

MFSA

MALTA FINANCIAL SERVICES AUTHORITY

14th Circular regarding the EU Markets in Financial Instruments Directive ('MiFID')

5th June, 2007

On the 29th May 2007, the Committee of European Securities Regulators ['CESR'] announced the publication of the last set of MiFID Level III guidance dealing with **Passporting [CESR Doc 07-337 and 07-317]**, **Best Execution [CESR Doc 07-320]**, **Inducements [CESR Doc 07-228b]**, and **Transaction Reporting [CESR Doc 07-301]**. These documents, which are being attached to this circular for your consideration, have the purpose of: [a] providing guidance on the operational aspects that may arise as a consequence of the provisions of the MiFID and its implementing measures; and [b] identifying practical solutions to address the regulatory challenges to ensure certainty amongst market participants.

Passporting and Protocols on Notifications - [CESR Doc 07-337 and 07-317]

The passporting recommendations aim to promote a common supervisory approach to Articles 31 and 32 of the MiFID by setting out a number of practical proposals to ensure the efficient and consistent supervision of firm's cross-border activities. This CESR document contains 20 recommendations which set out:

- A harmonised approach and a common interpretation to the notification procedures set out in Article 31(3) and Article 32 (6) of MiFID;
- A commitment to further work to develop a common model of practical cooperation regarding the supervision of branches;
- Clarifications on aspects regarding the supervision of tied agents, MTF and representative offices;
- Transitional arrangements for the transition from the ISD to the MiFID passport.

The Protocol on notifications provides a framework for the cooperation among Competent Authorities with respect to passport notifications for investment firms and market operators operating an MTF in the EEA. The protocol deals with both the 'freedom to provide services and activities' (Article 31) and the 'establishment if a branch' (Article 32) and provides the following:

- The content and nature of the information to be provided by the Home to the Host Competent Authority in the initial notification;
- The means of transmitting the notification;
- The timelines for transmission;
- The addressee of the notification;
- The determination of who is responsible for guaranteeing its safe receipts; and
- The practicalities of dealing with notifications of changes to the information provided in the initial notification.

Q&A on Best Execution - [CESR Doc 07-320]

The best execution requirement under the MiFID aims to ensure that investment firms implement a process where the best possible result for their client's orders is obtained on a consistent basis. CESR believes that this process-driven approach will ensure that two of its main objectives, namely market efficiency and investor protection will be obtained through competition among trading venues. This will in turn promote investor confidence by ensuring that investment firms will take all reasonable steps to execute clients' orders for the best possible result, by choosing the execution venue that appears most likely to do so.

The CESR best execution Q&A aims at achieving a common supervisory approach in relation to the best execution requirements. It covers in a practical manner the content of execution arrangements, the content and degree of differentiation of the best execution policy, the possibility of using single execution venues, the assessment of the relative importance of the best execution factors, the notion of total consideration and fees and commissions, disclosure of information, consent, and the requirements of monitoring and review.

Recommendations on inducements - [CESR Doc 07-228b],

Article 26 of the MiFID Level 2 Directive, entitled "Inducements", sets out requirements in relation to the receipt or payment by an investment firm of a fee, commission or non-monetary benefit that could place the firm in a situation where it would not be acting in compliance with the principle in MiFID Article 19(1) that the firm act honestly, fairly and professionally in accordance with the best interest of its clients.

The document contains six recommendations and a number of supporting examples which illustrate some of the variety of situations in which Article 26 of the MiFID Level 2 Directive is relevant. The recommendations themselves clarify the range of application of the regime, specifying a common approach to the understanding of the different categories of payments within Article 26. The paper also introduces some indicative factors aimed at helping supervisors establish whether specific third-party

payments are likely to meet the regulatory tests within Article 26(b). The paper further clarifies the effect of Recital 39 in interpreting the operative provisions Article 26. Finally, some direction is provided with regard to the possibility for firms to have recourse to summary disclosure in connection with third party payments.

Guidelines on Transaction Reporting - [CESR Doc 07-301]

In terms of the MiFID transaction reporting provisions, CESR members must monitor the activities of investment firms and ensure that they act honestly, fairly and professionally in a manner which promotes integrity of the market. MiFID transaction reports may be made by the investment firm or by a third party acting on its behalf; by a trade matching or reporting system approved by the competent authority; by the regulated market, or by MTF's through whose systems the transactions was completed. A system, Transaction Reporting Exchange Mechanism (TREM), is currently being developed in order to allow CESR members to exchange the reports between themselves.

CESR's guidelines dealing with transaction reporting provide for:

- Practical solutions for the reporting obligations for branches;
- Clarification as to what constitutes 'execution of a transaction' for transaction reporting purposes; and
- Operational solutions for some aspects of reporting channels.

Contacts

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