

Commission Directive 2006/73/EC of 10 August 2006 implementing Directive 2004/39/EC of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive

Question

MiFID states that Best Execution has to be assured for all financial instruments covered by MiFID. There is also some detail on what Best Execution would be in regulated markets. Is there any hint or information what Best Execution would look like for OTC products? Is there a Best Execution policy necessary? Would it be possible to only have expressive client orders for OTC business and therefore not dispose of any Best Execution policy for OTC?

We are market-maker on several platforms for bonds (MTS, Senaf, Bloomberg, RTFI, TradeWeb). We are quoting in real time in all these trading venues but with different spreads (different prices). When we are going to close a trade on Trading Venue 1 with a worse price that we quote on Trading Venue 2, are we complying with MiFID or not?

Recital 59 of Directive 2006/73/EC states that a client who has engaged in a course of dealings involving a specific type of product or service beginning before the

Answer

Best execution applies to all financial instruments. This means that investment firms will need to have an execution policy in relation to all instruments for which they provide execution. However, it is not expected that best execution obligations will be applied in the same manner in relation to different instruments. Recital 70 of the MiFID implementing Directive clarifies that by stating that, for example, transactions involving customised OTC financial instruments may not be comparable for best execution purposes with transactions involving shares traded on centralised execution venues.

Article 21(3) of MiFID as well as Recital 66 of the MiFID implementing Directive provide some guidance on how an execution policy should be established. However, there are specifics concerning the OTC transactions. CESR will provide further guidance on the application of best execution obligations to OTC products at its webpage (<http://tinyurl.com/2bj2oq>).

Article 21 (best execution) does not apply to transactions done under the rules governing an MTF between its participants: see Article 14(3).

Not all trading platforms will qualify as MTFs. In particular, single-dealer platforms are not MTFs for MiFID purposes: see Recital (6) of Directive 2004/39/EC.

Transactions done by a market maker with a client who is not a participant of a multilateral trading facility may give rise to best execution obligations, but in the wholesale bond markets this is unlikely. For more details see the Commission's advice on scope questions annexed to the CESR Questions and Answers on best execution at <http://www.cesr.eu/index.php?docid=4606>.

Yes: the presumption of necessary knowledge and experience for the purposes of Article 19(5) can be based on a previous course of dealings involving a different firm, and it is not generally necessary to require proof from the client unless the client's statement is manifestly inaccurate.

Article 19(5) of MiFID, together with Article 36 of Directive

date of application of Directive 2004/39/EC should be presumed to have the necessary experience and knowledge in order to understand the risks involved in relation to that product or investment service.

Is it possible to presume the previous knowledge and experience if the client has dealt with complex instruments in another financial institution?

Is it necessary for the client to provide some kind of proof?

2006/73/EC, require the investment firm to assess whether the client has the necessary experience and knowledge to understand the risks in relation to a product or investment service. Recital (59) of the implementing directive explains that a firm may presume that the client has that necessary experience and knowledge if he has engaged in a course of dealings before 1st November 2007 involving the type of product or service in question.

The presumed knowledge and experience is that of the client, and it does not depend on a specific financial institution having been involved. An investment firm should therefore be entitled to rely on the presumption of knowledge and experience in cases where the client's dealings involved another institution.

Article 37(3) of Directive 2006/73/EC makes it clear that an investment firm can rely on information provided by its clients unless it is aware, or ought to be aware, that the information is manifestly inaccurate. Accordingly, the firm can rely on a client's statement about previous dealings, and no further proof is necessary, unless the firm knows that the statement is false or inaccurate or, in the circumstances, it should be aware that the statement is false or inaccurate. However, if the client's statement is obviously implausible, so that the firm cannot be satisfied that the client has the presumed knowledge and experience, then it would be appropriate to ask for proof.