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CESR Technical Advice to the European Commission in the Context of the MiFID Review – Investor Protection and Intermediaries

Response from FAIDER – May 2010

FAIDER (Fédération des Associations Indépendantes de Défense des Epargnants pour la Retraite) is a French organisation which federates several associations of life policyholders, savers and small investors, representing 1 million of members. FAIDER is an active member of the AMF Commission des Epargnants and participate actively to the retail investor consultations organized by CESR. In the summer of 2009 FAIDER created EuroInvestors (the European Federation of Investors or EFI) with Euroshareholders and other European associations.

Before dealing with the questions raised by CESR FAIDER would like to point out that the fundamental question of the economic pertinence of the market fragmentation organized through Mifid is not challenged. In our view, equity markets are a public good that is supposed to enable issuers and investors to get and to provide capital directly. Financial markets have a primary function in a free economy that is to facilitate the development of companies by providing access to the investors whether small or institutional to their capital.. They should not be organized to serve primarily the interests of financial intermediaries, which seems now to be the case : more that 60% of trades are done by these financial companies for their own account mainly through automatic dealing and high frequency trading. To be efficient, capital markets must collect the maximum quantity of bids and offers and in the most transparent and economical way. Fragmenting them can only go against these goals.

Pre-trade transparency regime for RM/MTFs

On this point, we would like to refer to EuroInvestors answer to the consultation which we support totally. We therefore agree with CESR to apply the pre-trade transparency requirements to OTC as well. In addition, CESR needs to ensure that this pre-trade transparency is real for small investors. Regarding exceptions to pre-trade transparency, we agree with CESR seeking to move from a "principle based approach" to waivers from pre-trade transparency to an approach that is more "rule based". As regards the scope and criteria for the waivers, we do not believe some should be recast (i.e. thresholds for, and scope of, large in scale waiver, introduction of a minimum order size for the reference price waiver). Indeed, the reasoning of some professional market participants, as mentioned by CESR, is based on the collapse of the average trades size in the last two years. But this trend has been totally driven by the market intermediaries, certainly not by the end investors. In fact the "trades" reported come from orders that have been sliced into pieces by intermediaries, not by the end investors. We urge CESR to analyze this evolution more in depth: we have absolutely no evidence that the average size of orders from end investors has significantly decreased. Intermediaries should provide all the facts and evidence and tell us how this massive slicing of end investors orders benefits them.

Definition of and obligations for systematic internalisers

Their obligations should be at least the same as the ones of "organized markets".

Post-trade transparency regime

We agree with CESR proposals to improve the quality and timeliness of publication.

The costs for collecting consolidated market data is now much too high for small and even medium size investors to collect. MiFID has ignored the very nature of capital markets data as a

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public good[3]. We ask for a publicly enforced and controlled "consolidated tape" both for pre- and post-trade data, and that this "tape" be easily and quickly accessible by all investors in the market, as it was the case prior to the MiFID –induced markets fragmentation. This implies of course to start with clear and harmonized standards and format for post-trade transparency information.

Application of transparency obligations to equity-like instruments

We agree with CESR's proposal, as we see no reason why depository receipts, exchange-traded funds, exchange-traded commodities and certificates should not follow the transparency obligations of "organized" equity markets.
However, we do not agree that all "*these instruments are considered to be equity-like, since they are..., from an economic point of view, equivalent to shares*". This may be true for example for equity ETFs (although they are also equivalent to investment funds in many respects), but not for fixed income ETFs. We wish to stress that the lack of transparency of fixed income markets is even much worse that the equity ones. If MiFID transparency rules are extended to fixed income ETFs, then they should also be extended to the underlying fixed income markets as well, especially the bond markets.

Regulatory framework for consolidation and cost of market data

As mentioned above, we are clearly asking for the second approach mentioned by CESR:
"The other approach would built on this APA (Approved Publication Arrangements) regime but would require a single consolidated tape to offer market users a single point of access".
The "industry" or commercially-driven approach has obviously failed to deliver any improvement of pre and post trade transparency for small investors. The commercial cost to get consolidated post trade data is astronomical, even for medium size investors. Therefore, we see no reason to continue with this approach where investors have already lost more than two years of trade transparency.
In the USA, a country which can hardly be suspected of being anti free market rules, the publicly controlled consolidated tape has been the chosen approach. We would welcome the intermediaries "Industry" to explain why this solution suitable for the US equity markets is not suitable for the European ones.
This consolidated tape of trade data must be made available to all investors (including small ones) at no cost and with a reasonable delay (a few minutes), like what they got before the markets fragmentation.
In addition, we suggest that CESR analyses the MiFID induced development of monopolies and oligopolies in the trade data collecting and selling business, and its economic and social impact for the real economy market participants (issuers and and end investors).

Regulatory boundaries and requirements

We support CESR's proposal to require investment firms operating crossing systems/processes to set up MTFs for their crossing activity once they have reached a certain size on its own or in combination with other crossing systems/processes with which they have a private link. This is indeed one way to reduce the inflated share of OTC trades in the equities markets.
We support the request of EuroInvestors for a fact-finding study being conducted by CESR on the impact of MiFID induced changes on small and individual investors, and the consequences on the economic and social value of the now largely "re intermediated" European capital markets.
CESR should also investigate another potentially dramatic economic consequence of MiFID: the impact of the MiFID induced fragmentation and re intermediation of equity markets on small and medium size businesses in Europe. Also, CESR should investigate about the evolution of liquidity, transparency and costs in small and mid cap markets since MiFID came into force.