

OPINION

About the existence of a limitation of pre-trade transparency in Germany

I. Introduction and legal basis

1. Following the agreement reached at the 25 May 2011 BoS, ESMA has finalised its review on whether pre-trade transparency waivers which are currently being used but were not assessed under the CESR/ESMA waiver process are either in conformity with CESR/ESMA precedents or are otherwise consistent with MiFID.
2. Building on a questionnaire circulated in 2009 (Ref. CESR/09-759) where national CAs provided information on waivers in their jurisdictions, ESMA has compiled a complete list of all those waivers of pre-trade transparency currently in use which have not previously been analysed by CESR/ESMA. This includes any situation where an order sent to a regulated market or an MTF is not subject to any pre-trade transparency, and regardless of whether the waiver had been formally granted, grandfathered or built-in through national legislation. The list encompasses waivers granted by authorities other than those who are represented at the BoS (e.g. waivers granted by regional authorities).
3. ESMA's competence to deliver an opinion is based on Article 29(1)(a) of Regulation (EC) No 1095/2010 (the "Regulation"). In accordance with Article 44(1) of the Regulation the Board of Supervisors has adopted this opinion.

II. Description of the system

4. A trading venue permits the execution of retail orders between an order flow provider (OFP) and a liquidity provider (LP) at a volume weighted average price calculated by trading venue, known as the VBBO. That VBBO methodology incorporates prices from major European trading venues and from its own lit order book. Pre-trade transparency for the VBBO is delivered through a number of mechanisms which include:
 - Real-time dissemination of the VBBO at two specified sizes: retail size and standard market size; and
 - Publicly accessible website functionality, which allows a user to obtain the current VBBO for any volume specified by the user, in a given security.
5. OFPs and LPs are able, but are not required, to enter into agreements which relate to administrative matters, such as the particular risk limits that a LP may wish to apply to a OFP and clearing/settlement arrangements. Such agreements do not set trade price criteria, as all trades occur at the VBBO which is set and calculated by the trading venue and not a LP. It is not necessary for retail OFP to enter into an agreement with a LP in order to be eligible to participate in the system.



6. Other key features of the trade execution functionality are as follows:

- LPs will set risk limits in the form of a maximum quote size;
- The order of a OFP will be executed by one or more LPs where the VBBO is within the limit price (where LPs are ranked by OFP preference, or else by the size of their risk limits);
- No price improvement on the VBBO is possible; and
- Any unexecuted part of an OFP order is transmitted to the trading venue's lit order book.

III. General observations

7. In ESMA's opinion that trading system complies with the requirements for hybrid systems under Article 17(5) of the MiFID implementing Regulation, by "*...maintaining a standard of pre-trade transparency that ensures that adequate information is made public as to the price level of orders or quotes for each share...as well as the level of trading interest in that share*". In other terms, the system is considered pre-trade transparent and MiFID compliant.

Done at Paris, 26 March 2012

A handwritten signature in black ink, appearing to be 'S. Maijoor', written over a faint, illegible stamp or watermark.

Steven Maijoor

Chair

For the Board of Supervisors