



Date: 13 April 2010
Ref.: CESR/10-423

PRESS RELEASE

**CESR begins the process to overhaul MiFID
by consulting on policy options**

CESR publishes today three consultation papers on its technical advice to the Commission. The papers are to be seen in the context of reviewing MiFID, the Markets in Financial Instruments Directive that entered into force in November 2007. The review includes proposed technical advice by CESR on investor protection and intermediaries (Ref. CESR/10-417), equity markets (Ref. CESR/10-394) and transaction reporting (Ref. CESR/10-292). CESR invites stakeholders to comment on all of the three consultation papers by 31 May 2010.

Since MiFID's entry into force, European financial markets have undergone a fundamental restructuring. For instance, markets have seen greater competition and more pan-European trading, the emergence of dark pools, consolidation between exchanges, improvements in trading technology as well as other innovations, such as smart order routing, algorithmic trading and new clearing arrangements.

In its three consultation papers, CESR addresses areas of the MiFID legal framework where it has identified a need for improvement, including quality, cost and consolidation of post-trade transparency data and delays in the publication of such data. Furthermore, with the global financial crisis in the background, regulators have seen a need to focus more on selling practices for certain financial instruments, in order to further improve the protection of investors, in particular retail investors.

Eddy Wymeersch, Chair of CESR and Chair of the Supervisory Board of the Belgian Commission Bancaire, Financiere et des Assurances (CBFA), stated:

“MiFID is one of the cornerstones of the regulation of securities markets in the EU. Ensuring that the regulatory framework keeps pace with the changing shape of financial markets is key, especially as the Directive itself was conceived with the strong intention of encouraging the modernisation and progress of Europe's securities markets, whilst also seeking to ensure that this progress affords the investor with the necessary protections to ensure a strong degree of market confidence.

The proposals developed in these three consultation papers which form the first phase of CESR's work to provide the Commission with technical advice, are focused on ensuring that market confidence is strengthened further. We are also seeking to make progress on convergence to ensure that market participants can effectively benefit from the single market and that retail investors have greater certainty dealing on a cross-border basis. As such, the review of MiFID will be incredibly valuable in ensuring that the political objectives set out in this Directive are realised, even under changing market conditions.”

CESR has been working on assessing the functioning of the MiFID regime since 2008, when it provided its advice to the Commission on the review of the MiFID provisions relating to commodity derivatives business (Ref. CESR/08-752). This work was followed by the publication of the report on the impact of MiFID on equity secondary markets functioning in June 2009 (Ref. CESR/09-355) and the submission of CESR's report on the transparency of corporate bond, structured finance product and credit derivatives markets (Ref. CESR/09-348) to the European Institutions in July 2009. In the course of 2009, CESR initiated additional work in preparation for the review of MiFID also in other



areas, including assessing some of the MiFID provisions on investor protection and considering the need for changes in the transaction reporting requirements of MiFID, once it had become evident that sufficient results cannot be achieved only through supervisory convergence.

The draft advice that CESR puts for consultation today is three-folded and includes policy proposals on investor protection and intermediaries (I.), equity markets (II.) and transaction reporting (III.).

In addition, CESR received from the Commission a request for additional information on some further areas. In a number of cases, these questions have been addressed by proposals within these consultation papers, however, in some cases CESR will launch a subsequent consultation on very specific areas these areas are outlined in next steps. Further requests from the Commission also included some fact finding questions and requests for CESR to respond on the basis of supervisory experience. In these cases, CESR will provide its advice on this basis and will therefore not consult on these areas. For further information on these questions, please view the request from the Commission and CESR's response to it published today along with these consultation papers.

I. Consultation on investor protection and intermediaries

The first consultation paper published today deals with issues relating to investor protection and intermediaries (Ref. CESR/10-417). With some exceptions, CESR has limited its review in this area to those provisions where the legal text of MiFID incorporated review clauses. In some areas, CESR has already suggested proposals for changes to the legislation. In other cases, CESR intends to provide technical advice to the Commission without providing specific legislative proposals, but setting out CESR's view on the policy approach that should be adopted. CESR's consultation covers six main policy lines:

Requirements for recording telephone conversations and electronic communications

CESR is consulting on the key elements of a possible common EEA recording requirement for orders received or transmitted by telephone or through electronic communications. CESR believes that such a regime would be an important step forward in terms of legal certainty, consumer protection, and surveillance of markets to achieve a credible deterrence in EEA securities markets.

Execution quality data

In the context of Art. 44(5) of the MiFID Implementing Directive, CESR considers whether or not regulatory intervention is required to ensure that necessary information to select appropriate execution venues is available in the market. The review discusses two main policy options in relation to the issue of execution quality data for shares. The two options put forward by CESR are:

- (i) Whether CESR should define key metrics that execution venues and data vendors would use on a voluntary basis to provide comparable execution quality data to their members and clients; or
- (ii) Whether execution venues should be required to produce periodic reports on execution quality using metrics defined by CESR.

Both of these alternatives are assumed to take effect in a regulatory context in which the quality and comparability of post-trade transparency data has been improved.

Complex vs. non-complex financial instruments

CESR proposes to clarify and deliver a more graduated risk-based approach to the distinction between complex and non-complex financial instruments for the purposes of the Directive's appropriateness requirements.



The proposals included in this consultation paper are based on the feedback received in CESR's consultation in May 2009 (Ref. CESR/09-295) on MiFID complex and non-complex financial instruments, where the industry requested CESR to provide further clarification on the types of MiFID products that might be categorised as complex/non-complex.

Definition of personal recommendation

CESR seeks to clarify that the provision of personal recommendations provided exclusively through distribution channels amounts to investment advice as defined under Article 4(1)(4) of MiFID. This issue was included in the consultation paper as a result of a CESR consultation in July 2009 (Ref. CESR/09-665) on investment advice, where CESR considered that the current definition in Article 52 of the MiFID Implementing Directive needed greater clarity.

Supervision of tied agents and related issues

CESR proposes amendments to the MiFID tied agents regime. The review focuses on three broad areas:

- Further harmonising the national rules on the use of tied agents;
- Enhancing transparency concerning the identity of tied agents; and
- Enhancing investor protection through clarifying the passport regime for firms using tied agents (Articles 31 and 32 of MiFID).

MiFID options and discretions

CESR has conducted an internal mapping exercise of discretions within MiFID in order to identify areas where a more harmonised approach might be desirable. 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, an aim that has been endorsed at a political level by the ECOFIN Council. As a result, both in the area of investor protection and intermediaries and equity markets (see section II below) CESR proposes either eliminating certain discretions or converting them to rules to reach greater convergence.

II. Consultation on equity markets

The second consultation paper deals with equity markets and was developed on the basis of CESR's continued work on the issues identified in its previous report on the impact of MiFID on equity secondary markets functioning (Ref. CESR/09-355). It marks the culmination of nearly 18 months of work by CESR, including an earlier call for evidence published in November 2008 (Ref. CESR/08-872), fact findings, roundtables with market participants and presentations held by stakeholders. The main topics addressed in this consultation paper can be summarised under following headings:

Retaining pre-trade transparency regime for organised markets

Data from CESR's earlier fact finding shows that more than 90 percent of trading on organised markets in Europe can be qualified as being pre-trade transparent. CESR recommends retaining the general requirement for pre-trade transparency on organised markets (regulated markets (RMs) and Multilateral Trading Facilities (MTFs)). However, exceptions to pre-trade transparency should continue to be allowed under certain circumstances. In order to provide greater clarity for regulators and market participants, CESR seeks to move from a 'principle based approach' for pre-trade transparency waivers to an approach that is more 'rule based'. As regards the scope and criteria for the waivers, CESR consults on whether some of the waivers should be recast (i.e. thresholds for, and scope of, large in scale waiver, introduction of a minimum order size for the reference price waiver) and provides further clarifications on the interpretation of the waivers.



Review of definition of and obligations for systematic internalisers

CESR's recommendation is to retain the current systematic internaliser regime, but to revisit the definition of systematic internaliser (SI) and related obligations to ensure a consistent understanding and implementation and to improve the value of information provided to the market. In particular, CESR proposes to require SIs to maintain two-sided quotes and a minimum quote size and to identify themselves in post-trade reports.

Improving the post-trade transparency regime

A key theme in this consultation paper is the recommendation of CESR for an improvement in the quality and timeliness of post-trade transparency data and the ability to effectively consolidate information received from multiple European equity markets. CESR therefore recommends to retain the current framework for post-trade transparency, but to introduce formal measures to improve quality, shorten delays for regular and deferred publications and reduce the complexity of the regime. More specifically, it is proposed to amend MiFID to embed standards for the publication of post-trade information and to provide further clarifications of the post-trade transparency obligations.

To finalise the proposed standards for post-trade transparency information and to further specify proposed amendments to improve the quality of OTC post-trade transparency data by July 2010, CESR proposes to establish a joint CESR-Industry Working Group immediately following the publication of the consultation paper.

Enhancing application of transparency obligations to equity-like instruments

CESR also proposes to increase the scope of the transparency regime by applying transparency obligations to equity-like instruments admitted to trading on an RM, including depository receipts, exchange-traded funds, exchange-traded commodities and certificates. These instruments are considered to be equity-like, since they are traded like shares and, from an economic point of view, are equivalent to shares. CESR believes that there are benefits for investors stemming from a harmonised pan-European pre-and post-trade transparency regime for these instruments.

Regulatory framework for consolidation and cost of market data

CESR recognises that significant barriers to the consolidation of post-trade data remain and that, without further regulatory intervention, market forces are unlikely to deliver an adequate and affordable pan-European consolidation of transparency information. Two possible approaches to achieve this goal are proposed for consultation. Both approaches address the cost of market data. One approach would retain the commercially-driven consolidation process currently taken by MiFID but supplement the introduction of new standards to improve data quality and to achieve greater consistency in trade publication practices by requiring investment firms to publish their trades through Approved Publication Arrangements (APAs). All APAs would be required to operate data publication arrangements to prescribed standards. The other approach would build on this APA regime but would require all trades to be made available to and published by a single consolidated tape to offer market users a single point of access.

Addressing regulatory boundaries and requirements

CESR addresses concerns about certain inconsistencies which may have impacted the level playing field. It is proposed to align the requirements which apply to RMs and MTFs under MiFID, and to introduce tailored additional obligations for investment firms operating crossing systems/processes (e.g. notification of activity to regulators, identification of the crossing system in post-trade reports). Similar to the US approach, CESR also consults on the possibility of requiring investment firms operating crossing systems/processes to set up MTFs for their crossing activity once they have



reached a certain size on their own or in combination with other crossing systems/processes with which they have a private link. This implies that, for instance, obligations such as pre-trade transparency and fair access would be applicable once internal crossing processes reached a certain market share.

Eliminating certain options and discretions of MiFID

CESR consults on the desirability of eliminating some options and discretions relating to MiFID's markets provisions. These include the discretion for Member States to choose some of the criteria to define liquid shares for the purposes of the MiFID systematic internaliser requirements.

III. Consultation on transaction reporting

The third consultation paper (Ref. CESR/10-292) published today deals with transaction reporting. The paper sets out CESR's proposal for amending and clarifying the transaction reporting regime under MiFID. In preparing this consultation paper, CESR has benefited from the feedback given by stakeholders to its call for evidence (Ref. CESR/08-873) issued in November 2008. The key purpose behind the suggested amendments is to improve market supervision and ensure greater market integrity. The main changes proposed focus on:

The introduction of a third trading capacity (riskless principal)

CESR considers the introduction of a new trading capacity (riskless principal) in transaction reports to be the best and most robust way to differentiate principal transactions made by a firm on its own account and on behalf of the client from other types of principal and agency transactions reported to the competent authorities. The MiFID Implementing Regulation should therefore be amended accordingly.

Collection of and standards for client and counterparty identifiers

CESR intends to suggest to the Commission that the collection of client IDs would be made mandatory to all competent authorities. The provision of such identifiers could lead to greater efficiency in market surveillance and detection of market abuse. Furthermore, CESR is investigating the use of a unique identifier for each client or counterparty and elaborates in the consultation paper on possible future standards and guidance for such identifiers.

Client ID collection when orders are transmitted for execution

CESR suggests amending MiFID to enable competent authorities to require the reporting of client IDs when orders are transmitted for execution, with the transmitting firm either providing the client ID to the receiving firm or reporting the transaction, including the client ID, to the competent authority.

Transaction reporting by market members not authorised as investment firms

Finally, CESR suggests amending MiFID by extending the transaction reporting obligation to all members of regulated markets and MTFs – whether they are investment firms or not – or, alternatively, by introducing an obligation on regulated markets or MTFs that admit these undertakings as members to report the transactions on their behalf.

Next steps

A public hearing will be held to cover these issues on 17 May 2010 in the premises of the CESR Secretariat in Paris. An agenda for the hearing will be published shortly on CESR's website where attendees can register (please see the section hearings). CESR intends to publish feedback



statements for the three consultations launched today and provide its final advice to the Commission by the end of July 2010.

CESR is continuing its work in preparing its draft advice to the Commission in other areas of the MiFID review. In particular, CESR will develop further details for its proposal on the non-equity markets transparency regime published in July 2009, extending the work also to other derivatives than CDS. In line with the G20 conclusions, CESR is also analysing the criteria for and the level of standardisation necessary to achieve a higher degree of derivatives trading on organised platforms. Consultations on these two work streams will be launched in the course of the spring.

In the area of investor protection and intermediaries, CESR will consult on certain aspects of the client classification regime on the basis of the additional questions received from the Commission (please see the Commission request published alongside these documents and CESR's response to that request). A consultation paper is also likely to be published in relation to some of the questions regarding transaction and position reporting.



Notes to editors:

1. The development of these consultation papers has been undertaken through three CESR Standing Committees, namely Secondary Markets Standing Committee chaired by Sally Dewar, Managing Director (Risk Business Unit) of the FSA, Investor Protection and Intermediaries Standing Committee chaired by Jean-Paul Servais, Chair of the Belgian CBFA and CESR-Pol chaired by Anastassios Gabrielides, Chairman of the Hellenic Capital Market Commission. MiFID and its implementing measures include a number of review clauses. The ones that are covered in these consultation papers are set out below. The three consultation papers published today will feed into the review of MiFID by the European Commission.

2. The review clauses in MiFID and its implementing measures include:

Investor protection and intermediaries

- Art. 65(3)(c) of MiFID requires the Commission to report on the appropriateness of the rules concerning the appointment of tied agents.
- Art. 51(5) of the MiFID Implementing Directive requires the Commission to report on the continued appropriateness of the right of Member States to impose obligations on investment firms relating to the recording of telephone conversations or electronic communications involving client orders.
- Art. 44(5) of the MiFID Implementing Directive requires the Commission to present a report on the availability, comparability and consolidation of information concerning the quality of execution of various execution venues.

Equity markets

- Art. 65(2) of MiFID requires the Commission to present a report on the application of Art. 27 of MiFID.
- Art. 40(1) of the MiFID Implementing Regulation requires the Commission to re-examine the criteria for determination of liquid shares contained in Art. 22 of the MiFID Implementing Regulation as well as to re-examine, among others, the Table 3 of Annex II of the MiFID Implementing Regulation relating to standard market sizes.
- Art. 40(1) of the MiFID Implementing Regulation requires the Commission to re-examine, among others, the Table 2 of Annex II of the MiFID Implementing Regulation relating to orders large in scale compared with normal market size.
- Art. 40(3) of the MiFID Implementing Regulation requires the Commission to re-examine Table 4 of Annex II of the MiFID Implementing Regulation relating to the deferred publication thresholds and delays and report on the results of this re-examination.
- Art. 65(4) of MiFID requires the Commission to present a report on the state of removal of the obstacles which may prevent the consolidation at the European level of the information that trading venues are required to publish.

Transaction reporting

- Art. 40(1) of the MiFID Implementing Regulation requires the Commission to re-examine the definition of 'transaction'

3. **Regarding MiFID review clauses in relation to commodities:** CESR considers that its technical advice on the MiFID exemptions for commodity derivatives business (Ref. CESR/08-752) published on 15 October 2008 remains valid. This advice is based on the review clauses of Art. 65(3)(a) and (d) of MiFID requiring the Commission to report on the continued appropriateness of the exemptions under Art. 2(1)(k) and 2(1)(i) of MiFID. Therefore CESR is not providing further technical advice on the MiFID exemptions regarding specialist commodity derivative firms.

4. CESR is an independent Committee of European Securities Regulators. The role of the Committee is to improve co-ordination among securities regulators and act as an advisory group



- to assist the European Commission, in particular in its preparation of draft implementing measures in the field of securities; and
- to work to ensure more consistent and timely day to day implementation of community legislation in the Member States.

The Committee was initially established under the terms of the European Commission's decision of 6 June 2001 (2001/527/EC) which was repealed and replaced by the Commission Decision of 23 January 2009 (2009/77/EC). CESR was one of the two Committees first envisaged in the Final Report of the Group of Wise Men on the regulation of European securities markets chaired by Baron Alexandre Lamfalussy. The report itself was endorsed by the European Council and the European Parliament. The relevant documents are available on the CESR website.

5. Each Member State of the European Union has one Member in the Committee. The members are nominated by the Member States and are the heads of the national public authorities competent in the field of securities. The European Commission has nominated as its representative the Director General of the DG MARKT. Furthermore, the securities authorities of Norway and Iceland are also represented at a senior level as observers.

Further information:

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