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Comments by FESE on Commission Working Document ESC/23/2005 Rev. 1 – Draft level II measures for the MiFID

FESE is the representative organisation of Europe's Regulated Markets for securities and derivatives and has incorporated EACH, the European Association of Central Counterparty Clearing Houses. Our Membership comprises all Members States of the EU, old and new, as well as the countries of the EFTA.

We appreciate the opportunity to comment on the Commission' drafts for level II implementing measures on the MiFID. We are convinced of the crucial role of proper consultation in legislative processes since such consultation enables legislators to make better and more appropriate laws and rules. We may add at this juncture that the discussions and decisions in the ESC do not take place in the same spirit of openness and transparency to the outside world and we urge the European Commission to propose to the ESC improvements in this area.

We are aware that several of our Members submit individual comments. We expressly refer to these submissions; they do in certain cases focus on particularities in these Members' environment and may therefore provide additional specific insight to the Commission.

In this document, we submit our views on certain passages of the European Commission's fourth Working Document with draft level II measures for the MiFID (ESC/232005) on conduct of business rules, best execution etc. in its revised version Rev. 1.

We have included our detailed comments in the **annex** to this letter.

We hope that the Commission and its staff will find our comments useful in its deliberations, we are of course always available for the discussion of any related matters, and we look forward to further good co-operation.

Yours sincerely,

Gregor Pozniak
Deputy Secretary General, FESE

Annex

Article 3 – Fair, clear and not misleading information

1. Art. 3(a) in its currently proposed version stipulates that any information (that is regulated under this article) shall "not emphasise any potential benefits of an investment service … without also giving a fair and prominent indication of any relevant risk". We endorse this language; it might, however, be appropriate mandating the express mention of internalisation services (if applicable), together with their potential benefits and relevant risks.

Article 5 – Information about the investment firm

2. We note that Art. 5 of the draft level II instrument does not include implementation measures on the **information about the services** that an investment firm provides. As the words "and its services" are explicitly included in Art. 19(3) first indent of the MiFID, we assume that appropriate information about the services provided must nevertheless be provided.

3. Given this, we would reiterate our opinion as expressed to CESR during the consultation process on CESR's advice. We suggested to CESR considering the inclusion

   – in the information about material changes to the ongoing provision of services – of information about the **start of** (systematic) **internalisation** in a certain instrument; and
   – in the general description of the services to be provided by the investment firm – of a mention that the firm is an internaliser in certain instruments and may thus **execute client orders against its own book**.

4. Similarly, the draft level II instrument seems not to include implementation measures on the (ex-ante) **information about execution venues** as referred to in the second indent of Art. 19(3) of the MiFID.

Article 17(2) – Best execution, relative importance of factors

5. As an introduction, we would like to recall CESR's explanatory text just before Box 14 in its advice 05-290b.

   > **It is not appropriate for regulatory requirements to pre-determine the relative importance of the factors** under Article 21(1) of the Directive because each investment firm is best placed and should retain the flexibility to tailor its execution policy to its particular strategies and goals. However, the best execution requirements do not leave complete discretion to the investment firm to define whatever execution policy and arrangements it likes. The investment firm must devise arrangements (including an execution policy) that fulfill the best execution requirements, including the requirement to take all reasonable steps to achieve the best possible result when carrying out orders on behalf of their clients.

6. We are aware of the discussion in the ESC about whether an **effective ranking** (including the determination of any as "the most important") should now be included in the level II measure. We would in any case urge the Commission to strive for balanced legislation that provides an appropriate compromise between the requests on one hand to provide a level, consistent, and reliable European playing field and those on the other hand to provide enough flexibility for firms.

7. Regardless of the question whether it is declared "the most important" factor, some FESE Members wonder whether the definition of "**total consideration**" as explained in Art. 17(3) and the related recital is broad enough and appropriate. For them, it is not evident why **various components of the total costs** to be borne by the client should be treated differently, namely the costs of execution (charged by the venue) and the costs of order-handling etc. (charged by the firm).

8. It is true that the investment firm is under the obligation to seek and find the "cheapest" venue. Many argue, however, that the **end-beneficiary** of the best execution principle is **the client** and that it is therefore the **amount that the client has to pay** (in the case of a purchase) is the crucial amount that has to be minimised. Following this argument suggests the reintroduction of the words "payable by the client" and an amendment to the second sentence of the recital.[1]

9. The underlying reason for this argumentation is that the client could end up with a higher total price to pay when a firm finds a security at an originally cheaper (say, foreign) venue, but then destroys the advantage for the client by charging higher fees for that trade than for an execution on another venue where the original price may have been higher.

10. In any case, the wording in the recital should be amended by replacing the term "exchange fees" by the more neutral term "**execution venue fees**".

Article 17(3) – Execution quality data

11. For various reasons, most FESE Member Exchanges **remain sceptical** versus the obligation stipulated in Art. 17(3). First of all, we are not certain that

    (a) requesting such information from execution venues is indeed covered in the substance paragraphs of Art. 21 MiFID (par. 1 through 5); and that
    (b) defining purpose and/or details of such information, including a mandate to CESR, is covered by the "Lamfalussy" paragraph of Art. 21(6).

12. The inclusion of the clause "on a reasonable commercial basis" confirms to us that the Commission indeed thinks of a market-led approach to producing the information that could assist investment firms in identifying and scrutinising those venues that would enable them to obtain the best execution results on a consistent basis. We argue that Regulated Markets have to provide and do provide ample public information in real time so that external financial data service providers **have already all opportunities** to calculate the quality data needed and desired by firms.

13. Should the obligation of Art. 17(3) remain in the level II text despite our concerns expressed above, we would strongly favour further specifications **directly in the level II document**, rather than a sub-mandate to CESR. We are also not certain about the legitimacy of extending further mandates to CESR in a level II document.

[1] A linguistic challenge lies in the necessity to avoid any phrasing that relates only to purchases.