal on own account solely on an OTC basis and the characteristics of those transactions include that they are ad-hoc and irregular, carried out with wholesale counterparties, are part of a business relationship which is itself characterised by dealings above standards market size and are carried out outside the systems usually used by the firm concerned for its business as a systematic internaliser.*" (Consultation Paper p. 62).

3. Investment Advice

(Article 4, paragraph 1, no. 4 MiFID, CESR Consultation Paper pp. 8 et seq.)

In order to appropriately deal with the considerable demarcation problem concerning a definition of investment advice in accordance with the directive, it should be made even more clear that investment advice can only be assumed in such cases where, within the scope of a client relationship, recommendations concerning specific financial instruments are made, which on the one hand specifically address the client's personal situation and circumstances (risk/return assessment of the financial instrument in terms of portfolio aspects) and on the other, have an obvious connection to the transaction.

Thus — and this fact should also be emphasised even more strongly — a large number of client contacts cannot be subsumed under the term *"investment advice"*, for example:

a) inquiries and information within the scope of mere activity and/or service consulting/advice (CESR Consultation Paper, Question 1.1., p. 10); as well as

b) discussions or co-ordination activities that typically come up within the scope of sales activities and order executions, which are undoubtedly connected to the transaction and can absolutely contain general opinions and recommendations in regards to the respective financial instrument, but lack the character of advice with respect to the client's personal financial circumstances and individual investment objectives; and

c) verbal or written recommendations by investment firms and offers to an undefined group of people as well as (often periodical) marketing publications and market information, even if such publications and information may contain rating information such as positive or negative evaluations of the future return perspectives of individual financial instruments (here, the characteristic of individual consulting/advice is lacking as well).

In general, the formulation of technical implementation measures with respect to MiFID should not under any circumstances be used to establish a presumption rule according to which *any* client relationship related to transactions and/or including rating information in regards to individual financial instruments should be considered an investment advice unless proven otherwise.

For reasons of legal certainty, the aim should also be to demarcate, as sharply as possible, investment advice on the one hand from investment and contract brokerage (already accounted for as financial services) on the other hand.

4. Eligible Counterparties

(Article 24, paragraphs 2 and 3 MiFID; CESR Consultation Paper pp. 53 et seq.)

Here, we consider the CESR proposal for categorisation as eligible counterparties and the associated legal implications to be generally well-balanced and expressly support this construction.

Inasmuch as Article 24, paragraph 3 MiFID is geared *towards "proportionate requirements, including quantitative thresholds"* that, if existing, lead to undertakings other than the ones mentioned in paragraph 2 as being recognisable as eligible counterparties, the criteria for considering clients as professional clients according to Annex 2 MiFID should be consistently applied for reasons of a coherent and legally secure regime. An expanded restriction of these criteria is not required, since clients in such cases are professionals who

can independently decide on their own if the eligible counterparty status is opted for.

Putting eligible counterparties under the intended general obligation of reciprocal information in regards to this status and the associated legal implications appears less appropriate and implies a considerable and insofar unjustified amount of administrative effort and overhead. Investment firms that already are eligible counterparties *per se* would otherwise be effectively required to contact all stock exchange trading participants on all markets for which they have a trading license. Such a notification obligation cannot be inferred from MiFID, in particular. At most, it might be established for eligible counterparties as defined by Article 24, paragraph 3 MiFID and the insofar newly included insurance companies listed in Article 24, paragraph 2 MiFID; however, this does not apply to the other eligible counterparties in accordance with paragraph 2.

5. Withdrawal of Quotes by Internalisers

(Article 27, paragraph 3 MiFID; CESR Consultation Paper pp. 75 et seq.)

Due to the competition between internalisers, regulated markets and MTFs, the aim should definitely be, within the scope of formulating the MiFID implementation measures — in the case that legitimate interest of systematic internalisers to withdraw published quotes under exceptional conditions is recognised — to tie the option of withdrawing published quotes to strict and verifiable criteria, comparable to the requirements applicable to investment firms that are active on regulated markets or MTFs as market makers, specialists or generally as market personnel authorised for price determination in a specific stock (e.g. local stock brokers, *"Skontroführer"*).

Yours faithfully,

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Secretary General

Dr Hans Mewes
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