Setting the global standard for investment professionals

The Committe of European Securities Regulators
11-13 avenue de Friedland
75008 Paris
France

1st June 2010

CESR Technical Advice to the European Commission in the Context of the MiFID Review – Equity Markets

CFA Institute is pleased to comment on the Committee of European Securities Regulators' (CESR) consultation paper on Technical Advice to the European Commission in the Context of the MiFID Review – Equity Markets (the "consultation").

CFA Institute, through its members' experience in international markets and different investment disciplines, represents the interests of investors and investment professionals to standard setters, regulatory authorities, and legislative bodies worldwide. CFA Institute promotes fair, open, and transparent global capital markets, and advocates for investors' protection.

We welcome the opportunity to comment on certain aspects of the European equity markets related to pre- and post-trade transparency and harmonisation of the regulatory framework for trading venues. These issues form a cornerstone of the Markets in Financial Instruments Directive (MiFID) review. In this respect, CESR's technical advice to the European Commission on equity markets will play a critical role in enhancing the efficient functioning and integrity of the structure of equity markets.

CFA Institute is committed to providing input into the MiFID review and trusts that the interests of investors are fully recognised and considered throughout that process. We support measures designed to improve the transparency of the markets and the quality and accessibility of trade data, which are critical for the efficiency of the investment decision-making process. We also support measures designed to level the playing field amongst trading venues and market participants alike.

We wish to note that the importance of these issues, coupled with the publication in the same period of three additional CESR consultations on the MiFID review[1], warrants a longer timeframe to allow market participants to respond in sufficient detail. We are concerned that CESR's final advice may be compromised by the short consultation timeframe imposed on market participants.

[1] CESR Technical Advice to the European Commission in the Context of the MiFID Review: i) Investor Protection and Intermediaries; ii) Transaction Reporting; and iii) Non-equity Markets Transparency.

10th Floor, One Canada Square
Canary Wharf, London E14 5AB
United Kingdom

+44 (0)20 7531 0750 tel
+44 (0)20 7531 0767 fax
info@cfainstitute.org
www.cfainstitute.org

Executive Summary

The consultation addresses the MiFID pre-trade and post-trade transparency framework; the systematic internaliser regime; consolidation of transparency information; regulatory level-playing field issues, focusing on regulated markets vs. MTFs and investment firms' internal crossing systems; and MiFID options and discretions. Our main observations are as follows:

Pre-Trade Transparency

- CFA Institute supports retaining the generic pre-trade transparency framework that requires trading on Regulated Markets (RMs) and Multilateral Trading Facilities (MTFs) to be pre-trade transparent, whilst allowing certain exceptions based on trading systems that satisfy the existing waiver categories.

- We support retaining the existing calibration of the Large In Scale (LIS) waiver thresholds. Though it is difficult to assess the appropriateness of the waiver thresholds given other developments in the markets, there is no conclusive evidence to suggest that the existing LIS waiver thresholds are inappropriate. In principle, we believe that all orders should be displayed to the market unless they are genuinely large. Displayed liquidity facilitates the process of price discovery and quantity discovery. A reduction in the LIS thresholds could result in a greater proportion of trading being executed without displayed pre-trade quotes. It would be disadvantageous for investors if a reduction in the LIS thresholds leads to an increase in the share of orders routing through dark pools, which would lead to a reduction in overall market transparency. This would have adverse consequences for price discovery in the lit markets with adverse secondary effects on the quality of price formation in dark pools.

- With regards to the treatment of residual orders ('stubs'), we favour option 2 put forward by CESR which would amend MiFID to clarify that the LIS waiver does not apply to stubs. Therefore, only the initial order would qualify under the LIS waiver and thus the stub would have to be displayed or cancelled.

- We note that average transaction sizes on dark order book markets are generally small and broadly equivalent to transaction sizes on lit order book markets. Consequently, same-sized orders on 'reference price' systems (benefitting from pre-trade transparency waivers) and lit order book markets may not be treated equally. We therefore support amending the waiver to include minimum size thresholds for orders submitted to reference price systems. In principle, we are firmly of the view that only genuinely large orders should be exempt from pre-trade transparency requirements.

- We agree with CESR that the negotiated trade waiver should be retained. The waiver framework should be sufficiently flexible to allow counterparties to formalise negotiated transactions away from the central order book where such transactions involve non-standard terms not suited to the trading algorithm run by the exchange.

- With regards to the order management facility waiver and the treatment of 'iceberg' orders, we support CESR's assertion in Annex I that all new peaks introduced in the order book should be treated like new orders and get the time stamp of their

introduction in the order book. This is necessary to protect time-priority for limit orders entered into the displayed order book.

Systematic Internaliser Regime

- With regards to the Systematic Internaliser (SI) framework and the definition contained in the MiFID Implementing Regulation regarding the type of activity that constitutes systematic internalisation, we support removal of the reference to 'non-discretionary rules and procedures' in Article 21(1)(a) of the Implementing Regulation. We do not consider 'non-discretionary' to be a necessary condition for 'organised, frequent, and systematic' activity. However, we believe that it would be difficult to provide quantitative thresholds for determining whether the activity of the firm constitutes a 'material commercial role'.

- We support CESR's proposals to require SIs to maintain two-sided quotes as opposed to the current rules which require only one-sided quotes, and for SI's to quote in sizes that are commensurate with the size of business they are prepared to undertake. We also support CESR' proposal to rescind the provision in MiFID that exempts SIs from identifying themselves in post-trade reports if they publish quarterly trading data. Identification of SIs in post-trade reports, regardless of the size of the transaction, would improve the transparency and utility of published trade information.

Post-Trade Transparency

- We fully support CESR's proposals (set out in section III of our response) to improve the quality and consistency of post-trade transparency information. Improving the quality of post-trade data is of primary importance to improve the decision-usefulness of that data and thus facilitate the efficient investment of investors' capital.

- We also support CESR's proposals to improve the timeliness of post-trade reporting and to shorten the delays permissible under the deferred publication framework for large trades. Delays in the reporting of trades reduce the usefulness of trade information to investors and exacerbate difficulties in accurately consolidating post-trade data. Such delays may also hamper the price discovery process. We therefore welcome the proposed amendments to MiFID that would place greater emphasis on immediate reporting of trades, and that would shorten the maximum permissible delay under the deferred publication framework from 3 days to the end of the current trading day.

Application of Transparency Obligations for Equity-Like Instruments

- We consider that the simplest and most effective approach towards transparency for equity-like instruments (such as depositary receipts, exchange traded funds, etc) would be to extend the MiFID equity transparency framework to equity-like instruments. These instruments are similar in economic substance to equities and therefore it would be appropriate to harmonise the transparency requirements for equities and equity-like financial instruments. The economic substance of an instrument should prevail over its legal form when determining the appropriate regulatory framework.

Consolidation of Transparency Information

- CFA Institute is firmly of the view that MiFID should be amended to include explicit provisions regarding the consolidation of trade data. Specifically, MiFID should require trade data to be published in a standardised format, utilising standardised and consistent symbology, so that consolidation is possible. It is also imperative that quality control procedures are put in place to ensure data quality and thus provide investors with an accurate and reliable consolidated tape.

- Moreover, MiFID should explicitly require the implementation of a consolidated tape of post-trade data (at a minimum, with scope to include provisions for a consolidated quotation system of pre-trade data in subsequent periods if not immediately practicable). The provision of a consolidated tape (whether industry-led or the Mandatory Consolidated Tape model put forth by CESR) should be underpinned by an explicit regulatory requirement.

- Of the two options set forth by CESR for the provision of a consolidated tape, we favour the option to maintain the commercially driven approach based on the Approved Publication Arrangement (APA) regime at this stage, as opposed to the introduction of a Mandatory Consolidated Tape (MCT) established as a not-for-profit entity overseen by CESR/ESMA. Given CESR's proposals regarding the APA regime (which sets specific standards for data quality, consistency and consolidation), we believe it would first be sensible to see whether industry-led solutions built on the APA regime are successful in delivering a consolidated tape that is cost-effective, accurate, complete, and reliable. If such commercially-driven efforts are unsuccessful, determinable after an appropriate period of time, then we would firmly support the implementation of the MCT, under the terms proposed by CESR.

- We support CESR's proposals that would require publication arrangements to make pre- and post-trade information available separately (and not make the purchase of one conditional upon the purchase of the other). Separating these offerings would provide greater product transparency, which should place downward pressure on costs as vendors compete on more transparent terms. We also agree with CESR that post-trade data should be made available free of charge after 15 minutes.

Regulatory Boundaries and Requirements

- We support the proposals to harmonise the organisational and regulatory requirements applicable to Regulated Markets vs. MTFs. In principle, CFA Institute believes that all trading venues should be subject to the same rules. It is in the interests of investors that all trading venues compete on fair and equal terms.

- We believe that broker-dealer crossing systems should not escape the regulatory framework applicable to other trading venues under MiFID in order to provide for a level playing field. We also recognise that these systems share characteristics with both MTFs and internalisation. As such, it may be appropriate to classify such crossing systems separately. Accordingly, we support measures to more accurately define and capture the trading activity transacted through broker crossing systems and to attach requirements to put such systems on fair and competitive terms with all other trading venues. We support the proposed bespoke requirements (as detailed on pages 26-27 of our response) for broker crossing systems specified by CESR.

- We also support the proposal that would set a limit on the amount of client business that can be executed by investment firms' crossing systems before requiring such systems to be formally established as an MTF. If an investment firm is executing a material amount of business in the form of multilateral crossing through its internal crossing system, the economic substance of that operation is equivalent to that of an MTF. In that case, the investment firm should be required to register and operate its crossing system as an MTF in order to provide for a level playing field amongst trading venues and to promote fair competition.

MiFID Options and Discretions

- Removal of discretions over the granting of pre-trade transparency waivers would provide the benefit of minimising any divergence in regulatory treatment of waiver applications across Member States. It would also ensure a consistent application of the transparency obligations relating to trading systems throughout the EU. In the interests of harmonisation of standards and to avoid regulatory arbitrage, we support replacing the discretion over pre-trade transparency waivers with legal exemptions automatically applicable across Europe. This would help ensure that all trading venues are subject to the same regulatory framework.

- With regards to the discretion over the definition of what constitutes a liquid share for the purposes of the SI regime, we are in favour of establishing a unique definition of liquid share. Removal of the discretion would minimise divergence in the determination of a liquid share and hence harmonise the application of the SI regime across Member States.

- We also support removing the discretion granted to Member States to decide that investment firms may comply with the obligation to make public limit orders not immediately executed by transmitting such orders to a RM or MTF. We favour replacing this discretion with a rule requiring transmission of such orders to a RM or MTF. We believe that the clarity and consistency from a rule in this instance would benefit investors and provide for even treatment of orders across Member States.

We attach our response that addresses the questions of the consultation. Please do not hesitate to contact us should you wish to discuss any of the points raised.

Yours faithfully,

Charles Cronin, CFA
Head, Standards and Financial Market Integrity
Europe, Middle East and Africa

+44 (0)20 7531 0762
charles.cronin@cfainstitute.org

Rhodri G. Preece, CFA
Director, Capital Markets Policy
Europe, Middle East and Africa

+44 (0)20 7531 0764
rhodri.preece@cfainstitute.org

With headquarters in Charlottesville, VA, and regional offices in New York, Hong Kong, London and Brussels, CFA Institute is a global, not-for-profit professional association of over 100,000 investment analysts, portfolio managers, investment advisors, and other investment professionals in 135 countries, of whom more than 88,000 hold the Chartered Financial Analyst® (CFA®) designation. The CFA Institute membership also includes 137 member societies in 58 countries and territories.

CFA Institute develops, promulgates, and maintains the highest ethical standards for the investment community, including the CFA Institute Code of Ethics and Standards of Professional Conduct, Global Investment Performance Standards ("GIPS®"), and the Asset Manager Code of Professional Conduct ("AMC"). CFA Institute is best known for developing and administrating the Chartered Financial Analyst® curriculum and examinations and issuing the CFA Charter.

Our specific comments in response to the consultation's questions are set out below.

I. Pre-Trade Transparency

The consultation cites a number of issues related to the existing pre-trade transparency framework under MiFID. In particular, the consultation notes that there have been difficulties with the application of the pre-trade transparency waivers and issues over their structure and scope, among others. To address these issues, CESR proposes the following:

- Retain the generic requirement that all trading on organised markets (RMs/MTFs) must be pre-trade transparent;
- Continue to allow exceptions to pre-trade transparency in certain circumstances. However, certain options are presented (in subsequent sections) to modify the criteria for evaluating when a waiver may be granted; and
- Seek to move from a 'principles based' approach to pre-trade transparency waivers to a 'rules based' approach.

1. Do you support the generic approach described above?

We are supportive of retaining the generic approach that requires trading on Regulated Markets (RMs) and Multilateral Trading Facilities (MTFs) to be pre-trade transparent, whilst allowing certain exceptions based on trading systems that satisfy the existing waiver categories[2]. Our comments on the appropriateness of the existing waivers are set out in questions 3 through 9.

2. Do you have any other general comments on the MiFID pre-trade transparency regime?

[2] The pre-trade transparency waiver categories are summarised in paragraph 12 of the consultation. Waivers may be granted to orders and trading systems satisfying one of the following criteria: a) orders that are 'large in scale'; b) 'reference price' systems; c) systems which formalise 'negotiated transactions'; and d) orders held in an order management facility.

We have no other general comments. Our specific comments are set out in subsequent questions.

Large in Scale Waiver

The Large in Scale pre-trade transparency waiver is designed to minimise market impact costs. Market participants submitting large orders would be adversely affected if those orders were publicly displayed; such exposure would allow other participants to trade against those orders. The Large in Scale waiver is therefore designed to protect investors who submit large orders from undue risk.

The minimum order sizes qualifying as Large in Scale are determined according to Average Daily Turnover (ADT) of the shares in question. The MiFID Large in Scale thresholds are set out in Table 3 of the consultation, reproduced below:

Table 3: Option 1: Existing MiFID regime - orders large in scale compared with normal market size

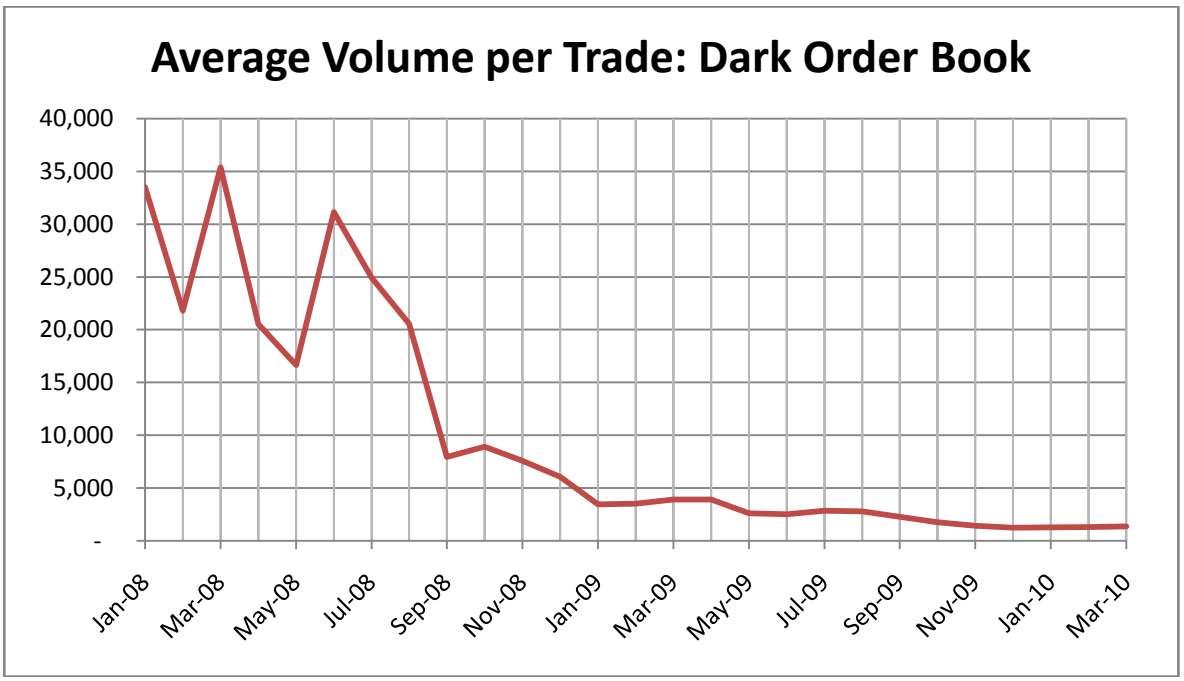
Class in terms of average daily turnover (ADT) in €	**ADT < 500 000**	**500,000 ≤ ADT< 1,000,000**	**1,000,000 ≤ ADT < 25,000,000**	**25,000,000 ≤ ADT < 50,000,000**	**ADT ≥ 50,000,000**
Minimum size of order qualifying as large in scale (LIS) compared with normal market size	50,000	100,000	250,000	400,000	500,000

According to CESR, 4.2% of trading on European RMs and MTFs took place in 2009 using the Large in Scale waiver, up from 3.1% in 2008.

3. Do you consider that the current calibration for large in scale orders is appropriate (Option 1)? Please provide reasoning for your view.

CESR notes that the reduction in average transaction sizes in recent years has led to a widening gap between average trade sizes and 'large' trades according to the LIS waiver thresholds (set in 2006). CFA Institute's own analysis clearly shows that average transaction sizes have fallen on electronic order book markets, with the downward trend being particularly pronounced on 'dark' order books[3]. The following chart shows average volume per trade on dark electronic order book markets in the EU (plus Switzerland). The trend is well pronounced, to the extent that average transaction sizes on such markets are now similar to those on lit markets.

[3] See data presented in CFA Institute's response to the CESR call for evidence on micro-structural issues of the European equity markets, available at http://www.cfainstitute.org/Comment%20Letters/20100430_2.pdf



Sources: Thomson Reuters Equity Market Share Reporter; CFA Institute calculations

The first observation from this chart is that dark electronic order book markets do not exclusively, or even primarily, deal in large orders. This perspective is supported by CESR's assertion that only 4.2% of trading on RMs and MTFs in 2009 took place under the LIS waiver. Based on these trends, it would appear that the waiver thresholds have had little effect on average trade size.

The second observation is that, if such orders are not transacted through organised electronic venues, then one would expect large orders to be executed in one of two ways. Either they would transact over the counter (OTC) as block trades, or as several smaller orders (e.g. 'parent/child' orders), transacted through electronic order books, possibly across multiple platforms, in order to complete the full order. Again, it is unclear whether either of these scenarios are related to, or affected by, the LIS waiver thresholds.

The market share of OTC trading in Europe has fluctuated between approximately 30% and 40% over the past two years but without indicating any significant upward trend. Accordingly, there is no clear evidence that large trades have migrated away from organised electronic trading venues such as RMs and MTFs and towards OTC trading. As CESR acknowledges in paragraph 25 of the consultation, there is no commensurate increase in the market share of OTC trading that could account for such a migration of 'large' trades. It is therefore likely that the volume of large block trades being executed OTC has not changed significantly. OTC has been the traditional option for executing large orders via the 'upstairs' trading desk and the OTC market share appears to have been little affected by the introduction of the LIS waiver.

In summary, though it is difficult to assess the appropriateness of the waiver thresholds given other developments in the markets, there is no firm evidence to suggest that the LIS waiver thresholds have had any material impact on the trends indicated. As such, there is

no conclusive evidence to suggest that the existing LIS waiver thresholds are inappropriate.

Moreover, we believe that in principle, all orders should be displayed to the market unless they are genuinely large. Displayed liquidity facilitates the process of price discovery and quantity discovery. A reduction in the LIS thresholds could result in a greater proportion of trading being executed without displayed pre-trade quotes. This could have adverse implications for the quality of the price formation process, and could lead to an increase in the fragmentation of liquidity. It would be disadvantageous for investors if a reduction in the LIS thresholds leads to a reduction in overall market transparency (and an increase in the market share of dark pools). This would have adverse consequences for price discovery in the lit markets with adverse secondary effects on the quality of price formation in dark pools.

For each of these reasons, we support retaining the existing calibration of the LIS waiver thresholds.

4. **Do you consider that the current calibration for large in scale orders should be changed? If so, please provide a specific proposal in terms of reduction of minimum order sizes and articulate the rationale for your proposal?**

We do not support a change in the current calibration for LIS orders. Please refer to our response to question 3.

5. **Which scope of the large in scale waiver do you believe is more appropriate considering the overall rationale for its application (i.e. Option 1 or 2)? Please provide reasoning for your views.**

This question refers to the treatment of residual orders ('stubs'). The consultation notes that MiFID does not specify how the large in scale waiver should apply to partially filled orders for which the residual portion is below the relevant LIS threshold. CESR puts forward two options: 1) amend MiFID to make it clear that partially executed LIS orders (stubs) continue to benefit from the waiver following execution; or 2) amend MiFID to clarify that the LIS waiver does not apply to stubs. Under this option, only the initial order would qualify under the LIS waiver and thus the stub would have to be displayed or cancelled.

We favour option 2. If the stub is below the LIS threshold, then the market impact risk from the order has been largely mitigated since the material portion of the order has already been executed in the dark. Also, as CESR points out, allowing residual orders below the LIS threshold to remain undisclosed would create an inconsistency with the transparency requirements for new orders of the same size. Accordingly we do not see any economic justification for extending pre-trade transparency protection to the stub.

Reference Price Waiver

Trading systems operating under the 'reference price' pre-trade transparency waiver match orders according to a price referenced to another system. Examples include a price determined on the primary exchange, or the mid-point of the best bid and offer quoted

across all exchanges, among others. Such 'passive' systems do not to contribute to price discovery and hence may be granted a pre-trade transparency waiver.

CESR notes that reference price systems account for only a small proportion of trading in EEA shares, although this proportion is rising. Specifically, CESR illustrates that the value of trading under reference price systems has risen from 0.1% in Q1 2008 to 0.9% in Q4 2009.

6. Should the waiver be amended to include minimum thresholds for orders submitted to reference price systems? Please provide your rationale and, if appropriate, suggestions for minimum order thresholds.

CESR notes that reference price systems are being used to execute small orders, which is perhaps inconsistent with the primary intention of the pre-trade transparency waivers to protect orders from market impact costs. We concur with CESR.

As we note in our response to question 3, average transaction sizes on dark order book markets are generally small. Consequently, same-sized orders on reference price systems and lit order book markets are not treated equally. This provides for an uneven playing field.

Further, whilst it can be argued that reference price systems do no contribute to price discovery, hiding the level of trading interest at those reference prices for same-sized orders can distort quantity discovery.

For these reasons, we support amending the waiver to include minimum size thresholds for orders submitted to reference price systems. In principle, we are firmly of the view that only genuinely large orders should be exempt from pre-trade transparency requirements.

7. Do you have other specific comments on the reference price waiver, or the clarifications suggested in Annex I?

In Annex I, CESR comments that the future design of the reference price waiver should refer to a quality standard. Specifically, CESR comments that the reference price should be trustworthy and the markets referred to should be sufficiently liquid. Also, the methodology for generating the reference price should be pre-defined and publicly available, and the reference price should have a validation mechanism to ensure its quality on an ongoing basis. We fully support these recommendations.

We have no other specific comments on the reference price waiver.

Negotiated Trade Waiver

The negotiated trade waiver applies to orders for which the counterparties have pre-negotiated the terms under which the order will be executed. The waiver enables counterparties to execute trades outside of the central order book of the exchange / MTF. CESR notes that the waiver is needed for cases in which the type of the order is not suited to the terms of the central trading mechanism of the venue in question. For example, negotiated trades have been used for principal transactions which are subject to

conditions other than the current market price, such as VWAP trades (Volume Weighted Average Price).

CESR notes that the waiver is used primarily by RMs. According to CESR, trading under the negotiated trade waiver accounted for an average of 4.2% of trading in EEA shares on RMs and MTFs in 2009, up from 3.2% in 2008.

8. Do you have any specific comments on the waiver for negotiated trades?

We agree with CESR that the negotiated trade waiver should be retained. The waiver framework should be sufficiently flexible to allow counterparties to formalise negotiated transactions away from the central order book where such transactions involve non-standard terms not suited to the trading algorithm run by the exchange.

We have no further comments on the negotiated trade waiver.

Order Management Facility Waiver

This pre-trade transparency waiver applies to orders held in an order management facility 'pending disclosure to the market'. CESR notes that this type of waiver is commonly used by RMs for 'iceberg' orders[4]. CESR comments that order management facilities provided by RMs/MTFs are designed to help intermediaries and their clients execute orders in the most efficient way.

9. Do you have any specific comments on the waiver for order management facilities, or the clarifications provided in Annex I?

We support CESR's assertion in Annex I that all new peaks introduced in the order book should be treated like new orders and get the time stamp of their introduction in the order book. If each new peak were given the time stamp of the original order, this would violate time priority for similar orders entered into the displayed order book between the time of the release of the initial peak and subsequent peaks. This would provide for uneven treatment of similar orders and discourage investors from posting displayed limit orders, to the detriment of liquidity and price discovery. We therefore agree with CESR that the treatment of time stamps with regards to order management facilities should be clarified in MiFID.

We have no other comments on the order management facility waiver.

II. Systematic Internaliser Regime

Under MiFID, a systematic internaliser (SI) is an investment firm that internalises order flow to deal on its own account 'on an organised, frequent and systematic basis'.

[4] Iceberg orders are typically large orders divided into smaller portions in which only the 'tip' of the order is displayed to the market. The remainder of the order is held in the RM's order management facility pending disclosure to the market. As the tip of the order is filled, the next portion of the order is released and displayed in the order book as determined by the parameters of the order management facility.

Investment firms that act as SIs fill buy and sell orders from the firm's own inventory, thereby providing bilateral order execution.

The consultation cites Article 21(1) of the MiFID Implementing Regulation which establishes the criteria for determining the types of activity considered to be 'organised, frequent and systematic'. Most significantly, the activity must have *'a material commercial role for the firm'*, and be conducted according to *'non-discretionary rules and procedures'*.

10. Do you consider the SI definition could be made clearer by:

i) Removing the reference to non-discretionary rules and procedures in Article 21(1)(a) of the MiFID Implementing Regulation?

ii) Providing quantitative thresholds of significance of the business for the market to determine what constitutes a 'material commercial role' for the firm under Article 21(1)(a) of the MiFID Implementing Regulation?

i) The context for considering removing the reference to non-discretionary rules is provided by paragraph 55 of the consultation, which states:

"*The reference to non-discretionary rules may provide scope for firms to decide that any discretion they exercise in determining whether or not to execute client orders against own account leaves them outside the scope of the definition. However, it should be noted that a firm should always use discretion when deciding whether or not to execute a client order against its own account as the firm has to meet best execution obligations. In addition, the non-discretionary element of a SI is a relevant component of the definition to avoid including ad hoc transactions that would not be systematic.*"

The implication is that removal of the reference to 'non-discretionary' rules would increase the proportion of OTC trading classified as systematic internalisation[5]. Commensurately, this would increase the proportion of OTC trading being subject to the rules pertaining to SIs, such as the requirement to publish pre-trade quotes when dealing in orders up to 'standard' market size in 'liquid' markets.

This outcome would have the benefit of minimising the amount of internalisation escaping regulatory capture, and (in theory) increase market transparency through greater publication of pre-trade quotes.

Moreover, we do not consider 'non-discretionary' rules to be a necessary condition for systematic activity. Firstly, ad-hoc OTC transactions would not likely be interpreted as 'organised, frequent and systematic' irrespective of any reference to non-discretionary rules in the Implementing Regulation. Hence the risk of unintentionally capturing genuinely ad-hoc transactions under the SI framework is low. Secondly, investment firms operating 'crossing networks', which provide for the crossing of trades between counterparties utilising the network, may be considered to match orders in an orderly or

[5] Systematic internalisation is currently thought to account for a relatively small proportion of OTC trading. CESR notes that only 10 firms have notified their respective competent authorities that they conduct systematic internalisation.

systematised fashion even though they operate on a discretionary basis. The point is that 'non-discretionary' is not a precondition for 'systematic' activity. As such, removal of this term would not dilute the clarity of the SI definition.

The issue of broker-dealer crossing networks raises a more significant issue. Such crossing networks are deemed to be 'discretionary' because order matching typically does not take place according to the pre-defined parameters of a conventional order book system. Additionally, access to the network may be limited to only certain counterparties. Trades executed through crossing networks are classified as OTC, in essence because the network is not classified as a non-discretionary multilateral system run by a market operator (i.e. an MTF), nor is it classified as an SI since the activity conducted within the network is not constrained to bilateral internalisation (i.e. the system may permit multilateral crossing). Accordingly, the legal form of the crossing network is such that it escapes classification as either MTF or SI under MiFID, even though in economic substance it has similarities with both MTFs and SIs. We believe that broker-dealer crossing networks should not escape the regulatory framework applicable to other trading venues under MiFID. We comment further on this issue in questions 42 through 45 in section VI.

In short, we support removal of the reference to non-discretionary rules and procedures in Article 21(1)(a) of the MiFID Implementing Regulation. This would benefit market participants and regulators whilst not diluting the clarity of the SI definition.

ii) CESR notes that the materiality criteria pertaining to Article 21(1)(a) of the Implementing Regulation permits firms a degree of flexibility in assessing whether the activity falls within the definition of 'systematic'. Recital 15 of the Implementing Regulation, cited in the consultation, states that an assessment of a material commercial role should:

"…take into account the extent to which the activity is conducted or organised separately, the monetary value of the activity, and its comparative significance by reference both to the overall business of the firm and to its overall activity in the market for the share concerned in which the firm operates."

We believe that it would be difficult to further clarify the SI definition by providing quantitative thresholds of significance of the business. Materiality is a broad concept, the assessment of which must be tailored according to the specific circumstances of the firm in question. A quantitative threshold for assessing materiality, whilst providing clarity, would be too narrow. It would also be inflexible to changing business conditions and changes in the levels and types of trading activity over time.

11. Do you agree with the proposal that SIs should be required to maintain quotes in a size that better reflects the size of the business they are prepared to undertake?

CESR comments in paragraph 58 that at present, SIs are permitted to quote one-sided and in a size of only one share. Accordingly, the quotes published by SIs are often of little use to market participants as they do not give a clear indication of the size of business that SIs are prepared to trade in.

We support CESR's proposals to require SIs to maintain two-sided quotes and to quote in sizes that are commensurate with the size of business they are prepared to undertake.

The economic value of a trading venue depends upon the extent to which investors can see prices on both sides of the market and be able to accurately gauge the depth of trading interest at those prices. CESR's proposals are therefore necessary for SIs to provide investors with a meaningful alternative to transacting orders on RMs and MTFs.

12. **Do you agree with the proposed minimum quote size? If you have a different suggestion, please set out your reasoning.**

CESR proposes that SIs be required to maintain a minimum quote size equivalent to 10% of the standard market size of any liquid share in which they are a systematic internaliser. We have no reason to consider 10% not to be a reasonable threshold.

13. **Do you consider that removing the SI price improvement restrictions for orders up to retail size would be beneficial/not beneficial? Please provide reasons for your views.**

We are not able to comment on the appropriateness of this proposal.

14. **Do you agree with the proposal to require SIs to identify themselves where they publish post-trade information? Should they only identify themselves when dealing in shares for which they are acting as SIs up to standard market size (where they are subject to quoting obligations) or should all trades of SIs be identified?**

CESR proposes to rescind the provision in MiFID that exempts SIs from identifying themselves in post-trade reports if they publish quarterly trading data. We support CESR's proposal. Identification of SIs in post-trade reports, regardless of the size of the transaction, would improve the transparency and utility of published trade information. Such identification would make it easier for investors and regulators to assess the level of trading activity conducted by SIs, and level the playing field with respect to the post-trade transparency requirements for RMs and MTFs.

15. **Have you experienced difficulties with the application of 'Standard Market Size' as defined in Table 3 of Annex II of the MiFID Implementing Regulation? If yes, please specify.**

We are not able to comment on the application of 'Standard Market Size'.

16. **Do you have any comments on other aspects of the SI regime?**

We have no further comments on the SI regime.

III. Post-Trade Transparency

This section addresses improving the quality of transparency information; reducing delays in the publication of data; and promoting the consolidation of transparency information.

Quality of post-trade information

In paragraph 69 of the consultation, CESR proposes to address concerns relating to the quality of post-trade data by:

a) Amending MiFID to embed standards for the publication of post-trade transparency information aimed at improving clarity, comparability and reliability of post-trade transparency;
b) Amending MiFID to provide greater clarity i) in terms of what constitutes a single transaction for post-trade transparency purposes and ii) in terms of which investment firm shall make information related to OTC transactions public.
c) Establishing a joint CESR/Industry Working Group to finalise the development of standards and clarification of amendments.

17. Do you agree with this multi-pronged approach?

The need to address the quality and integrity of post-trade data is highlighted by a recent CFA Institute survey in which 68% of respondents identified problems with the post-trade reporting framework under MiFID[6]. Accordingly we fully support the proposals a) through c) set out above. Improving the quality of post-trade data is of primary importance to improve the decision-usefulness of that data and thus facilitate the efficient investment of investors' capital.

Timing of publication of post-trade information

In paragraph 74 of the consultation, CESR proposes to improve the timeliness of post-trade transparency information by:

i) Amending the MiFID obligation which requires RMs, MTFs and investment firms trading OTC to publish post-trade data in real time by specifying that "*transactions would need to be published as close to instantaneously as technically possible*", and
ii) Reducing the 3 minute deadline to 1 minute.

18. Do you agree with CESR's proposals outlined above to address concerns about real-time publication of post-trade transparency information? If not, please specify your reasons and include examples of situations where you may face difficulties fulfilling this proposed requirement.

As CESR notes, the current 3 minute deadline for the reporting of transactions is intended to be used only in exceptional circumstances where the systems available do not allow for publication of trades in a shorter period of time. CESR further comments that some investment firms routinely use the full 3 minutes to publish a transaction rather than on an exceptional basis.

Delays in the publication of trades reduce the usefulness of trade information to investors and exacerbate difficulties in accurately consolidating post-trade data. Further, trades executed via 'negotiated transactions', such as VWAP trades, may be adversely affected by trade reporting delays as the prices negotiated may be distorted by trades reported outside of the window of calculation for the negotiated price.

---

[6] Taken from the report *"Market Microstructure: The Impact of Fragmentation under the Markets in Financial Instruments Directive," CFA Institute (2009)*, available at http://www.cfapubs.org/toc/ccb/2009/2009/13

Accordingly, we support CESR's proposal specified in i) above that places greater emphasis on immediate reporting of trades.

With regard to part ii) of the proposal, we note that, if firms currently use the full 3 minutes permissible, there is a risk that firms would simply substitute 3 minutes for 1 minute. CESR also notes that in the United States, the Financial Industry Regulatory Authority (FINRA) is proposing to reduce its respective reporting deadline to 30 seconds from trading time. In the interests of harmonisation of standards and to mitigate the afore-mentioned risk, we recommend that CESR proposes a 30 second deadline instead of 1 minute. If it is possible to report trades *"as close to instantaneously as technically possible"*, then we see no reason why 30 seconds would impose undue difficulty for investment firms.

19. In your view, would a 1-minute deadline lead to additional costs (e.g. in terms of systems and restructuring of processes within firms)? If so, please provide quantitative estimates of one-off and ongoing costs. What would be the impact on smaller firms?

We are not in a position to comment on the quantitative impact of CESR's proposals.

Deferred publication regime

The MiFID Implementing Regulation, in Annex II Table 4, sets out transaction size thresholds and corresponding permissible time delays for post-trade reporting. Only 'large' transactions (determined by reference to Average Daily Turnover) may be reported with a delay. Deferred publication of large trades enables counterparties to minimise the market impact of their positions.

As CESR notes, the existing time delays under the deferred publication thresholds may be considered unnecessarily long. In particular, the maximum time delay (permitted for the largest transaction threshold) is 3 days after a transaction has been executed. CESR comments that such long delays contrast with the U.S. approach which requires real-time publication for 'on-exchange' trades and publication in no later than 90 seconds for OTC trades.

In paragraph 74, CESR proposes to recalibrate the delays and thresholds by:

i) Shortening the delays so as to ensure that all transactions are published no later than the end of the trading day;
ii) Shortening the intra-day delay of 180 minutes to 120 minutes; and
iii) Raising all intra-day transaction size thresholds.

Table 7 of the consultation sets out the proposed deferred publication thresholds and delays, reproduced below:

Table 7: Proposed deferred publication thresholds and delays

	Class of Shares in terms of average daily turnover (ADT)			
	ADT < EUR 100,000	**EUR 100,000 ≤ ADT < EUR 1,000,000**	**EUR 1,000,000 ≤ADT < EUR 50,000,000**	**ADT ≥EUR 50,000,000**
	Minimum qualifying size of transaction for permitted delay			
60 minutes	EUR 15,000	Greater of 10% of ADT and EUR 30,000	Lower of 15% of ADT and EUR 5,000,000	Lower of 15% of ADT and EUR 10,000,000
120 minutes	EUR 30,000	Greater of 20% of ADT and EUR 80,000	Lower of 25% of ADT and EUR 10,000,000	Lower of 25% of ADT and EUR 20,000,000
Until end of trading day	EUR 50,000	Greater of 30% of ADT and EUR 120,000	Lower of 35% of ADT and EUR 15,000,000	Lower of 35% of ADT and EUR 35,000,000

20. Do you support CESR's proposal to maintain the existing deferred publication framework whereby delays for large trades are set out on the basis of the liquidity of the share and the size of the transaction?

We support CESR's proposal. We are not aware of other more appropriate criteria for determining the deferred publication thresholds.

21. Do you agree with the proposal to shorten delays for publication of trades that are large in scale? If not, please clarify whether you support certain proposed changes but not others, and explain why.

We support each of the proposals i) through iii) above. The quality of post-trade transparency information would be significantly improved by simplifying the deferred publication thresholds and reducing the number of potential delays. In particular, we firmly support measures to reduce the maximum permissible threshold from 3 days to the end of the current trading day. We consider the end of the trading day to provide sufficient time for market participants to hedge against market impact costs. Further, shortening the time delays for publication would mitigate adverse effects on price discovery from delayed trade reporting and would improve the accuracy and reliability of consolidated post-trade data.

22. Should CESR consider other changes to the deferred publication thresholds so as to bring greater consistency between transaction thresholds across categories of shares? If so, what changes should be considered and for what reasons?

We do not have a view on whether CESR should consider other changes to the deferred publication thresholds.

23. In your view, would i) a reduction of the deferred publication delays and ii) an increase in the intraday transaction size thresholds lead to additional costs (e.g. in ability to unwind large positions and systems costs)? If so, please provide quantitative estimates of one-off and ongoing costs.

We are not in a position to provide quantitative estimates on the impact of CESR's proposals. Nonetheless, we are not aware that shortening the time delays for deferred publication would impose undue costs on investment firms. Any such costs would likely be outweighed by the transparency benefits to investors.

IV. Application of Transparency Obligations for Equity-Like Instruments

In paragraph 79 of the consultation, CESR proposes to extend pre- and post-trade transparency obligations to certain equity-like financial instruments admitted to trading on a RM. The main consideration is whether these instruments are equivalent in economic substance to shares and thus whether a harmonised pan-European transparency regime would be beneficial.

24. Do you agree with the CESR proposal to apply transparency requirements to each of the following (as defined above):
- **Depositary Receipts (DRs);**
- **Exchange Traded Funds (ETFs);**
- **Exchange Traded Commodities (ETCs); and**
- **Certificates**

If you do not agree with this proposal for all or some of the instruments listed above, please articulate reasons.

We agree with CESR that these instruments are equity-like in economic substance. Therefore we see no reason why these instruments should not be incorporated into the same transparency framework as that pertaining to equities.

25. If transparency requirements were applied, would it be appropriate to use the same MiFID equity transparency regime for each of the 'equity-like' financial instruments (e.g. pre- and post-trade transparency, timing of publication, information to be published, etc.). If not, what specific aspect(s) of the MiFID equity transparency regime would need to be modified and for what reasons?

We consider that the simplest and most effective approach would be to extend the MiFID equity transparency framework to these instruments. As we note above, these instruments are similar in economic substance to equities and therefore it would be appropriate to harmonise the transparency requirements for equities and equity-like financial instruments. The economic substance of an instrument should prevail over its legal form when determining the appropriate regulatory framework.

26. In your view, should the MiFID transparency requirements be applied to other 'equity-like' financial instruments or to hybrid instruments (e.g. Spanish

participaciones preferentes)? If so, please specify which instruments and provide a rationale for your view.

We have no further comments.

V. Consolidation of Transparency Information

Regulatory framework for consolidation

As CESR notes, the provision of market data was left to competitive forces under MiFID. However, the industry has yet to develop a cost-effective solution to the provision of consolidated pre-trade and post-trade data. Existing commercial offerings have also not yet provided investors with sufficiently timely and comprehensive information.

CESR comments that regulatory intervention is therefore necessary in order to facilitate data consolidation, and that the focus should be on post-trade transparency information as a priority.

To this end, CESR puts forward two approaches: i) retain the commercially-driven approach to consolidation but introduce new standards to improve data quality and achieve greater consistency in trade publication practices. This approach would be supplemented by requiring firms to publish reports through Approved Publication Arrangements (APAs) which would be required to operate according to prescribed standards and be subject to regulatory approval; or ii) introduce a single EU mandatory consolidated tape built on the APA regime.

27. **Do you support the proposed requirements/guidance (described in this section and in Annex IV) for APAs? If not, what changes would you make to the proposed approach?**

We support the proposed guidance that would require competent authorities to ensure that the APA meets prescribed standards, as set out in points a) through g) in paragraph 88 of the consultation[7].

28. **In your view, should the MiFID obligation to make transparency information public in a way that facilitates the consolidation with data from other sources be amended? If so, what changes would you make to the requirement?**

Paragraph 94 of the consultation notes that:

[7] The requirements for APAs include: a) ensuring the security and confidentiality of data; b) incorporating mechanisms for identification of errors in trade information to be made public; c) publishing the information required under MiFID in accordance with MiFID timeframes; d) incorporating mechanisms for authenticating the source of information to be made public; e) establishing precautionary measures in the case of system failure; f) facilitating the consolidation of data with similar data from other sources; g) making the information available to the public on non-discriminatory commercial terms at reasonable cost.

"Some market participants are of the view that the requirement to facilitate the consolidation of data is too general and is not resulting in effective consolidation of data".

We firmly agree with this view and believe that MiFID should be amended to include explicit provisions regarding the consolidation of trade data. Specifically, MiFID should require post-trade data to be published in a standardised format, utilising standardised and consistent symbology, so that consolidation is permissible. It is also imperative that quality control procedures are put in place to ensure data quality and thus provide investors with an accurate and reliable consolidated tape.

Moreover, MiFID should explicitly require the implementation of a consolidated tape of post-trade data (at a minimum, with scope to include provisions for a consolidated quotation system of pre-trade data in subsequent periods). CFA Institute has consistently called for such a consolidated tape, reflecting the opinion of its membership in which 65% of investors surveyed supported the introduction of a consolidated tape under MiFID[8].

The need for substantial improvements in the provision of a consolidated tape has also been recognised by the European Investors' Working Group (EIWG)[9], whose report in February 2010 highlighted existing difficulties in data access and high costs of consolidated data.

Of the two options set forth by CESR for the provision of a consolidated tape, we favour the option to maintain the commercially driven approach based on the APA regime at this stage, as opposed to the introduction of a Mandatory Consolidated Tape (MCT) established as a not-for-profit entity overseen by CESR/ESMA[10].

Before adopting the latter, it would first be sensible to establish whether the APA regime, as noted above, is successful in producing industry-led consolidated data solutions that are cost-effective, accurate, complete, and reliable. Such industry-led solutions are the least costly option (given that data vendors already provide consolidated data, albeit those offerings are currently unsatisfactory). The industry-led option would also avoid the need to establish fee and revenue sharing arrangements between data originators (such as RMs and MTFs) and the not-for-profit MCT.

However, if the APA regime is unsuccessful in providing market participants with a robust and reliable commercially-driven consolidated tape at reasonable cost, then we would firmly support initiatives to implement a Mandatory Consolidated Tape.

---

[8] The survey results are contained in the report *"Market Microstructure: The Impact of Fragmentation under the Markets in Financial Instruments Directive," CFA Institute (2009)*, available at http://www.cfapubs.org/toc/ccb/2009/2009/13

[9] The EIWG is an independent, non-political group organized by the European Capital Markets Institute (ECMI) in partnership with CFA Institute. The EIWG represents retail and institutional investors and aims to elevate investors' perspectives in regulatory reform and make an active contribution towards creating an efficient, effective, and globally competitive European regulatory model. The report of the EIWG is available at https://www.cfainstitute.org/ethics/Pages/european_iwg.aspx

[10] The details regarding the creation of a MCT are discussed in questions 34 through 37.

In short, the key point we wish to emphasize is that MiFID should be clarified and amended so that the provision of a consolidated tape (industry-led or MCT) is underpinned by an explicit regulatory requirement.

29. In your view, would the approach described above contribute significantly to the development of a European consolidated tape?

Yes, please refer to our response to question 28.

30. In your view, what would be the benefits of multiple approved publication arrangements compared to the current situation post-MiFID and compared to an EU mandated consolidated tape (as described under 4.1.2 below)?

Please refer to our response to question 28. We have no further comments.

31. Do you believe that MiFID provisions regarding cost of market data need to be amended?

Paragraph 95 of the consultation notes that MiFID requires transparency information to be made available to the public "on a non-discriminatory basis at reasonable cost". Paragraph 95 also notes that the estimated total fee charged by data vendors for consolidated pre-trade and post-trade data is approximately EUR 450 per user per month, compared to approximately $70 in the U.S. for consolidated post-trade data.

There is clear need for investors in Europe to have more affordable access to consolidated data. However we do not see how this could be achieved merely by amending MiFID. The current language that transparency information must be made available "on a non-discriminatory basis at reasonable cost" is appropriate and we are not aware of any means by which this provision could be made more explicit without imposing fixed fees on the industry.

32. In your view, should publication arrangements be required to make pre- and post-trade information available separately (and not make the purchase of one conditional upon the purchase of the other)? Please provide reasons for your response.

The practice of tying the purchase of pre- or post-trade data to the purchase of the other is potentially discriminatory and limits consumer choice. Therefore, we support the proposal to unbundle pre-trade consolidated data from post-trade consolidated data. Such unbundling provides greater flexibility for investors, not all of whom require both pre-trade and post-trade consolidated data. Separating these offerings would also provide greater product transparency, which should place downward pressure on costs as vendors compete on more transparent terms. Unbundling these services should go some way toward making consolidated data available on a "non-discriminatory basis at reasonable cost".

33. In your view, should publication arrangements be required to make post-trade transparency information available free of charge after a delay of 15 minutes? Please provide reasons for your response.

We agree that post-trade data should be made available free of charge after 15 minutes. This practice is already adopted by many RMs and MTFs. Investors paying for market data are primarily concerned with obtaining real-time data feeds. The commercial value of market data therefore declines as time elapses. After 15 minutes have elapsed since trade execution, there is little commercial value in post-trade data and hence such data should be made freely available to the public.

34. Do you support the proposal to require RMs, MTFs and OTC reporting arrangements (i.e. APAs) to provide information to competent authorities to allow them to prepare MiFID transparency calculations?

We support this proposal.

EU Mandatory Consolidated Tape

The second option put forth by CESR to address the provision of consolidated data is the implementation of a single Mandatory Consolidated Tape. The MCT would supplement the measures to introduce new standards over data quality under the APA regime. CESR notes that the MCT approach would be similar to the model adopted in the U.S. The MCT would be run as a not-for-profit entity regulated and supervised by the European Securities and Markets Authority (ESMA, the successor to CESR). The details regarding the operation of the MCT are set out in points a) through j) in paragraph 99 of the consultation. CESR notes that the MCT model would require a more substantial implementation project than option 1 but would represent a more structured step towards a more integrated pan-European market.

34. Do you support the proposed approach to a European mandatory consolidated tape[11]?

As we note in our response to question 28, given CESR's proposals regarding the APA regime, we believe it would first be sensible to see whether industry-led solutions built on the APA regime are successful in delivering a consolidated tape that is cost-effective, accurate, complete, and reliable. If such commercially-driven efforts are unsuccessful, determinable after an appropriate period of time, then we would firmly support the implementation of the MCT.

The proposed approach set out by CESR for the creation of the MCT would require, inter-alia, every RM, MTF and other APA to send trade reports to the MCT in the required format, free of charge, whilst being able to sell their data to any other interested party as they see fit. The MCT would charge a fee for real-time data and provide data free of charge after a 15 minute delay. The MCT would not be permitted to develop value-added products based on the aggregated data. Any profit made by the MCT beyond covering operating costs would be distributed back to the RMs, MTFs, and other APAs.

We consider the proposed approach to be appropriate.

35. If not, what changes would you suggest to the proposed approach?

---

[11] This is the 35th question of the consultation; however, we have proceeded according the numbering set out in the consultation to avoid confusion.

Please refer to response to question 34. We have no further comments.

36. In your view, what would be the benefits of a consolidated tape compared to the current situation post-MiFID and compared to multiple approved publication arrangements?

Please refer to our response to questions 28 and 34.

37. In your view, would providing trade reports to a MCT lead to additional costs? If so, please specify and where possible please provide quantitative estimates of one-off and ongoing costs.

We are not in a position to comment on the quantitative impact of the MCT proposal.

VI. Regulatory Boundaries and Requirements

Regulated Markets vs. MTFs

In paragraph 100 of the consultation, CESR comments that RMs are concerned that they are subject to more stringent regulatory requirements than their MTF competitors, which raises level playing field issues. In paragraph 101, CESR comments further that an extension of requirements for RMs under Article 39(a) to (c) of MiFID to investment firms or market operators operating an MTF may provide more clarity. Specifically, RMs and MTFs should be subject to the same organisational requirements regarding the operation of their trading platform.

CESR therefore proposes that investment firms or market operators operating an MTF, in addition to the requirements set out in Article 13, should:

a) *"have arrangements to identify clearly and manage the potential adverse consequences for the operation of the MTF or for its participants, of any conflict of interest between the interest of the MTF, its owners or its operator and the sound functioning of the MTF, and in particular where such conflict of interest might prove prejudicial to the accomplishment of any functions delegated to the MTF by the competent authority;*

b) *be adequately equipped to manage the risks to which it is exposed, to implement appropriate arrangements and systems to identify all significant risks to its operation and to put in place effective measures to mitigate this risks;*

c) *to have arrangements for the sound management of the technical operations of the system, including the establishment of effective contingency arrangements to cope with risks of systems disruptions."*

38. Do you agree with this proposal? If not, please explain.

We agree with CESR's proposal. In principle, our position is that all trading venues should be subject to the same rules. It is in the interests of investors that all trading venues compete on fair and equal terms.

39. Do you consider that it would help address potential unlevel playing field [concerns] across RMs and MTFs? Please elaborate.

We are not aware of any reasons why CESR's proposals would not help address level playing field concerns with regards to the requirements imposed on RMs vis-à-vis MTFs.

40. In your view, what would be the benefits of the proposals with respect to organisational requirements for investment firms and market operators operating an MTF?

We are not able to comment on the proposals in this context.

41. In your view, do the proposals lead to additional costs for investment firms and market operators operating an MTF? If so, please specify and where possible please provide quantitative estimates of one-off and ongoing costs.

We are not in a position to comment on the quantitative impact of CESR's proposals.

Investment firms operating internal crossing systems/processes

CESR notes that a number of investment firms in the EU operate systems that match order flow internally. Some systems match only client orders, while other systems also provide matching between client orders and 'house' orders. CESR comments that investment firms operating these crossing systems are subject to client-oriented conduct of business rules, including best execution, rather than the market-oriented rules designed for RMs and MTFs.

Trading executed through brokers' crossing systems is published through OTC reporting channels. Orders are not displayed prior to execution in the crossing system. As such, these type of systems are commonly referred to as 'dark pools' run by investment firms.

Data provided in Table 7 of the consultation show that trading executed in brokers' crossing systems accounts for a small proportion of total EEA trading. According to CESR, such crossing activity has increased from 0.6% of the total value of EEA trading in Q1 2008 to 1.4% in Q4 2009. As a percentage of total OTC trading, Table 7 shows that trading in crossing systems accounted for 1.5% in Q1 2008 and 4.0% in Q4 2009.

In paragraphs 113 and 114 of the consultation, CESR proposes to introduce bespoke requirements for investment firms operating crossing systems. These requirements would include:

- *"A requirement for investment firms operating such systems to notify their competent authority and provide a description of the system, including (at least) details on access to the system, the orders that may be matched in the system, the trading methodology, the arrangements for post-trade processing and trade publication;*

- *A requirement for competent authorities to place on the CESR website the name of any firm that has notified it that it operates a broker internal crossing system with the respective BIC code to identify the crossing system;*

- *A requirement for investment firms to add the identifier for its crossing system to their post-trade information for all transactions executed on such systems;*

- *In addition, investment firms that operate a broker internal crossing system would be brought within the scope of the MiFID Article 41(2). This would require a competent authority demanding the suspension or removal of a financial instrument from trading on a RM or MTF to make a similar demand to a broker internal crossing system;*

- *CESR is also considering the adequacy of existing arrangements for monitoring obligations in the context of firms' requirements to report transactions that may constitute market abuse; and*

- *[para. 114] Impose a limit on the amount of client business that can be executed by investment firms' crossing processes/networks before the crossing system is required to become an MTF. This implies that, for instance, obligations such as pre-trade transparency and fair access would be applicable once internal crossing processes reached a certain percentage of the market (i.e. similar to the proposed U.S. approach), either on its own or in combination with other crossing systems/processes with which they have a private link."*

42. Do you agree to introduce the definition of broker internal crossing process used for the fact finding into MiFID in order to attach additional requirements to crossing processes? If not what should be captured, and how should that be defined?

The definition referred to by CESR is specified in footnote 21 of the consultation, which states:

"For the purposes of the fact finding, broker operated crossing systems/processes were defined as internal electronic matching systems operated by an investment firm that execute client orders against other client orders or house account orders. Information related to internal electronic systems used exclusively for systematic internalisation was excluded and only trades executed in crossing systems/processes where post-trade transparency information is published are included (i.e. internal transactions where a house account order matches against another house account order are excluded)."

As we have commented in our response to question 10 on page 10, we believe that broker-dealer crossing systems should not escape the regulatory framework applicable to other trading venues under MiFID in order to provide for a level playing field. We also recognise that these systems share characteristics with both MTFs and internalisation. As such, it may be appropriate to classify such crossing systems separately. Accordingly, we support measures to more accurately define and capture the trading activity transacted through broker crossing systems and to attach additional requirements to such systems such that all trading venues can compete on fair and even terms.

43. Do you agree with the proposed bespoke requirements? If not, what alternative requirements or methods would you suggest?

We agree with the proposed requirements (as set out in the bullet points above). In particular, the requirement for an investment firm to add an identifier in its post-trade data for all transactions executed in its crossing system will greatly assist investors and supervisors better determine the type and level of activity transacted through such systems. This would enable investors to better determine whether such internal crossing systems meet their execution needs.

44. Do you agree with setting a limit on the amount of client business that can be executed by investment firms' crossing systems/processes before requiring investment firms to establish an MTF for the execution of client orders ('crossing systems/processes becoming an MTF)?

a) What should be the basis for determining the threshold above which an investment firm's crossing system/process would be required to become an MTF? For example, should the threshold be expressed as a percentage of total European trading or other measures? Please articulate rationale for your response.

b) In your view, should linkages with other investment firms' broker crossing systems/processes be taken into account in determining whether an investment firm has reached the threshold above which the crossing system/process would need to become an MTF? If so, please provide a rationale, also on linking methods which should be taken into account.

We support the proposal that would set a limit on the amount of client business that can be executed by investment firms' crossing systems before requiring such systems to be formally established as an MTF. As CESR notes, this proposal is conceptually similar to the U.S. proposals for Alternative Trading Systems (ATSs)[12].

If an investment firm is executing a material amount of business in the form of multilateral crossing through its internal crossing system, the economic substance of that operation is equivalent to that of an MTF. In that case, the investment firm should be required to register and operate its crossing system as an MTF in order to provide for a level playing field amongst trading venues and to promote fair competition.

We are not able to comment on the threshold at which an investment firm's crossing system should be required to become an MTF, or on whether linkages with other investment firms' crossing systems should be taken into account.

45. In your view, do the proposed requirements for investment firms operating crossing systems/processes lead to additional costs? If so, please specify and where possible please provide quantitative estimates of one-off and ongoing costs.

[12] The U.S. proposals for ATSs include lowering the trading volume thresholds for displaying best-priced orders to the public and increasing the post trade transparency requirements for ATSs such that ATSs are subjected to the same obligations as for registered exchanges.

We are not in a position to comment on the quantitative impact of CESR's proposals.

VII. MiFID Options and Discretions

CESR comments that a reduction of options and discretions in the EU regulatory framework may remove key differences in national legislation and could generally contribute to the realisation of a single European rulebook.

Waiver of pre-trade transparency obligations

Paragraphs 116 and 117 of the consultation note that the MiFID Implementing Regulation foresees discretion for competent authorities to waive pre-trade transparency obligations for RMs and MTFs under certain conditions (as discussed in section I of this comment letter).

46. Do you think that replacing the waivers with legal exemptions (automatically applicable across Europe) would provide benefits or drawbacks? Please elaborate.

As CESR notes, certain types of pre-trade transparency waivers are applied more widely in some Member States than in others. CESR comments that this does not necessarily point at a divergent application of the waivers, but rather results from the fact that the business models of RMs and MTFs differ in different Member States.

In our view, removal of discretions over the granting of pre-trade transparency waivers would provide the benefit of minimising any potential divergence in regulatory treatment of waiver applications across Member States. It would also ensure a consistent application of the transparency obligations relating to trading systems throughout the EU. In the interests of harmonisation of standards and to avoid regulatory arbitrage, we support replacing the discretion over pre-trade transparency waivers with legal exemptions automatically applicable across Europe. This would help ensure that all trading venues are subject to the same regulatory framework.

Determination of liquid shares

This section refers to the determination of liquid shares for the purposes of the Systematic Internaliser regime. CESR comments that, in order to be liquid, a share must be traded daily, have a free float of not less than EUR 500 million, and satisfy one of the following:

a) The average daily number of transactions must not be less than 500; or
b) The average daily turnover for the share must not be less than EUR 2 million.

CESR comments further that, in respect of shares for which they are the most relevant market, Member States are permitted to specify by public notice that *both conditions are to apply*.

47. Which reasons may necessitate the application of both criteria?

We are not able to comment on such circumstances.

48. Is a unique definition of liquid share for the purposes of Article 27 necessary?

We believe that a unique definition of a liquid share is necessary, in order to avoid divergences in the determination of a liquid share – and hence the application of the SI regime – amongst Member States.

49. If CESR were to propose a unique definition of 'liquid share' which of the options do you prefer?
a) apply condition a) and b) of the existing Article 22(1), or
b) apply only condition a), or
c) apply only condition b) of Article 22(1)?
Please elaborate.

We are not in a position to determine which criterion is the most appropriate basis for determining a unique definition of a liquid share.

Immediate publication of a client limit order

The MiFID order handling rules are set out in Article 22(2). CESR notes that, in respect of client limit orders not immediately executed under prevailing market conditions, investment firms are required to make those orders public immediately in a manner which is easily accessible to other market participants. CESR comments further that MiFID creates discretion for Member States to decide that investment firms comply with this obligation by transmitting the client limit order to a RM or MTF.

50. Is this discretion (for Member States to decide that investment firms comply with this obligation by transmitting the client limit order to a regulated market and/or an MTF) of any practical relevance? Do you experience difficulties with cross-border business due to a divergent use of this discretion in various Member States?

Although, as CESR notes, the vast majority of Member States apply this discretion, we see no reason or sound economic justification why this discretion should not be replaced by a rule under Article 22(2) to transmit such limit orders to a RM and/or MTF if they are not immediately executed. We believe that the clarity and consistency from a rule in this instance would benefit investors and provide for even treatment of orders across Member States.

51. Should the discretion granted to Member States in Article 22(2) to establish that the obligation to facilitate the earliest possible execution of an unexecuted limit order could be fulfilled by a transmission of the order to a RM and/or MTF be replaced with a rule?

We support replacing the afore-mentioned discretion with a rule. Please refer to our response to question 50.

Requirements for admission of units in a collective investment undertaking to trading on a RM

This section relates to the discretion afforded to Member States over the admission of units in collective investment undertakings to trading on a RM. Member States currently have discretion to provide that it is not a necessary precondition that the RM satisfy itself that the collective investment undertaking has complied with necessary procedures for the marketing of its units in the jurisdiction of the RM prior to those units trading on the RM.

52. Should the option granted to Member States in Article 36(2) of the MiFID Implementing Regulation be deleted or retained? Please provide reasoning for your view.

We do no comment on this option.

1st June 2010

ANNEX II – Proposed Standards for Post-Trade Transparency

We comment only on those questions listed in the Annexes (specifically Annex II) where we are able to respond.

1. **Do you agree to use ISO standard formats to identify the instrument, price notation and venue? If not, please specify reasons.**

CESR proposes to require the use of International Standards Organisation (ISO) standard formats for post-trade transparency information. Further details are specified in Table 9 of Annex II in the consultation. CESR recommends ISO standards because ISO is the international standard body and ISO standards are widely used within the EEA.

We support the use of ISO standard formats to facilitate the standardisation and consistency of post-trade transparency information.

2. **Do you agree that the unit price should be provided in the major currency (e.g. Euros) rather than the minor currency (e.g. Euros cents)? If not, please specify reasons.**

We agree with this proposal.

Exchange of shares determined by factors other than the current market valuation of the share and non-addressable liquidity

In this section, CESR comments that there is currently no standard practice to identify transactions determined by factors other than current market valuation of the share in question. Accordingly, there is no consistency in the way that publication arrangements identify such transactions.

CESR therefore comments that, if considered beneficial, it intends to promote consolidation by proposing that each type of transaction be identified in a harmonised way across RMs, MTFs and OTC publication arrangements, in accordance with Table 10 (reproduced below):

Table 10 - Transaction type standards

Type of transaction	Standard identifier	Publication arrangement on which standard would need to be applied
VWAP	V	RM, MTF, OTC
Portfolio transaction	P	RM, MTF, OTC
Ex/cum dividend + other	D	RM, MTF, OTC
Give up / give in	G	OTC
OTC hedge of a derivative	O	OTC
Inter-fund transfers	I	OTC

3. **Do you agree that each of the above types of transactions would need to be identified in a harmonised way in line with table 10? If not, please specify reasons.**

We support the proposal for transactions determined by factors other than current market valuation to be identified in a standardised and consistent fashion.

4. **Are there other types of non-addressable liquidity that should be identified? If so, please provide a description and specify reasons for each type of transaction.**

We are not able to comment on other types of non-addressable liquidity.

Identification of dark trading

CESR proposes that a transaction that is not pre-trade transparent should be identified as such. Two options are set forth by CESR in this regard. Either the information would need to be made public in real-time in which case a new field would be required that would contain 'D' ('dark') where a transaction was not pre-trade transparent; or, the information could be published by the relevant trading venue on a monthly basis.

5. **Would it be useful to have a mechanism to identify transactions which are not pre-trade transparent?**

Such a mechanism would be very useful for both investors and regulatory authorities in determining the level of transparency of trading activity. Of the two options put forth by CESR, we favour the former. It would be much more informative and decision-useful for investors to have real-time disclosure of 'dark' trades as opposed to monthly aggregated information. Real-time disclosure of dark trades would help investors to better gauge the level of activity being transacted away from lit order book markets.

6. **If you agree, should this information be made public trade-by-trade in real-time in an additional field or on a monthly aggregated basis? Please specify reasons for your position.**

Please refer to our response to the previous question.

7. **What would be the best way to address the situation where a transaction is the result of a non-pre-trade transparent order executed against a pre-trade transparent order?**

If one side of the order is displayed, this should be sufficient for the transaction to be treated as being pre-trade transparent. For simplicity and to avoid any uncertainty on the part of market participants, it may be most appropriate to only label 'dark' ('D') trades as those trades that are purely executed in the dark, i.e. where one non-displayed order executes against another non-displayed order.

Unique transaction identifier

8. **Do you agree each transaction published should be assigned a unique transaction identifier? If so, do you agree a unique transaction identifier should consist of a unique transaction identifier provided by the party with the publication obligation,**

a unique transaction identifier provided by the publication arrangement and a code to identify the publication arrangement uniquely? If not, please specify reasons.

We are not able to comment on this proposal.

Cancellations

In paragraph 17 of Annex II, CESR proposes that when there is a decision to cancel a transaction, the information relating to the transaction would need to be republished together with the unique transaction identifier of the previously disclosed information as soon as possible and no later than 90 seconds. In accordance with the CESR Level 3 Recommendations, a new field would be required that would need to be populated with 'C'.

9. Do you agree with CESR's proposal? If not please specify reasons.

This approach is appropriate in order to ensure the accuracy and relevance of published data and to avoid potentially misleading investors over the details of executed trades.

Amendments

In line with the proposal above for cancellations, CESR proposes that when there is a decision to amend information related to a transaction, the information relating to the transaction would need to be republished together with the unique transaction identifier of the previously disclosed information as soon as possible and no later than 90 seconds. A 'C' for cancellation would be used and the amended version of the information would need to be published together with the unique transaction identifier of the previously disclosed information as soon as possible and no later than 90 seconds. In accordance with the CESR Level 3 Recommendations, a new field would be required that must be populated with 'A'.

10. Do you agree with CESR's proposal? If not please specify reasons.

We agree with this proposal.

Negotiated Trades

CESR proposes that where a transaction is a negotiated trade, in accordance with the CESR Level 3 Recommendations, the flag 'N' would need to be used.

11. Do you agree with CESR's proposal? If not please specify reasons

We agree with this proposal.