

BUNDESVERBAND DER WERTPAPIERFIRMEN AN DEN DEUTSCHEN BÖRSEN e.V.

Bundesverband der Wertpapierfirmen an den deutschen Börsen e.V.
Fasanenstraße 3, 10623 Berlin

CESR
Secretary General
Mr. Fabrice Demarigny

by e-mail

Berlin, 19 February 2004

ISD/CESR/Call for evidence

Dear Sir, dear Madam,

the Bundesverband der Wertpapierfirmen an den deutschen Börsen e.V. (Federal Association of Securities Firms on the German Stock Markets - A Registered Association) welcomes the possibility to participate in the course of the current CESR procedure by expressing our views on possible technical measures with regard to the implementation of the proposed Financial Instruments Markets Directive, FIM.

Therefore, we kindly ask you to add our association to your mailing-list in order to provide us with relevant future information and documents concerning this matter. We intend in particular to express our views within the course of the upcoming open consultation process and to attend open hearings on this subject.

The Bundesverband der Wertpapierfirmen an den deutschen Börsen e.V. is a nationwide union of local securities trading firms and authorised stockbrokers which came into being around the turn of the year. The members of the Association are made up of the former Bundesverband der Finanzintermediäre an den deutschen Wertpapierbörsen (BFI) and the Bundesverband der Wertpapierhandelsfirmen (BWF) on behalf of which

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petitions to the EU Commission and the European Parliament concerning the revised ISD have been sent so far.

We kindly ask you to consider the following points within the scope of the further CESR proceedings:

I.

Obligations for investment firms to make public firm quotes

Article 4, paragraph 1, subparagraph 7 and Article 27 Council common position (ISD-CCP)

1. Appropriate transparency standards for internalisers demand that a so-called market-internal internalisation can be assumed at most if in this case one acts *within* a regulated market or an MTF. To merely access the rules or systems of such markets indirectly does not compensate the negative effects of internalisation with regard to the market fragmentation and liquidity splitting. For this reason it has to be ensured within the scope of implementation of the ISD that a systematic internalisation – including all duties of publication combined with this – always is to be assumed in those cases where the corresponding trade is carried out outside a regulated market or an MTF.
2. Likewise with reference to the important direction of regulation of Article 27 ISD-CCP the following aspects for further CESR proceedings are to be quoted here:

a) Article 27, paragraph 1 ISD-CCP

The publication of firm quotes through internalisers should *always* take place if titles which can be also traded on a regulated market are concerned; beyond that the conditions of liquidity in *these* titles should not be of consequence.

Internalisers should not be released from the strict transparency regime on account of an (alleged) market inadequacy of their quotes only. One should rather stick to demand as far as that is concerned (or exclusively) an order size of the respective transaction from which corresponding reliefs are a possibility anyway (key word „Block Trades“). It has to be remarked argumentatively in this case that otherwise the restriction of the admission and allocation function of regulated markets and MTFs occurring in the course of the internalisation extension would only be compensated insufficiently.

Besides, it should be clarified within the scope of implementation of the ISD that an internalised execution of the order must not only be equal or better than the preceding quotation, but that the quote itself is equal or better than the reference market.

b) Article 27, paragraph 2 ISD-CCP

It has to be ensured that the exclusion of the so-called price improvement towards firmly published quotes is to be strictly complied with in the field of retail trading and should not be watered down by using the Best Execution Rule which is by its nature very similar to a blanket-clause; anyhow, the latter has rather a fig leaf function because of the liquidity splitting as a result of internalisation.

In the field of professional trading a price improvement is to be limited to „well-founded cases“ as proposed by the Council and organised in detail according to appropriate criteria. Such criteria should be compiled within the framework of the CESR mandate.

c) Article 27, paragraph 3 ISD-CCP

As a matter of principle the investors' access to the internaliser's quotes should be guaranteed non-discriminatory which also includes in reversal conclusion to restrict the access non-discriminatory as well. This may not only be done on the basis of business-policy considerations of the internaliser, but must meet requirements of equal treatment (hence: „non-discriminatory“) and correspond to legally clear and verifiable regulations in the demarcation between retail clients and professional clients. Besides, a corresponding regulation should not only include new, but also present customers.

d) Article 27, paragraph 4 ISD-CCP

Here it should be kept to it that internalisers may limit in isolated cases the number of transactions from one customer. The regulation of internalisers (duties of publication and the essential restriction of the price improvement) would largely run dry, if internalisers would allowed to discretionary restrict their offer to the firmly published quotes and could “update” the quotes beyond this limit.

e) Article 27 paragraph 5

The scope of the rules laid down here for the procedure of comitology will in the end be determined by the final version of paragraphs 1 to 4. In this case we are assuming that the mandate to work out further implementing regulations by the Commission and CESR will relate to the four above-mentioned paragraphs (and not as demanded last by the Rapporteur of the Parliaments Committee on Economic and Monetary to the first three paragraphs only). Since the scope of application of the Directive merely represents a general framework further practical embodiment for the whole Article is required.

II.

Pre-trade transparency requirements for MTF's and regulated markets

Article 29, paragraph 2 and Article 44, paragraph 2 ISD-CCP

The further implementation and embodiment of the ISD regulations is of importance especially in the light of the investor protection and at the same time serves to create a future level playing field. The pre-trade transparency requirements for regulated markets and MTFs to publish current bid/offer prices as well as the market depth at these prices must not lead to the result that market models and/or trading systems that are typically used in the member states – namely the local use of closed order books – will be thwarted; as far as that is concerned, an appropriate regime of exceptions is required. Accordingly, within the scope of the ISD transparency regime regulated markets and MTFs pursuing specific trading methods may not be put under the obligation to carry out a binding disclosure of the orders books with regard to the order book depth. Otherwise the free competition between different market models would be virtually levelled out in this case and would cause a lasting damage to the protection of investors. The latter is especially rooted in the risk that advantage would be taken of leads of knowledge with regard to titles which are narrow on the market as well as within the scope of the participation of active market operators (by name: issuers or market makers in warrant trading). Then one virtually would have to deal with a level playing field in which the conditions of a pure professional trade apply.

III. Other Considerations

1. The more detailed embodiment of the regulations concerning the *best execution* handling (“Obligation to execute orders on terms most favourable to the client”, Article 19 ISD-CCP) should take different parameters into consideration and be designed as flexible that also small securities firms may meet the requirements. On the other hand a maximum harmonisation would be inimical to the interest of an integrated internal market and would involve the risk that small and medium-sized businesses will be edged out of the market on account of an over-regulation. The result should be to minimise any risks of lapse by the securities firms. Therefore, the approach to consider the specific circumstances of the securities firms and to orient the standard for the best possible execution by these circumstances seems to be appropriate. Such an approach requires necessarily a supervisory regime that is designed and can be handled flexible.

In this connection the advantages and disadvantages of the applied trading systems and specific trading methods should be taken into consideration as parameters, too. Likewise, priority shall be given to executing orders undivided for reasons of investor protection.

From our point of view a subordinate implementing regulation in this connection might contain the following:

„The member states issue rules which are to be observed by securities firms performing services for executing client orders with regard to financial instruments when carrying out their activities. These rules shall at least guarantee the observance of the following criteria while the customer’s specific instructions have to be taken into account. The criteria to be taken into consideration comprise

- the trading quality of the concerned security;
- the fastness of execution of the order;
- the price;
- the volume of the client orders;
- the trading centre (place of execution and trading system/specific trading method); in case of client limit orders: observation of the trading centre enabling an undivided execution of the order;

- costs and any difficulties connected with the execution of an order in a certain trading centre.“
- 2. In connection with the compilation of implementing regulations with regard to the Client Order Handling Rule according to Article 22, paragraph 3 ISD-CCP, good reasons of investor protection seem to indicate that the execution of private client orders taking place outside regulated markets or MTFs should be made dependant on the express previous general approval or approval in an individual case to be given by the customer. CESR will have to explore to what extent the final ISD admits this and, if necessary, will have to compile measures of implementations in this area.
- 3. The transmission of limit orders according to Article 22, paragraph 2 ISD-CCP to regulated markets or MTFs should not be undermined through wide-ranging exemptions. This is a necessity of investor protection and market integrity, too.
- 4. Besides, it should be ensured in connection with the said Client Order Handling Rule of Article 22 ISD-CCP within the scope of the CESR mandate that partial executions will be avoided as far as possible within the framework of transmission of orders which cannot be executed internalisable.

We thank you for taking our aforementioned considerations and petitions into account within the scope of the further CESR proceedings. We are any time at your disposal should further explanations or consultation be required.

For further information and correspondence please refer to:

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