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EFSA comments on ESMA's Consultation on Order Execution Policy

EFSA sees merits in having a RTS providing details on the expectations on best execution requirements, building on ESMA's existing Q&As [1]and CESR's Q&A on Best execution under MiFID (including Commission's answers to CESR scope issues under MiFID and the implementing Directive).

However, we do not read revised Article 27 of MiFID II[2] as requesting to further tighten the existing provisions on best execution and consider the draft RTS as being far too demanding, in a context where:

- No actual impact assessment has been conducted;
- The consultation paper does not evidence poor practices that such stringent requirements would address;
- To our knowledge, there is no market failures regarding best execution rules that would call for strengthening the requirements.

In the light of Mario Draghi's report, competitiveness should be a core objective for the EU, with any regulatory initiative considering that imperative. Indeed, the competitiveness and attractiveness of EU's capital markets is critical to finance the 5 transitions the Union is facing in the digital, defence, decarbonization, deglobalization and demographics areas. We are concerned about that excessive regulatory requirement could create extra costs for European firms, that are likely to impact their competitiveness and ability to serve investor's needs. This would be all the more regrettable since small and medium-sized EU investment firms, which often tend to focus on small and mid-caps, are likely to be particularly affected. The effect on access to the market by retail investors is also likely to be negatively affected, since those investment firms generally serve retail clients. This would be even more ill-advised since the proportion of retail clients being active in the markets has declined significantly during the last years.

We therefore urge ESMA to maintain the current best execution provisions.

[1] section 1 of Questions and Answers on MiFID II and MiFIR investor protection and intermediaries topics.

[2] in the primary objective of deleting the requirement for RTS 27 and 28

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EFSA in particular has severe issues with the following proposals in the draft RTS:

- The requirement to use CT data, which might become de facto mandatory. This is contrary to the Level 1 compromise resulting from the MiFIR review work and would result in significant additional data costs that would be disproportionate for some firms. The issue of cost of data is crucial for firms as data is essential for them to carry out their activities, while current prices have already reached extremely high levels which also can create a barrier to entry. Therefore, the use of CT data should be the result of individual decisions made by each firm, based on its needs and on costs, and not on a regulatory de facto obligation that may give the CT a monopoly like character.

- Consideration of historical prices both in determining the execution venues to be included in the execution policy and in determining the execution venue to be selected upon receipt of a client order. While prices are certainly relevant when making the decision to route clients' order and when monitoring firms' best execution policies on an ex-post basis, it does not necessarily make sense to focus on historical prices when selecting venues: for illiquid instruments, liquidity is by far the essential criterion to take into account; for liquid instruments, if there are occasional discrepancies, they tend to amount to "market noise" as they are small, temporary, and, more importantly, unpredictable. Moreover, the requirement in level 1, art. 27 (1) clearly stipulates that "… Member States shall require that investment firms take all sufficient steps to obtain, when executing orders, the best possible result for their clients taking into account price, costs, speed, likelihood of execution and settlement, size, nature or any other consideration relevant to the execution of the order…". Consequently, a requirement to measure only against a price (consolidated tape) would not meet the legal requirements to take into account the other specified relevant factors.

- Demanding best execution policies to be based on categories of financial instruments determined according to ISO Standard 10962. This would result in a need to assess 76 different categories of financial instruments[3] [3], notwithstanding the creation of equity categories per country of primary listing. Apart from the feasibility issues attached to such requirement, we do not see how firms could provide clients with readable information on best execution policy in this context.

[3] 304 categories if we add Article 4(1)(g) i) requirement to make a distinction between retail an professional clients, and for each category to use two different order frequencies and values.

- "Monitoring of the execution quality" stipulated in article 6. The requirements made in such Article are very stringent and lack proportionality as the monitoring will have to be conducted for each class of financial instruments including OTC bespoke financial instruments for which market data or reference do not exist. They are also time-consuming as they should be carried out at least once every three months. Again, ESMA did not explain why such stringent obligations should be implemented by investment firms.

About EFSA

EFSA is a forum of European Securities Associations gathering, the French Association of Financial Markets (AMAFI), the Spanish Asociación de Mercados Financieros (AMF), Associazione Intermediari Mercati Finanziari (AMF Italia), Capital Market Denmark (CMD), the German Association Bundesverband der Wertpapierfirmen (bwf), the Belgian Association of Stock Exchange Members (ABMB-BVBL), the Polish Chamber of Securities' Brokers (IDM) and the Swedish Securities Markets Association (SSMA).