

## RESPONSE

### CONSULTATIONS ON THE PASSPORT UNDER MiFID AND INDUCEMENTS

#### I. Introduction and Summary

1. The Federation of European Securities Exchanges (FESE) represents operators of the European regulated markets and other market segments, comprising the markets for securities, financial derivatives and energy and commodity derivatives. With 24 members, FESE represents close to 40 securities exchanges from all the countries of the EU, Iceland, Norway, and Switzerland. Through its members' activities on a global scale, FESE enjoys links with the regulatory community and industry from around the world.
2. FESE members' main interest in the current CESR consultation on the passport relates to the cross-border activities of Multi-lateral Trading Facilities (MTFs). Some of our members already operate markets which are expected to be licensed as an MTF under the MiFID regime, and others might also make use of their right to operate an MTF.
3. In this paper we provide our views on the passport for MTFs and inducements. We have four specific concerns, which can be summarised as follows:
  - a. We believe that seeking to define remote access to an MTF on the basis of a specific set of technical arrangements ('connectivity test') would contradict Level 1 and potentially limit innovation and efficiency. CESR should rather consider applying a test focussing on whether or not the MTF provides specific arrangements (without trying to describe such arrangements) that could allow users/participants established in another Member State to conclude transactions under its rules and/or its systems;
  - b. While we recognise that the current CP relates to the passport, we take this occasion to highlight the need to ensure consistency in the local rules applicable to MTFs;
  - c. We find benefit in CESR carrying out work to ensure that notification procedures are equivalent and equally fast/efficient in all Member States; and
  - d. Finally, in relation to the consultation on inducements, we agree with the objectives pursued by CESR and agree that inducement policies should not reduce the firm's duty to act in the best interests of the client. Nonetheless, we recommend some flexibility in order to facilitate innovation and technological development in situations where there is only a remote risk that the client's best interest could be impaired.
4. Below we provide our detailed remarks on both consultations.

## II. Detailed Remarks on the Consultation on the Passport

### 1) Connectivity Test

5. The operation of an MTF is an investment services/activity and therefore in the scope of the investment services/activity passport. Due to Recital 6 of Level 1 which clarifies that an MTF can be composed of a technical platform and a set of rules or only function on the basis of a set of rules, it is not straightforward to determine when an MTF could be exercising its right to passport and when the firm is using its passport to access the MTF remotely. Arguably, if the firm accesses the MTF based on its own passport, there would be no need for the MTF to notify its home authority under Article 31, although for legal and regulatory certainty it may wish to do so. For those cases where the MTF may be providing remote access through specific arrangements, we accept that the application of Article 31 Para 5 and Para 6 of MiFID will be triggered.
6. Nonetheless, we do not believe that CESR should seek to define remote access on the basis of a specific set of technical arrangements ('connectivity test') as doing so would contradict Level 1 (i.e. Recital 6) and potentially limit innovation and efficiency - for example, a change in technical tools used or the technical set up could possibly open discussions on whether or not Article 31 Paragraphs 5 and 6 of MiFID apply to an MTF. CESR should rather consider applying a test focussing on whether or not the MTF provides specific arrangements (without trying to describe such arrangements) that could allow users/participants established in another Member State to conclude transactions under its rules and/or its systems.
7. Finally, it is important to underline that the consequences of the provision of remote access / cross border services should be limited to what is envisaged in Article 31 Paragraphs 5 and 6 of MiFID (i.e., the home competent authority is informed of the Member state(s) where arrangements for remote access are intended; the home competent authority informs host competent authority and the latter can ask for the identity of the identity of the members or participants established in that Member State.). Any requests for detailed information on the technical arrangement would be an unnecessary burden on MTFs and go beyond the requirements of MiFID.

### 2) Consistency of Rules applicable to MTFs

8. While we recognise that the current CP relates to the passport, we take this occasion to highlight the need to ensure consistency in the local rules applicable to MTFs. A real "level playing field" among MTSs engaged in cross-border activities will not be ensured if excessively divergent national requirements (whether they are too restrictive or permissive) are imposed by local regulators to services rendered by MTFs.

### 3) Notification

9. In its approach regarding the procedures for notification, CESR will have to ensure that these procedures are equivalent- and equally fast/efficient - in all Member States.

### III. Detailed Remarks on the Consultation on Inducements

10. We share the objectives of this consultation paper. The treatment of inducements under MiFiD complements the Commission's effort to strengthen the transparency of the EU securities market with a view to enhancing competition.
11. Price transparency is a goal which Europe's exchanges support. They have for instance taken measures in this direction on the basis of the relevant chapter of the Code of Conduct on Clearing and Settlement of Securities (which entered into force in December 2006). Price transparency is important not only to establish a level playing field among exchanges, MTFs, internalisers and other venues, but also to enhance market integration. Therefore, we would welcome further CESR work on this issue aimed at achieving supervisory co-ordination across the EU in the context of inducements.
12. We agree that inducement policies should not reduce the firm's duty to act in the best interests of the client. This is indeed essential in order to maintain investors' confidence in financial markets and for the markets' development. Nonetheless, it appears possible to distinguish between situations where there is a tangible risk that the client's best interest could be impaired and situations where this risk is very remote. In the latter case, there should be some flexibility in order to allow firms to innovate and more generally to facilitate technological development. For instance, we believe that the situation described in example 7 where a broker would provide computer equipment to a firm should not be considered a priori as inadequate. Other elements should be taken into account, such as the other execution venues the firm can access to. There may well be cases where this situation could benefit the client by providing additional choice. We therefore consider that a more nuanced approach could be taken in that case.

### IV. Conclusion

13. As the present response demonstrates, we recommend re-considering several aspects of the proposed Level 3 guidance on MTFs and are generally supportive of the consultation on inducements but recommend more flexibility on one point. We remain at CESR's disposal for any further comments on either consultation.