COMMITTEE OF EUROPEAN SECURITIES REGULATORS

Date: October 2010
Ref.: CESR/10-975

**FEEDBACK STATEMENT**

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

## Table of contents

## Executive Summary

The Markets in Financial Instruments Directive (MiFID) came into force on 1 November 2007. It introduced significant changes to the European regulatory framework for secondary markets. CESR initially assessed the impact of these changes in the first half of 2009 and published a report in June 2009. This report on 'impact of MiFID on equity secondary markets functioning' (Ref. CESR/09-355) recommended further work to address some issues identified.

Following the publication of the report, CESR held a series of meetings with representatives from regulated markets (RMs), multilateral trading facilities (MTFs), investment firms, buy-side firms and market data vendors and conducted a fact-finding to obtain information on dark trading taking place on RMs, MTFs and investment firms' crossing processes. The information gained fed into the Consultation Paper (CP) on equity markets that CESR published in April 2010 as part of the MiFID review (Ref. CESR/10-394). 76 responses to that consultation, including confidential submissions, were received. The responses to the CP, together with information received in response to CESR's Call for Evidence on micro-structural issues that was also published in April (Ref. CESR/10-142), informed the Technical Advice that CESR provided to the European Commission on 29 July 2010.

The main recommendations addressed in the Technical Advice are covered by the following headings:

<u>Pre-trade transparency regime for RMs/MTFs:</u>

Data from fact-finding undertaken by CESR shows that more than 90 percent of trading on organised markets in Europe is pre-trade transparent. CESR recommends retaining the general requirement for pre-trade transparency on organised markets (RMs/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 and facilitate continuous supervisory convergence, CESR seeks to move from a 'principle based approach' to waivers from pre-trade transparency to an approach that is more 'rule based'. In addition, CESR recommends the Commission provide ESMA with specific powers to monitor and review the pre-trade transparency waivers going forward and to develop binding technical standards in this regard.

Regarding particular waivers, CESR recommends the Commission undertake/commission further analytical work based on empirical data to determine whether the existing large-in-scale (LIS) thresholds should be revised. CESR stands ready to provide the Commission with further assistance in this work, including recommending parameters and reviewing data. CESR also recognises the need for a harmonisation of the treatment of 'stubs' under the LIS waiver and recommends to clarify that venues using the reference price waiver should not embed a fee in the price of trades. With respect to the existing wording of the waivers, CESR continues to work on appropriate clarifications (as were outlined in Annex I of the CP) which may, as appropriate, be included in binding technical standards at a later stage.

In addition, CESR recommends that MiFID be amended to clarify that actionable indications of interest (IOIs) are considered to be orders and as such subject to pre-trade transparency requirements.

<u>Definition of and obligations for systematic internalisers:</u>

CESR recommends the Commission clarify the objective of the systematic internaliser (SI) regime and consider a broader review of this regime within the MiFID review, including further consideration of whether to establish appropriate thresholds for the material commercial relevance of the activity to the market and whether to retain/remove the price improvement restriction. CESR stands ready to provide the Commission with further assistance in this work in the coming months, as appropriate.

Notwithstanding the recommendation for a broader review, CESR sees value in some clarifications to ensure there is a consistent understanding and implementation of the regime, as well as some specific amendments to the regime to improve the value of information provided to the market. CESR therefore recommends clarifying the criterion 'according to non-discretionary rules and procedures' in the definition of an SI and (inter alia) to revise the SI-obligations to require two-sided quotes and minimum quote sizes.

Post-trade transparency regime:

CESR recommends retaining the current framework for post-trade transparency but to introduce formal measures to improve the quality of post-trade data, shorten delays for regular and deferred publication and reduce the complexity of the regime. Detailed proposals for binding post-trade transparency standards and guidelines on the obligations for post-trade transparency (as were outlined in Annexes II and III of the CP) have been worked on with the industry and detailed recommendations have been published with the second set of CESR technical advice on the MiFID Review beginning of October 2010.

As a supplement to the introduction of new standards on data quality and guidelines on trade publication, CESR recommends 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, as set out in Annex I of the Technical Advice.

Application of transparency obligations to equity-like instruments:

CESR recommends to enhance the scope of the MiFID transparency regime by applying transparency obligations to equity-like instruments admitted to trading on an RM, including depository receipts, exchange-traded funds and 'certificates' as defined in CESR's advice. 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. CESR therefore recommends that a European consolidated tape be mandated and its main features outlined in MiFID. Regarding the technical implementation, CESR recommends a solution involving the industry within a clear scope and relatively short timeframe set by the Commission and ESMA. The process for the development of the European consolidated tape by the industry should be launched and progress and implementation monitored by ESMA. In case of default at any stage of the process, MiFID should identify a clear course of action and require the establishment of a mandatory single European consolidated tape run as a not-for-profit entity on the basis of terms of reference and governance to be set out by ESMA.

Regulatory boundaries and requirements:

CESR addresses concerns about certain inconsistencies which may have impacted the level playing field. It is recommended that the requirements which apply to RMs and MTFs under MiFID be further aligned. As regards broker crossing systems (BCSs), CESR recommends that a new regulatory regime with tailored additional obligations be introduced for investment firms operating such systems. This would include: notification by investments firms that they operate a BCS;

publication of a list of BCSs; a requirement for a generic BCS identifier in post-trade transparency information; publication of aggregate trade information at the level of each BCS at the end of the day; and identification of BCSs in transaction reports. CESR also acknowledges concerns expressed by some market participants and regulators about the speed of growth of BCSs and the potential impact of these OTC markets on price formation in the future. It is therefore recommended to impose a limit on the amount of business that can be executed by BCSs. CESR stands ready to provide the Commission with assistance in the refinement of these proposals in the coming months, where appropriate.

MiFID options and discretions:

CESR has identified certain options and discretions within MiFID's markets provisions and consulted on the desirability of eliminating them or turning them into rules. CESR recommends retaining the discretion regarding the use of pre-trade transparency waivers and to retain the role of CESR/ESMA in considering the use of the waivers to ensure their consistent and reasonable use. Taking the feedback from the consultation into account, the discretion of Member States to choose some of the criteria to define liquid shares and the discretion regarding requirements for admission of units in collective investment undertakings to trading on an RM should also be retained. However, CESR sees merit in converting the discretion of Member States under Article 22(2) of MiFID into a rule by prescribing that investment firms comply with their obligation to make an unexecuted client limit order immediately public by transmitting it to a pre-trade transparent RM/MTF.

Micro-structural issues:

CESR sets out the key themes emerging from its Call for Evidence on micro-structural issues and proposes an action plan for further work in this area. CESR also recommends the Commission amend MiFID to include specific references to ESMA competencies to develop binding technical standards on RMs'/MTFs' organisational requirements regarding sponsored access, co-location, fee structures and tick sizes, as appropriate. Pending the revision of MiFID, CESR will consider dealing with some of these issues under CESR guidelines. CESR will also work further on high frequency trading to better understand any risks that it may pose to the orderly functioning of markets.

Other MiFID provisions related to secondary markets:

Since the activity of MTFs in host Member States has become increasingly significant post-MiFID, CESR recommends extending the obligation in Article 56(2) of MiFID for competent authorities to cooperate, such that it extends to the activities of MTFs as well as RMs.

This Feedback Statement provides feedback to the views expressed by respondents to CESR's CP on equity markets (Ref. CESR/10-394) and should be read in conjunction with the CP and CESR's Technical Advice.

## 1. Pre-trade transparency for RMs and MTFs

***Waivers from pre-trade transparency***

*Background*

1. CESR has considered carefully the most appropriate framework for pre-trade transparency in a post-MiFID environment and concluded that it would be desirable to:

   a. retain the generic requirement that all trading on organised markets (RMs/MTFs) must be pre-trade transparent;

   b. continue to allow exceptions to pre-trade transparency in certain circumstances; and

   c. seek to move from a 'principle based' approach to waivers from pre-trade transparency to a 'rule based' approach where a more precise description of the waivers would provide greater clarity for market participants and competent authorities and facilitate continuous supervisory convergence with regard to waivers within CESR/ESMA, taking into account financial innovation.

**Q1: Do you support the generic approach described above?**

2. The 62 respondents overwhelmingly supported the generic approach described in the CP.

3. Respondents supported retaining pre-trade transparency on RMs/MTFs as a generic requirement, while allowing exceptions in certain circumstances. Some of these positive responses were however accompanied with more specific comments underlying the need for a review and recast of the waivers to provide more flexibility in the use of the waiver or disagreeing with any potential stricter rule thereof. Two respondents however expressed concerns that, under the current approach, pre-trade transparency obligations are limited to RMs and MTFs and suggested extending pre-trade transparency in some circumstances to OTC trades. One of those respondents suggested a new obligation that orders or indications of interest disclosed on all the other channels for trade executions that are not RMs or MTFs, should be made pre-trade transparent if such orders or indications of interest are distant from the price of the latest transactions on RMs or MTFs. More generally, one respondent, stressing that the key to understanding the impact of the existing waivers on the market is determining the extent to which they are used, welcomed CESR's work to provide statistics and suggested this analysis to be carried out regularly.

4. Respondents also almost unanimously supported a move from a principle based to a rule based approach that would provide greater clarity for market participants and competent authorities and would facilitate supervisory convergence. One respondent expressed a dissenting opinion and considered that a principle based approach should be retained with national competent authorities retaining discretion on application within broad parameters. However, about half of the respondents supporting the rule based approach stressed the need to retain some flexibility to adjust to market development and recommended that there must be a sufficiently robust process for CESR/ESMA to take into account financial innovation and therefore allow the rules to evolve.

**Q2: Do you have any other general comments on the MiFID pre-trade transparency regime?**

5. Out of the 36 specific responses to Question 2, 15 respondents generally explained that they had not encountered specific difficulties with existing waivers, while a number of respondents

argued that the key areas for improvements are in the post-trade transparency area. One of those respondents explained that the small number of waivers from pre-trade transparency obligations and limited percentage of the market volume undertaken within their remit does not provide sufficient evidence to recast the reasons for their existence.

6. 3 responses encouraged regulators to consider the global picture of pre-trade transparency waivers before deciding on any amendments on specific points. 4 respondents explained that current waivers, including the reference price waiver, were interpreted too narrowly.

7. On the other hand, one respondent considered that the recast of pre-trade transparency waivers should move towards more pre-trade transparency, one suggested that waivers should be available only to large orders, with one respondent generally stressing that deviations from pre-trade transparency should be well justified to protect price formation and avoid distortions to the level playing field.

***CESR view***

8. Taking into account the comments received, CESR recommended retaining the generic approach to pre-trade transparency outlined above and moving from a principle-based to a rule-based approach to pre-trade transparency waivers. When developing the rule-based approach, the current assessments of order types and order matching methodologies, as published in CESR's document 'Waivers from Pre-Trade Transparency Obligations under the Markets in Financial Instruments Directive (MiFID)' (Ref. CESR/09-324), should be the starting point for discussions.

9. Furthermore, CESR recommended that the Commission give ESMA the power to undertake regular (e.g. annual) reviews of the use of the pre-trade transparency waivers (including the proportion of trading taking place under them) and to form binding technical standards to adjust the waivers to provide certainty about their interpretation or to reflect market developments, where appropriate. These powers should relate to technical points/application of the waivers as opposed to points of overarching policy.

10. A potential recast of existing waivers is further discussed below.

***Large in scale waiver***

*Background*

11. The large in scale (LIS) waiver is designed to protect large orders from adverse market impact. MiFID recognises that mandatory public exposure for large orders makes the costs of execution higher than if the transaction is not displayed publicly. CESR considers that a waiver from pre-trade transparency for orders that are large in scale is still justified to allow investors to avoid market impact when executing large trades. However, CESR sought views on options for the calibration of the thresholds for large in scale orders and clarifications on the scope of this waiver.

***Large in scale – thresholds***

12. In the CP, CESR suggested two options as regards the LIS thresholds:

Option 1: No change
Option 2: Set thresholds as to provide for a moderate reduction in the minimum order size qualifying for a LIS waiver (e.g. a reduction of minimum order sizes for each liquidity band by 25%)

**Q3: Do you consider that the current calibration for large in scale orders is appropriate (Option 1)? Please provide reasoning for your view.**

The answers to this question are summarised together with answers to question 4 below.

**Q4: Do you consider the current calibration for large in scale orders should be changed? If so, provide a specific proposal in terms of reduction of minimum order and articulate the rationale for your proposal.**

13. Respondents were almost evenly divided on the need to amend the LIS thresholds.

14. 20 respondents considered that the current calibration was appropriate and should be maintained. They typically stressed that reductions in average trade size is a poor rationale for adjusting the LIS waivers and that no evidence was provided to support a reduction of such thresholds. One of those respondents further explained that, irrespective of smaller trade sizes, there is no indication that the market is less liquid and that the execution of large orders would generate more market impact than before. Concerns were also expressed regarding increases in dark trading that would result from decreasing LIS thresholds.

15. 2 additional respondents considered that the current calibration should be either maintained or slightly raised. One respondent considered that the current figures were far too low and should be moved up to at least 1% of the capital of a given issuer.

16. 23 respondents considered that the current calibration should be changed and thresholds reduced. The rationale typically provided was the need to adjust to market evolution and, more specifically, to reflect the sharp decline in average trade size. However, quite mixed views were expressed as to what would be an appropriate reduction in LIS thresholds. Among those 23 responses, 4 respondents expressly considered the 25% reduction suggested in the CP as appropriate, 9 considered that a reduction of 25% would not be sufficient, suggesting up to a 70% reduction in the thresholds. One respondent suggested a reduction of at least 75% from current levels so that the percentage of limit and iceberg orders that would be LIS would return to close to 2006 levels. 3 respondents suggested marginal adjustments across ADT buckets; one suggested that LIS be a multiple of the SMS and one that it be a multiple of average size of executions. Although supportive of a reduction in LIS size, 5 respondents stressed the need for further work to find the right calibration in any case.

17. 3 respondents expressed neutral views.

***CESR view***

18. CESR did not consider it received enough data from market participants in order to form a view on this waiver. Further work, based on empirical data, is needed before a final decision can be taken on the LIS thresholds. CESR noted comments that the reduction in trade or order size is not in itself a sufficient rationale for amending the LIS thresholds. However, CESR also noted comments that the thresholds should be reduced and that further assessment is needed to determine the potential market impact generated by a large order in today's market environment compared to 3 or 4 years ago.

19. CESR recommended that the Commission undertakes or organises further analytical work to be undertaken based on empirical data to better determine whether the existing LIS thresholds need to be revised, and if so, the magnitude of the potential recalibration. This work should be based on specific parameters, including a reliable reference period and the market impact of an order that would be considered acceptable. It should also take account of the specific characteristics of national markets. CESR stands ready to provide the Commission with assistance in this work, including recommending parameters and reviewing any outputs.

20. In addition, CESR recommends that the Commission give ESMA the power to monitor the waiver on an ongoing basis (which would include periodic reviews of whether the LIS thresholds remain appropriate) and to develop binding technical standards in this regard in the future, if needed.

***Large in scale – treatment of residual orders ('stubs')***

21. The current application of the large in scale waiver for large orders that do not get fully executed is unclear. The specific situation that arises is where an initial large order satisfies the relevant LIS threshold but, when partially filled/executed, is reduced to a 'stub' that falls below the relevant threshold. Whilst some CESR members have allowed 'stubs' to retain the protection of the LIS waiver, other CESR members considered that, as 'stubs' no longer meet the LIS threshold criteria, they should either become pre-trade transparent or be cancelled.

22. While there are divergent views on this issue, CESR recognises the benefit of a consistent approach and for this to be clarified in MiFID. Accordingly, CESR sought views on two options.

Option 1: Amend MiFID to clarify that the LIS waiver applies to partially executed LIS orders ('stubs');
Option 2: Amend MiFID to clarify that the LIS waiver does not apply to 'stubs'.

**Q5: 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.**

23. Of the 40 responses received to Question 5, 23 supported allowing stubs to remain dark. These respondents generally believed this option is the most consistent with the purpose of the LIS waiver, allows working a large order over the course of the day, avoids duplication of settlement charges in case the stub would have to be redirected to a lit venue, and reduces market impact for subsequent block orders in the same name. It is noted that asset managers monitor execution on an ongoing basis and make decisions about stubs rather than just leaving an un-executed order in a market. Even if there is some theoretical deterioration in pre-trade transparency, the cost of any other option was considered to far outweigh any benefit. These respondents typically agreed that, where a stub is modified by the trader itself, the LIS waiver should no longer apply. Another respondent instinctively had a preference for Option 2 but said it understood the complexity that would result from such option from a practical perspective.

24. 15 respondents supported Option 2, i.e. that the LIS waiver does not apply to stubs under the LIS thresholds and that stubs either becoming lit or need to be cancelled. They were of the view that the intention of the LIS waiver is to mitigate adverse impact on large orders and considered that there are no reasons for a stub to benefit from this waiver because it will not generate the same market impact as a large order. Some respondents also stressed that 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. One of these respondents further stressed that, if stubs remain dark, it allows market participants to circumvent regulation for the LIS waiver.

25. One further respondent saw good arguments for both options and had no strong views on the best one, stressing for regulatory consistency as a priority.

***CESR view***

26. CESR took note of the responses received but CESR members remained split on the treatment of stubs, with a majority of members considering that stubs under the LIS threshold should be displayed or cancelled, for the same reasons as the ones set out in the responses to the

consultation supporting that option. CESR decided therefore to refer the issue to the Commission and recommended strongly that the Commission provide clarification with regard to the treatment of stubs: that either the waiver does not apply to stubs (as per the majority view within CESR) or that the waiver does extend to stubs.

27. More generally, CESR believed it was important that the Commission, when amending MiFID to harmonise its application to 'stubs', also considers what the LIS waiver is intended to achieve apart from the avoidance of excessive market impact of a large order. As the feedback to the CP and the divergent views within CESR indicate, there are currently differing views on the underlying intention behind this waiver and there would be value in clarifying its aim.

***Reference price waiver***

*Background*

28. The reference price waiver is designed for passive price taking systems that match supply and demand without price discovery and at a fixed reference price (e.g. the opening or closing price, or at a reference price recorded at some other point during the day). Post-MiFID, reference price systems have gained in popularity and, in particular, are provided by new entrant MTFs, although not exclusively. Broadly, the policy rationale for the reference price waiver remains. However, some concerns have been raised that reference price systems are being used to execute small orders and it has been suggested that this is inconsistent with the general intention of the waivers to provide protection against market impact. On the other hand, some market participants have expressed concerns that the reference price waiver is overly restrictive and provides little scope for market development and innovation.

29. CESR sought views on whether the waiver should be amended to include minimum thresholds for orders submitted to a reference price system, and any other comments on this waiver.

**Q6: 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.**

30. Out of the 42 respondents, 26 were against the introduction of a minimum threshold for orders benefitting from a reference price waiver. Their main argument was that the purpose of the waiver is not to protect orders from market impact but to allow for "passive pricing" and that reference price systems have no impact on price formation. It was noted that the introduction of a minimum threshold would no longer allow child orders or small orders to be executed on reference price systems and would either lead to increased execution costs of such child/small orders on lit venues or discourage these orders from being executed on organised venues altogether. It was also noted that reference price systems typically offer the possibility for participants to set a minimum execution size.

31. 12 respondents supported the introduction of a minimum threshold.

32. Out of those 12 respondents, 10 supported the introduction of a minimum threshold in order to protect price formation, to stay close to the original intention of the waiver which in their view is to limit market impact, and to prevent those transactions from free riding on price discovery done in pre-trade transparent venues. Two responses mentioned a minimum threshold up to 80% of the LIS.

33. One respondent stressed that the introduction of a minimum threshold on reference price systems to avoid retail flow could be considered but should apply to all execution venues (RMs, MTFs and broker crossing systems).

34. Another respondent supported the introduction of a minimum size of €2,000 to avoid intermediaries submitting orders of 1 share on reference price systems in order to detect and trade ahead of large orders.

35. In addition to those for and against the proposal, two respondents argued that further evidence was needed. One had mixed views, considering on the one hand that it is not obvious that the use of reference price systems to execute small orders is consistent with the general intention of the waivers to provide protection against market impact and, on the other hand, that further restrictions on pre-trade transparency waivers on RMs and MTFs are likely to result in these trades being executed OTC, resulting in a potential further reduction in overall transparency.

36. One respondent believed that the waiver should be revoked altogether since the market has a clear interest in pre-trade information concerning volumes.

**Q7: Do you have other specific comments on the reference price waiver, or the clarifications suggested in Annex 1**?

37. With one exception, all 35 responses were in favour of retaining the waiver one way or another. Out of those 35 responses, 13 were in favour of a more flexible use of the reference price waiver, for example allowing crossing anywhere within the spread and not just at mid-point, best bid or best offer in order to provide more choice to market participants and to ensure a level playing field with broker crossing networks.

38. On the other hand, one respondent considered that crossing should be allowed only at the mid-point and that no execution should take place on a dark system at a price that is already displayed on a lit market, such as the best bid or the best offer. For that respondent, execution at a price other than the mid-point means that directional price information is contained within the reference price system.

39. One respondent considered that a limit should be implemented on an security-by-security basis for the amount of dark trading that can take place on any individual trading venue. Above this threshold, any dark orders (except LIS) should be routed to a lit book.

40. Responses typically welcomed and supported other clarifications provided in Annex 1, except as regards the interpretation of "widely published criteria" which was considered by a few respondents as being too narrow. Two respondents suggested that the reference price should not be required to be provided by "another system".

***CESR view***

41. Based on the comments received and taking into account the still low, although rapidly increasing, volume of trading in EEA shares taking place on RMs/MTFs under the reference price waiver, CESR decided not to recommend for the time being a recast of the reference price waiver. However, in order to anticipate possible further evolution in the use of this waiver, CESR recommended that the Commission give ESMA the power to monitor the waiver on an ongoing basis (which would include periodic review with respect to pricing methodologies, whether there should be mandatory minimum order sizes and whether there should be a cap on volumes executed under the waiver), and to develop binding technical standards in this regard in the future, if needed. According to some CESR members, the Commission should also consider including a minimum order size in the reference price waiver as part of the MiFID review and only leave the adjustment of that minimum order size to ESMA binding technical standards.

42. CESR was also of the view that venues making use of the reference price waiver should execute trades at gross prices and not incorporate any embedded fee in the price to ensure that

the prices published in trade reports clearly correlate with the venue's stated pricing methodology (e.g. executions taking place at mid-point) and recommended that the Commission clarify this point.

43. CESR continues to work on clarifications which may, as appropriate, be included in binding technical standards at a later stage

***Negotiated trade waiver***

*Background*

44. In the Consultation Paper, CESR took the view that the negotiated trade waiver should be retained subject to clarifications and did not put forward any specific proposals on the waiver for negotiated transactions. CESR sought views on whether there was any specific issue regarding this waiver that would deserve further attention.

**Q8: Do you have any specific comment on the waiver for negotiated trades?**

45. The outcome of the consultation broadly supported CESR's view. A vast majority of the 40 respondents supported retaining the negotiated price waiver. About half of those stressed the need for clarification of this waiver as venues seem to offer post-trade transparency services in two ways: as a printing service – which makes the trade visible, or as a negotiated trade – which subjects the trade to the venue's rulebook.

46. Two respondents encouraged CESR to look in depth at the true nature of negotiated trades as the very small size of a large proportion of negotiated trades may indicate this waiver is being used in a way that does not match with its original aim.

47. Two respondents stressed that, in their view, the waiver as currently interpreted by CESR unfairly discriminates against trading systems that do not have a displayed order book.

48. Two respondents did not believe that the price should be taken from the same platform in case there is no continuous trading and asked for greater leeway when the size of the negotiated trade is larger than the size displayed in the order book.

49. One respondent took the view that the existence of the LIS waiver eliminates the need for a negotiated trade waiver.

***CESR view***

50. CESR recommended that the existing waiver for negotiated transactions be retained, although recognised that further clarification on the scope of this waiver may be desirable. CESR continues to work on clarifications which may, as appropriate, be included in binding technical standards at a later stage.

51. CESR also recommended that the Commission give ESMA the power to monitor the waiver on an ongoing basis (including with respect to such clarifications) and to develop binding technical standards in this regard in the future, if needed.

***Order management facility waiver***

*Background*

52. This waiver provides an exemption from pre-trade transparency for orders held in an order management facility, 'pending their being disclosed to the market'. Most (if not all) RMs make use of this waiver for iceberg, stop market and/or stop limit orders. Some MTFs have also

introduced similar functionalities. Some trading platforms have raised concerns that the waiver is overly restrictive, does not allow for innovation and prevents them from providing the same order types and functionalities as investment firms. They claim that this is creating an unlevel playing field.

53. CESR did not put forward any specific proposals on the waiver for order management facilities in the CP.

**Q9: Do you have any specific comments on the waiver for order management facilities, or the clarifications provided in Annex 1?**

54. Out of the 33 respondents, a large majority supported retaining the waiver while welcoming further clarifications.

55. 3 respondents considered that there was a level playing field issue between organised platforms and intermediaries and that organised markets should be able to operate an OMF with the same functionalities as intermediaries.

56. On the other hand, 5 respondents considered that organised platforms and intermediaries are very different and the same requirements should therefore not necessarily be applied to both.

57. 3 respondents mentioned the need for more flexibly, two of them with respect to peaks of iceberg orders, one challenging the fact that an order held in an OMF should have a pre-trade element.

***CESR view***

58. CESR considered that the business conducted by RMs/MTFs is different to that of investment firms. There is therefore little ground to suggest that RMs/MTFs should operate under the same rules as intermediaries and that the order management facility waiver should therefore be amended to address potential level playing field concerns in the use of this waiver.

59. CESR recommended that the existing waiver for order management facilities be retained, recognising that further clarification on its conditions may be desirable. CESR continues to work on clarifications which may, as appropriate, be included in binding technical standards at a later stage. CESR also recommended that the Commission give ESMA the power to monitor the waiver on an ongoing basis (including with respect to such clarifications) and to develop binding technical standards in this regard in the future, if needed.

***Indications of Interest (IOIs)***

*Background*

60. In April 2010, CESR issued a Call for Evidence on micro-structural issues in the equity markets[1]. Among other issues, CESR sought views on indications of interest (IOI). An IOI is the name commonly used to refer to a message sent between investment firms to convey information about available trading interest. IOIs are also used by dark pools to attract order flow and to maximise trading opportunities by enabling investors to find the contra-side of orders. The information provided in an IOI can include the symbol of the security, the side (i.e. buy or sell) and volume/price of trading interest.

61. MiFID requires pre-trade transparency as an overarching principle for RMs/MTFs. It is unclear where IOIs stand within this framework. In addition, MiFID requires RMs/MTFs to have non-discretionary rules for fair and orderly trading. If IOIs were used to provide

[1] CESR's Call for Evidence on Micro-structural Issues of the European Equity Markets, 1 April 2010 (Ref. CESR/10-142).

information to a selected group of market participants to the exclusion of others, this might be inconsistent with the intention of MiFID. The CESR Call for Evidence invited comments as to whether MiFID should be amended to clarify that actionable IOIs should be subject to pre-trade transparency requirements and whether there would be circumstances where it would be appropriate for IOIs to be provided to a selected group of market participants.

62. Respondents made a clear distinction between IOIs used OTC for bilateral transactions and IOIs used on organised trading venues. It was noted that electronic communication methods (including IOIs) are widely used to send information about available trading interest to selected counterparties as a way of finding the opposite side of a trade in large transactions. These methods existed before MiFID came into force.

63. Generally, respondents indicated that it is not common for an RM/MTF to offer an IOI functionality. A large majority agreed that actionable IOIs sent from an RM/MTF must be subject to the pre-trade transparency regime and very few respondents believed that there could be limited circumstances where the use of selective information by RMs/MTFs would be appropriate.

***CESR view***

64. CESR recommended that MiFID be amended to clarify that an actionable IOI (i.e. an indication of interest that includes all necessary symbols (e.g. side [buy or sell], size, price) to agree on a trade is to be considered as an order and subject to applicable pre-trade transparency requirements. As part of this, CESR recommended that the Commission make clear actionable IOIs may not be used within a trading system such that they are transparent to direct participants without being made public. CESR believes that actionable IOIs should be visible to all or dark to all, and there should be no scope for a trading venue's direct participants and the public to be treated differently.

## 2. Systematic internaliser regime

*Background*

65. MiFID has introduced the concept of specific regulation for systematic internalisation. Although the basic concept is applicable regardless of asset class, MiFID obligations attaching to SIs relate to trading of shares. The core of these requirements is for SIs to publish firm quotes in shares that are classified as 'liquid' under MiFID when dealing in sizes up to standard market size.

66. In CESR's CP, questions were raised on the small number of investment firms currently classified as SIs and identified as such in the CESR MiFID database. CESR has no view on what the appropriate number of SIs in Europe should be but the small number of SIs may indicate that there have been difficulties with the practical application of the SI definition in various Member States. There are also issues regarding the way in which SIs have been fulfilling their quoting obligations.

67. CESR identified the following key issues relating to the SI regime:

a) Whether or not the SI definition requires clarification;
b) Whether or not the SI obligations should be recalibrated to ensure that they are meaningful and add value for market users.

68. Most of the respondents supported actions to clarify the definition of systematic internalisation and the circumstances under which investment firms would or would not be considered SIs, which in turn could encourage further development and use of this type of trading venue within the EU. In addition, many respondents underlined the need to recall the

original intention behind the introduction of the SI regime and the regulatory objectives in relation to SIs (including the perceived benefits to market users, the types of market user that are most appropriately covered by such a regime and the best method of delivering the appropriate regulatory protection).

***CESR view***

69. CESR considers that the regulatory objective of the SI regime is to provide transparency and investor protection, particularly for non-professional investors. CESR notes the general comments on the intention of the regime and recognises that it may be necessary for a more fundamental consideration of the overall regulatory intention of the SI regime.

70. CESR does not believe it is appropriate to recommend fundamental changes to the SI criteria before a broader review has taken place as per the recommendations provided. However, CESR does consider that some operational and technical changes would be beneficial at this time.

***Criteria for determining whether an investment firm is a systematic internaliser***

*Background*

71. Article 4(1)(7) of MiFID defines a systematic internaliser as "an investment firm which, on an organised, frequent and systematic basis, deals on own account by executing client orders outside a RM or MTF". Article 21(1) of the MiFID Implementing Regulation sets up further criteria indicating under which conditions the activity of a systematic internaliser is to be considered as 'organised, frequent and systematic'. Accordingly, the activity a) has to have a material commercial role for the firm, and needs to be carried out in accordance with non-discretionary rules and procedures, b) has to be carried on by personnel, or by means of an automated technical system, assigned to that purpose, irrespective of whether those personnel or that system are used exclusively for that purpose and c) has to be available to clients on a regular or continuous basis.

72. At present, the main problems with the definition rest in:

a) the reference to non-discretionary rules - it may provide scope for firms to decide that any discretion they exercise in determining whether or not to execute client orders against own account or whether or not to offer price improvement leaves them outside the scope of the definition;

b) the materiality criteria - it also offers scope for firms and regulators to adopt different views as to whether a firm falls within or outside the definition.

73. CESR considered it important that the criteria defining whether or not a firm falls within the SI regime should be as clear as possible and, accordingly, sought views on whether the SI definition could be made clearer by:

a) removing the reference to non-discretionary rules and procedures in Article 21(1)(a) of the MiFID Implementing Regulation; and
b) 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.

**Q10: 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?**

74. Most of the respondents considered that the SI definition could be made clearer by removing the reference to non-discretionary rules and procedures. It was considered that the 'non-discretionary' condition in the definition of SI provides a ready opt-out for investment firms, which may account for the apparently low number of SIs. Furthermore, many respondents did not consider non-discretionary rules to be a necessary condition for systematic activity since: a) 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; b) investment firms operating crossing networks, which provide for the crossing of trades between counterparties using the network, may be considered to match orders in an orderly or systematic fashion even though they operate on a discretionary basis. Few respondents indicated that removing the reference to non-discretionary rules and procedures would not be helpful considering that the discretionary aspect of order execution is precisely what distinguishes OTC business from other ways of order execution.

**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.**

75. Most of the respondents considered that the SI definition could be made clearer by providing quantitative thresholds of significance of the business for the market to determine what constitutes a 'material commercial role' for the firm. In this respect, some respondents considered that it would be appropriate for the threshold to be made relative to the market (i.e. market share), since a correct approach should focus on the effects on the price formation process and on whether the intermediary trades a significant percentage of the outstanding shares. Some respondents suggested that the threshold should have two elements: with respect to the firm's business as a whole and with respect to the market as a whole.

76. Some respondents did not consider quantitative thresholds as a proper approach for the determination of a 'material commercial role', taking into account the complexity and variety of the structures of investment firms, as well as the risks of adopting a quantitative threshold for assessing materiality, which would be too narrow and would be inflexible for changing business conditions (levels and types of trading activity over time). It was considered that the existing more principle-based approach may ultimately be the more practical solution and rather clearer guidance should be issued to allow consistent and informed judgments to be made.

***CESR view***

77. There were divided views on whether the SI definition would be made clearer by removing the reference to non-discretionary rules and procedures. Similarly, there were varying opinions on whether quantitative thresholds of the business for the market should be introduced to determine whether SI business represented a "material commercial role" for a firm.

78. CESR has considered whether further clarity on the SI criteria may be provided by clarifying the reference to 'non-discretionary rules and procedures'. In the context of the SI regime, CESR considers that 'non-discretionary rules and procedures' refers to a set of pre-defined, common standards developed by the investment firm for providing a service such that it does not differentiate between comparable clients.

79. CESR has also considered whether further clarity may be provided by removing the reference to 'non discretionary rules and procedures' from the SI definition and making it part of the SI requirements/obligations. However, CESR considers that the non-discretionary criterion is

necessary in the SI definition to distinguish this activity from other investment firm business and that such an amendment has the potential to broaden the scope of the regime beyond its original intention. CESR has therefore recommended to clarify the reference to 'non-discretionary rules and procedures' in Article 21(1)(a) of the MiFID Implementing Regulation but retain it in the definition.

80. With regard to the issue of clarifying whether business activity has a "*material commercial role*", CESR has considered also the guidance already provided in recital 15 of the MiFID Implementing Regulation[2]. CESR considers it important that further clarity is provided in determining whether business activity has 'material commercial' significance for the firm and for the market. Therefore, CESR has recommended amending Article 21 of the MiFID Implementing Regulation to reflect the guidance provided in Recital 15. In addition, CESR is of the view that the possibility of setting appropriate thresholds should be considered to determine whether the activity has a material commercial relevance to the market.

***SI obligations – quoting obligations***

*Background*

81. The present regime permits SIs to quote one-sided and in a size of only one share – a practice adopted by some but not all SIs. This means that many SIs are publishing quotes that tell the market little about the size of business they are prepared to take on.

**Q11: Do you agree with the proposal that SIs should be required to maintain quotes in a size that better reflects the size of business they are prepared to undertake?**

82. In general terms, there was strong support for 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. This was considered appropriate since 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.

83. Only a few respondents did not consider adequate any measures to require SIs to maintain quotes in a size that better reflects the size of business they are prepared to undertake. It was underlined that the SI regime represents a dark pool structure and provides clients and the market with enhanced post-trade transparency and is thus beneficial in this role. However it was not in any way considered effective as a pre trade transparency regime. It was therefore suggested that the quoting requirement be dropped completely and the SI regime considered only for the post trade transparency that it provides.

**Q12: Do you agree with the proposed minimum quote size? If you have a different suggestion, please set out your reasoning.**

84. Most of the respondents agreed with the CESR proposal on minimum quote size and that 10% of standard market size for liquid shares is considered a reasonable level for quotes to be provided for in those shares in which a firm is registered as a SI. Minimum quote sizes for SIs will aid transparency by enabling market participants to better compare the prices available

[2] Recital 15 of the MiFID Implementing Regulation states that *"An activity should be considered as having a material commercial role for an investment firm if the activity is a significant source of revenue, or a significant source of cost. An assessment of significance for these purposes should, in every case, 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. It should be possible to consider an activity to be a significant source of revenue for a firm even if only one or two of the factors mentioned is relevant in a particular case*".

on different SIs and understand how the prices available on SIs relate to those on other trading venues. However, the following elements were suggested to be taken into account:

- the proposed minimum quote size should be kept under review;
- consideration should be given to how the quoting obligations should apply outside normal market conditions to ensure that undue risk is not imposed on those operating as an SI.

85. A few respondents did not consider CESR's proposal to be a reasonable one, and considered the 10% of the standard market size (SMS) threshold to be very low.

***CESR view***

86. CESR has recommended amending the SI quoting obligations to make them more reflective of and useful to the type of business being undertaken. In particular, CESR recommends that:

a) SIs be required to maintain two-side quotes;
b) 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.

*SI obligations – price improvement*

***Background***

87. Currently, SIs are not allowed to offer price improvement for all orders up to customary retail size (currently set at €7,500) and all retail orders, regardless of size. The rationale for such restriction on price improvement is to provide for equal treatment of retail clients of systematic internalisers and for making quotes displayed meaningful. Whilst the constraints on price improvement were not identified as being problematic in the previous Call for Evidence, CESR also considered whether this particular aspect of the regime needs to be revisited.

**Q13: 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.**

88. Most of the respondents considered that the removal of SI price improvement restrictions for orders up to retail size would be beneficial. In particular, it was underlined that such a change:

i) would offer the possibility of a better execution for the client;

ii) would increase retail participation; and

iii) would restore the level playing field among clients.

89. A few respondents did not consider removal of SI price improvement restrictions for orders up to retail size to be beneficial. It was commented that removing the restriction could:

i) lead to empty the informational content of SI quotes as they would become just "indicative" quotes as long as price improvements would be performed without informing the market;

ii) lead to unequal treatment of retail investors; and

iii) be detrimental to market efficiency as the activity conducted within the SI is not subject to full transparency arrangements available to RMs and MTFs nor is the activity publicly available to all investors.

90. As to the customary retail size, some respondents did not consider the actual measure as a significant one, since the average of retail orders appears to be higher (approx. €15,000). Some others considered the level of the threshold used to define retail orders (€7,500) appropriate and did not envisage any need to revisit it.

***CESR view***

91. CESR has recommended the Commission consider in the context of a broader review of the SI regime whether the price improvement restrictions are still adequate for SIs when dealing with orders up to retail size.

***SI obligations – identification in post-trade reports***

92. Article 27(2) of the MiFID Implementing Regulation states that a systematic internaliser shall be entitled to use the acronym 'SI' instead of the venue identification for post-trade transparency information in respect of a transaction in a share that it executed in its capacity as a systematic internaliser. The systematic internaliser may exercise that right only as long as it makes available to the public aggregate quarterly data as to the transactions executed in its capacity as a systematic internaliser in respect of that share.

**Q14: 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?**

93. Some respondents supported the proposal to rescind the exemption allowing SIs to remain anonymous when publishing post-trade information for all trades. They considered that this would improve the transparency and utility of published trade information.

94. However, some respondents saw some risk for high volume SIs in disclosing their identity. In particular, it was considered that more granular identification of the business of intermediaries which are taking risk positions in committing capital may result in greater risk aversion and hence a greater cost to the provision of liquidity and diminishment in its supply. It was also underlined that the ability of a broker to make public OTC trades (SI or not) anonymously is critical as it gives a broker the ability to trade at its stated SI price and size without a further risk that other market participants will front run it when they see the trade reports connected to the broker name/mnemonic.

***CESR view***

95. CESR has recommended the following:

a) the provision exempting SIs from individually identifying themselves in post-trade reports if they publish quarterly trading data be retained;
b) periodic trading data reports for SIs making use of the exemption described in point a) be required on a more frequent basis (e.g. monthly).

*Other issues in the SI regime*

**Q15: 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.**

96. The majority of respondents have not experienced any difficulty. Those who emphasised any specific issue/concern in this area underlined the need to reflect more accurately the rapidly changing levels of trading in the market. In this respect, it was suggested that the SMS is assessed on a more frequent basis.

**Q16: Do you have any comments on other aspects of the SI regime?**

97. Some respondents considered that a thorough review of the trading venue definitions is needed. In this context, consideration should be given to the issue of the execution of OTC transactions done through the automated systems operated by investment firms. Since the implementation of MiFID, many investment firms have bought software tools that match orders internally prior to execution and send the remaining part to be executed externally (as the case may be). These tools are named order management systems or best execution engines, or crossing systems. One respondent specifically underlined that the current definition of systematic internaliser should be widened in order to include the concept of broker crossing networks (BCNs).

## 3. Post-trade transparency

98. The MiFID post-trade transparency obligations apply to RMs, MTFs and investment firms and are intended to promote the efficiency of the overall price formation process, to assist the operation of the best execution obligation and to mitigate the potential adverse impact of market fragmentation. The CP made a number of recommendations to improve the quality and reduce the cost of post-trade transparency information.

### 3.1 Quality of post-trade information

99. To address the concerns relating to the quality of post-trade transparency information, CESR proposed following a multi-pronged approach, comprising the following elements:

a) Amending MiFID to embed standards for the publication of post-trade transparency information.

The standards were generally aimed at improving clarity, comparability and reliability of post-trade transparency and would cover matters such as condition codes for trade types and process for correcting erroneous post-trade reports.

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.

CESR has also considered developing guidance to provide greater clarity about more complex trading scenarios; and

c) Establishing a joint CESR/Industry Working Group immediately following the publication of the CP to finalise the standards and clarification amendments in time for the MiFID Review.

**Q17: Do you agree with this multi-pronged approach?**

100. There was near unanimous support from market participants for the overall approach proposed by CESR. Respondents agreed that the quality of post-trade information was a vital issue and needed a co-ordinated regulatory and industry approach to ensure post-trade transparency information was of a high quality.

101. Of those respondents supporting the approach, the key points included in the responses were as follows:

- There was an appreciation that CESR was attempting to fix a number of problems with post-trade data quality, and a general agreement that a regulatory solution was needed in some areas;

- There was near unanimous support for the CESR/Industry Working Group and having it closely involved in the development of the precise standards. A number of respondents argued that the CESR/Industry Working Group should extend beyond July 2010 in order to sufficiently analyse the issues and develop solutions, and to deal with new data quality issues as they arise. A small number of respondents expressed concerns that the CESR/Industry Working Group would be dominated by intermediaries and not have representatives of investors and "the real economy";

- A number of RMs and MTFs noted it was primarily a problem in the OTC markets and that additional requirements should be focused on this sector rather than on RMs and MTFs;

- Some respondents argued that, where possible, changes should not be made to MiFID and instead the existing MiFID text should be used and therefore allow for maximum flexibility in application; and

- A number of respondents noted that the problem of multiple or non-reporting of the same transaction (Annex III) was one that regulators and the CESR/Industry Working Group should focus on solving.

102. The two respondents who did not support the approach were concerned that "real economy" investors would not be represented on the CESR/Industry Working Group and so their concerns would not be considered.

***CESR view***

103. To address the concerns relating to the quality of post-trade transparency information, CESR recommended in its technical advice to the European Commission amending MiFID and the MiFID Implementing Regulation to:

a) embed standards aimed at improving clarity, comparability and reliability of post-trade transparency information that would cover matters such as condition codes for trade types and a process for correcting erroneous post-trade reports; and

b) provide greater clarity in terms of: i) what constitutes a single transaction for post-trade transparency purposes; and ii) which investment firm shall make information related to an OTC transaction public.

104. CESR also recommended that ESMA be given powers under MiFID to set binding technical standards covering post-trade data quality. This would allow for ESMA to deal with data quality issues as they arise and help to ensure that post-trade data quality can become and remain consistently high.

105. In addition, CESR established the CESR/Industry Working Group to examine the issues that were set out in Annexes II and III of the CP. Based on the discussions in this Group, CESR provided its recommendations on post-trade transparency standards to the Commission as part of its second set of advice on the MiFID Review in October 2010[3].

[3] See CESR Technical Advice to the European Commission in the Context of the MiFID Review – Equity Markets: Post-trade Transparency Standards (Ref. CESR/10-882).

### 3.2. Timing of publication of post-trade information

***Real-time publication of transactions not eligible for delay***

106. CESR proposed to improve the timeliness of post-trade transparency information by amending the MiFID obligation on RMs, MTFs and investment firms trading OTC to publish post-trade trade information in real time. The proposal stated that transactions would need to be published as close to instantaneously as technically possible, and no later than 1 minute after the time of trade - a reduction from the existing 3 minutes.

**Q18: 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.**

107. Respondents were split almost evenly on whether this proposal would be beneficial, with a slight majority (28 out of 54 respondents) in favour of reducing the limit to 1 minute.

108. Those in favour of the proposal believed it would result in improved timeliness of post-trade transparency information. Some respondents noted that FINRA in the US is proposing to reduce the time required to report trades to 30 seconds, and so they believed 1 minute was reasonable.

109. Those against the proposal believed that for manually executed or complex trades (such as portfolio trades), particularly during periods of high market volatility, it would be very expensive, if not impossible, for firms to report these trades within 1 minute. They argued that the problem was one of enforcement, and not the maximum time limit, noting that whilst most reports were made close to instantaneously after the transaction was entered into, the problem was the small number of trades that were not reported immediately. Some respondents claimed that implementing the proposal would result in more errors in published trade reports, and therefore an increase in the number of amendments and cancellations.

**Q19: 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?**

110. Around half of the respondents to this question believed there would be significant additional costs incurred by firms. A quarter of the respondents believed there would be costs but they would not be significant, while the other one-quarter of respondents did not believe that any additional costs would be incurred.

111. 11 respondents believed it would simply not be possible for firms to publish all trade reports within 1 minute, with the details of some transactions taking longer than this to record (for example for complex telephone trades or portfolio trades). Similarly, during periods of exceptional market volatility, traders may not have sufficient time both to monitor the market and to report. A small number of respondents stated that the costs would be particularly high for smaller firms without automated processes and for whom having an automated trade reporting system might not be currently cost-effective. A trading platform argued that it would incur additional costs as it would have to correct more reports as error rates would be higher.

*CESR view*

112. After considering the feedback received, CESR considered that it would be beneficial to the interests of the market as a whole for the time limit to be reduced, as this would improve the timeliness of post-trade transparency information. CESR also believes that firms should have systems and processes in place that allow them to report all trades within the shortened time limit.

113. CESR has recommended in its technical advice to the European Commission that, in order to improve the timeliness of post-trade transparency information, Article 29(2) of the MiFID Implementing Regulation should be amended as follows:

a) the obligation which requires RMs, MTFs and investment firms trading OTC to publish post-trade trade information in real time should be strengthened by adding that transactions would need to be published as close to instantaneously as technically possible, and

b) the deadline for the reporting of these transactions should be reduced from 3 minutes to 1 minute.

114. CESR also noted that systems should not be designed to "batch" the publication of trades so they only get published at fixed intervals, but rather should be published as soon as entered into the system.

***Deferred publication regime***

115. In the Consultation Paper, CESR proposed to maintain the existing deferred publication framework (Table 4 of Annex II of the MiFID Implementing Regulation) which currently encompasses four liquidity bands but to recalibrate delays and thresholds so as to:

i) shorten the delays so as to ensure that all transactions were published no later than the end of the trading day;

ii) shorten the intra-day delay of 180 minutes to 120 minutes; and

iii) raise all intra-day transaction size thresholds.

116. Specific suggestions for deferred publication thresholds and delays were provided in the Consultation Paper.

**Q20: Do you support CESR 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?**

117. Of the 42 respondents to this question, there was near unanimous support for maintaining the existing deferred publication framework. Many respondents believed that firms needed some protection from market impact when entering into large trades, and investment firms needed an incentive to take on risk. Respondents believed that the ability for firms to defer publication of trades allowed them to provide better prices to investors and thus reduce their trading costs.

118. Some respondents believed that improvements could be made to the framework or that it could be implemented more effectively than it currently is. A few respondents were of the view that the framework should be changed so that trades would only need to be reported once the firm was no longer on risk. Some other respondents believed the liquidity bands should be simplified or the number of delay categories reduced. Some other respondents argued that

there should be better enforcement to ensure that firms published trades as soon as they were off-risk.

**Q21: 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.**

119. Half of the respondents to this question were in favour of the proposal, the other half explicitly opposed.

120. Those in favour of the proposal generally argued that, while the price they were offered by a firm that was taking on risk for any given trade might be affected, the overall benefit from improved market transparency, reduced information asymmetries and lower costs to undertake transaction cost analysis would justify a reduction in delays. They argued that the end of day maximum time would still allow market participants to hedge against market impact costs. One respondent commented that, where large trades needed to be transacted immediately near the end of the day, there should be some market impact. In addition, a shorter delay might result in a cost to the investor who wanted to trade but it would be beneficial to the rest of the market, thereby reducing the overall costs of trading. It was also noted that the delays allowed currently were much longer than those allowed pre-MiFID or in the US.

121. Those opposed to the proposals focused primarily on the shortening of the maximum deferral to the end of the day. They noted that, particularly for trades executed late in the day, it would allow very little time for investment firms to offset any risk they take on prior to the publication of the trade information. This would result in investment firms at the end of the day either providing investors wishing to trade with worse prices or not being willing to trade at all. This would result in liquidity levels being lower across the market. Another respondent noted that the US market was more liquid and risk provision was less frequent, so the delays in place in the US were not relevant for the European market.

122. A few respondents argued that CESR should reconsider the "end of day" maximum reporting period, possibly extending it to 24 hours, the next morning or the end of the next trading day. Respondents noted that this may result in an "end of day" trade needing to be published sooner than a smaller trade that received a 120-minute delay. Some respondents believed that end of day would need to be more carefully defined to ensure these trades were reported at the same time and all trading participants were clear what "end of day" was for each share.

123. A trading platform found that reports subject to a delay of 1-3 days constituted approximately 1% of all trades but 10-12% of value traded. It argued this showed that, while the number of trades being delayed was small in number, their value represented substantial risks to the participants taking on the trades. Another regulated market noted that most trades executed on the platform that were eligible for delay were not actually delayed. Another respondent referred to data from a post-trade publication arrangement which showed that only 0.1% of its reported trades and 3% of turnover was reported after the end of the day.

**Q22: 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?**

124. Few respondents expressed a view on this question. Of the 12 that did, half were in favour of the proposal to change the deferred publication regime to bring more consistency to the thresholds, while the remainder believed other changes were not needed. The arguments from those in favour of adjustment included:

- that the thresholds were determined in 2007 and there have been substantial market developments since then;

- there is inconsistency between the ADT based thresholds and the thresholds based on trade size in Euros;

- the rule should be clarified to make clear it only applies to the actual orders entered and not any larger "parent" order; and

- the complete deletion of the regime should be considered by CESR.

**Q23: 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.**

125. Most respondents to this question believed that additional costs would be incurred if the proposal was implemented, although none provided a quantitative estimate of what the costs would be. Of 23 respondents to this question, around two-thirds believed additional costs would be incurred, while one-third believed there would no additional costs or they would not be significant. Those who believed additional costs would be incurred believed that the costs would primarily be borne by investors, who would receive worse prices for trades taken on risk by brokers. Few respondents believed the systems costs to implement the proposal would be substantial.

***CESR view***

126. After considering the feedback received to the Consultation Paper, CESR believes that it would be beneficial to the market as a whole for the delays allowed under the deferred publication framework to be reduced. While CESR recognises that this may have an adverse impact on the price or quality of execution for individual trades, it believes that the overall benefit to the market from improved price formation and reduced information asymmetries outweigh these costs.

127. CESR has therefore recommended to the European Commission maintaining the existing deferred publication framework (Table 4 of Annex II of the MiFID Implementing Regulation) which currently encompasses four liquidity bands but to recalibrate delays and thresholds so as to:

a) shorten the delays to ensure that almost all transactions are published no later than the end of the trading day, with only the very largest trades that occur late in the trading day published prior to the opening of trading on the next trading day;

b) shorten the intra-day delay of 180 minutes to 120 minutes; and

c) raise all intra-day transaction size thresholds.

128. Details of the specific recommendation for deferred publication thresholds and delays were outlined in Table 5 of the Technical Advice.

## 3.3. Annex II of the CP: Post-trade transparency standards

**Reference data**

129. To help improve data consolidation, CESR proposed to require the use of International Organisation for Standardisation (ISO) standard formats for post-trade transparency information.

**Q1: Do you agree to use ISO standard formats to identify the instrument, price notation and venue? If not, please specify reasons.**

130. There was unanimous general support for the proposal. There were however some comments made by respondents, including:

- some respondents who noted that ISINs may not be sufficient to positively identify a security, as some securities have identical ISINs but are listed in different places. One respondent observed that Exchange Traded Commodities are often quite specialised and may not all have ISINs.

- One respondent believed that the precise standards should be applied through self-regulation rather than CESR standards.

- One respondent noted that it would be important to enforce these standards to ensure they were applied consistently.

**Q2: Do you agree that the unit price should be provided in the major currency (e.g. Euros) rather than the minor currency (e.g. Euro cents)? If not, please specify reasons.**

131. Of the 34 respondents who answered this question, almost all were in favour of the proposal, with those who commented believing it would ensure consistency across Europe. Others argued this should be left to the market to decide, with the proposal being inconsistent with current practice in some Member States, which might result in costs being incurred with no clear benefits.

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

132. CESR generally considered that 'non addressable liquidity' transactions should be identified. More generally, CESR proposed in its CO that, in order to promote consolidation, each type of transaction should be identified in a harmonised way across regulated markets, multilateral trading facilities and OTC publication arrangements, where applicable. CESR set out its proposal in Table 10 of the CP which is reproduced below:

| 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 |
| Interfund transfers | I | OTC |

**Q3: 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.**

133. Of the 31 respondents who answered this question, most were supportive of this kind of information being disclosed, although a number believed additional work was necessary to define the categories, while others expressed a general concern about the proliferation of the use of flags in published reports.

134. Of those against the proposal, a number believed that the costs outweighed the benefits, or at least a more thorough cost-benefit analysis should be completed before any more detailed standards were set.

135. Some respondents suggested more work be done by the CESR/Industry Working Group to determine a clearer set of standards before any changes were implemented. Some respondents were in favour of the retention of a single flag to represent non-addressable liquidity rather than the more granular structure being proposed. It was also noted that what was and was not addressable may differ for different clients, and so devising a definitive list would be hard. One respondent noted that publishing portfolio transactions within the time limit could present difficulties (e.g. if different transaction types had to be assigned to different individual trades).

**Q4: 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.**

136. A number of different types of transactions were noted as being potentially non-addressable. These include:

- Derivatives exercise/expiration;
- Pairs of trades where the price was struck based on the relationship between the two instruments; and
- Principal and agency crosses.

137. There were also suggestions to include an “other” category for those transactions that did not fit into the agreed categories but were also non-addressable.

**Identification of dark trading**

138. In previous consultations, some market participants considered it necessary for the post-trade transparency information related to a transaction to indicate whether the transaction was subject to pre-trade transparency. CESR therefore proposed in its CP that a transaction that was not pre-trade transparent would need to be identified. CESR proposed two options for meeting this obligation. Either the information would need to be made public in real-time, in which case a new field was required that would contain ‘D’ for a transaction that was not pre-trade transparent, or the information could be published by the relevant trading venue on a monthly basis.

**Q5: Would it be useful to have a mechanism to identify transactions which are not pre-trade transparent?**

**Q6: 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.**

**Q7: 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?**

139. There was almost unanimous support for some kind of disclosure of dark trading. Two-thirds of respondents to this question were supportive of real-time trade-by-trade disclosure of this information as opposed to disclosure of aggregate information (with those in favour of aggregate information split evenly between daily or monthly aggregate data).

140. On how trades that involved the matching of a lit order and a dark order should be reported, a slight majority were in favour of them being reported as dark trades, while a minority were in favour of the use of an additional flag to distinguish between dark matching with dark and dark matching with lit.

**Unique transaction identifier**

141. To ensure consistency of approach and to improve the process for correcting and amending published information, CESR proposed that each transaction should be identified uniquely. CESR considered that this obligation could be met through a unique transaction identifier (UTI) provided by the party with the publication obligation being supplemented with a UTI for the transaction provided by the publication arrangement (along with a code to identify the publication arrangement uniquely).

**Q8: 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.**

142. There was general support among the respondents in principle for proceeding with making UTIs mandatory, although one or two respondents questioned either the value or feasibility of doing so. The key points which CESR has drawn from the responses and the discussion within the CESR/Industry Working Group are:

- the transaction identifier needs to be genuinely unique so that any subsequent cancellations/amendments to the trade can be accurately identified. It should apply to all transactions, not just non-order book ones;

- the transaction identifier must be such as not to reveal the identity of the party reporting the transaction;

- the unique transaction identifier should not be overloaded with information (e.g. trading venue, instrument etc.);its only purpose is to provide a unique identifier for the transaction.

**Cancellations**

143. MiFID requires any amendments to previously disclosed information to be made public. To ensure consistency of approach and to improve the process for correcting published information CESR proposed that, when there is a decision to cancel a transaction, the information relating to the transaction should be republished together with its UTI. This

should be done as soon as possible and no later than 90 seconds after the decision to cancel is taken, and, in accordance with the CESR Level 3 Guidelines and Recommendations[4], a new field is required that would need to be populated with 'C'.

**Q9: Do you agree with CESR's proposal? If not please specify reasons**

144. Almost all respondents to this question were in favour of the proposal, although many noted the need for a carefully finalisation of the proposal by the CESR/Industry Working Group and for its consistent and uniform implementation.

145. Some respondents believed the costs of implementing the proposal would outweigh the benefits, or that the CESR/Industry Working Group should do additional work before any final decision was made. One respondent argued that the FIX standard should be used rather than a CESR-proposed standard. It was also noted that the proposed standard did not make clear when the "clock starts" for reporting trades, and therefore from when the 1-minute reporting deadline should be considered to start.

**Amendments**

146. As noted above, MiFID requires that any amendments to previously disclosed information be made public. In line with the proposal above for cancellations, CESR proposed that, when there was a decision to amend a transaction, its information should be republished, including its UTI, as soon as possible and no later than 90 seconds after the decision to amend, with a 'A' for amendment. The amended version of the information should then be published together with the UTI of the previously disclosed information as soon as possible and no later than 90 seconds after the decision to amend, and, in accordance with the CESR Level 3 Guidelines and Recommendations (Ref. CESR/07-043), a new field is required that would need to be populated with 'A'.

**Q10: Do you agree with CESR's proposal? If not please specify reasons.**

147. Almost all respondents to this question were in favour of the proposal, although many noted the need for it to be carefully finalised by the CESR/Industry Working Group and to be implemented in a consistent and uniform way.

148. Those against the proposal believed the costs of its implementation would outweigh the benefits, or that the CESR/Industry Working Group should do additional work before any final decision was made. One respondent argued that the FIX standard should be used rather than a CESR-proposed standard. It was also noted that the proposed standard did not make clear when the "clock starts" for reporting trades, and therefore when the 1-minute deadline was reached.

**Negotiated trades**

149. MiFID requires that an indication be provided where a trade was a negotiated trade. However there is no requirement that specifies how this obligation should be met and so there is no consistency in the way this information is made public. CESR proposed that, where a transaction is a negotiated trade, in accordance with the CESR Level 3 Guidelines and Recommendations (Ref. CESR/07-043), the flag 'N' should be used.

[4] CESR's Level 3 Guidelines and Recommendations on Publication and Consolidation of Markets Data, February 2007 (Ref. CESR/07-043).

**Q11: Do you agree with CESR's proposal? If not please specify reasons.**

150. With respect to the proposed use of a harmonised 'N' flag for all negotiated trades, most of the 15 respondents expressing a view were content. Four respondents argued that negotiated trades should be flagged but that the specific use of an 'N' flag should not be mandated (one recommending instead that a standard FIX flag be used). A further three respondents argued that mandating the use of the 'N' flag would involve greater cost than benefit.

***CESR view***

151. As noted above, to address the concerns relating to the quality of post-trade transparency information, CESR recommended in its Technical Advice to the European Commission amending MiFID and the MiFID Implementing Regulation to embed standards aimed at improving clarity, comparability and reliability of post-trade transparency information that would cover matters such as condition codes for trade types and process for correcting erroneous post-trade reports.

152. CESR also recommended that ESMA be given powers under MiFID to set binding technical standards covering post-trade data quality. This would allow for ESMA to deal with data quality issues as they arose and help to ensure that post-trade data quality can become and remain consistently high.

153. In addition and as already noted, CESR has also provided further technical advice to the European Commission based on the CESR/Industry Working Group's discussions early October 2010[5].

### 3.4 Annex III of the CP: Clarifications of the post-trade transparency obligations

154. Where a transaction is executed outside the rules of a regulated market or MTF, MiFID prescribes which investment firm shall arrange to make the information public. CESR acknowledged that there may be difficulties in applying the requirements to complex trading scenarios and recognised that trades are sometimes reported more than once, leading to a distorted picture of the market. This problem may cause an adverse impact on the overall price formation process and the ability of investment firms to use the information to assist the effective operation of the best execution obligation or to perform transaction cost analysis. Furthermore, the lack of clarity in the post-trade transparency obligations may present difficulties for competent authorities monitoring compliance.

155. To address these concerns CESR made a number of proposals and clarifications in Annex III of the CP.

**Q1: Do you agree with CESR's proposals? Are there other scenarios where there are difficulties in applying the post-trade transparency requirements?**

156. Of the 21 respondents to this question, about half of the respondents agreed with CESR's proposals. 11 expressed doubts over the clarity or correctness of the example regarding transactions undertaken on behalf of a client, whether CESR's proposals would work in practice, or whether the right approach to solving the problem was being used, and expressed a desire for the CESR/Industry Working Group or some other group to look at this issue in more detail.

[5] See CESR Technical Advice to the European Commission in the Context of the MiFID Review – Equity Markets: Post-trade Transparency Standards (Ref. CESR/10-882).

***CESR view***

157. As noted above, CESR recommended in its Technical Advice to the European Commission amending MiFID and the MiFID Implementing Regulation to provide greater clarity in terms of: i) what constitutes a single transaction for post-trade transparency purposes; and ii) which investment firm shall make information related to an OTC transaction public.

158. CESR also recommended that ESMA be given powers under MiFID to set binding technical standards covering post-trade data quality. This would allow for ESMA to deal with data quality issues as they arise and help to ensure that post-trade data quality can become and remain consistently high.

159. In addition, and as already noted, CESR has also provided further technical advice to the European Commission based on the CESR/Industry Working Group's discussions[6].

## 4. Application of transparency obligations for equity-like instruments

160. It has been proposed by some market participants and competent authorities that certain equity-like instruments admitted to trading on a RM should be subject to the same transparency requirements as shares under MiFID. At present, some Member States have applied MiFID transparency obligations to depositary receipts (DRs) whilst others have not. When traded on organised trading platforms, DRs are typically subject to the trading platforms' rules governing transparency and, in many cases, trading platforms have implemented the same transparency obligations which apply to shares admitted to trading.

161. Likewise, exchange traded funds (ETFs) and 'certificates' which are admitted to trading on RMs are typically subject to the same transparency regime as shares when traded on an RM or MTF[7].

162. CESR has considered whether such 'equity-like' instruments should be subject to pan-European mandatory transparency obligations (i.e. pre and post-trade). In considering this question, CESR has decided not to focus on legal interpretation issues, recognising that because of specific legal characteristics, an instrument might fall within the MiFID definition of shares in one jurisdiction but not in another one ('certificates' being a case in point). Rather, CESR considered whether these instruments were, from an economic point of view, equivalent to shares and whether there would be benefits stemming from a harmonised pan-European transparency regime.

**Q24: Do you agree with the CESR proposal to apply transparency requirements to each of the following: DRs (whether or not the underlying financial instrument is an EEA share), ETFs (whether or not the underlying is an EEA share), ETFs where the underlying is a fixed income instrument, ETCs and Certificates? If you do not agree with this proposal for all or some of the instruments listed above, please articulate reasons.**

163. In general there was broad support for the application of transparency requirements to the above mentioned instruments. However, market participants expressed their desire to have a fully harmonised and properly calibrated regime with clear definitions. The regime should also take into account the time necessary to implement these new requirements, possibly by way of a phased implementation.

[6] See CESR Technical Advice to the European Commission in the Context of the MiFID Review – Equity Markets: Post-trade Transparency Standards (Ref. CESR/10-882).

[7] Some RMs have implemented a publication service for transactions in ETFs executed OTC. In a separate initiative, some investment firms have voluntarily began to publish post-trade transparency information when trading ETFs OTC.

164. Some respondents commented that more fine-tuning was needed in relation to the scope of the equity-like instruments to be covered. Some respondents were of the opinion that fixed income ETFs and ETCs should not be included in a new transparency regime, whereas other market participants asked for the inclusion of additional instruments such as ETNs and CFDs.

165. With regards to certificates a considerable number of respondents stated that the definition was too broad and would capture instruments which should more appropriately fall into the category of structured products or bonds with derivative elements and should therefore be excluded. Furthermore with regards to ETFs it was repeatedly stated that only true ETFs which trade like shares and are not merely listed on a RM/MTF should be covered.

166. There were a number of suggestions to establish an ESMA process to handle questions about the scope of the regime, or to set up an Industry Working Group.

167. Finally, existing transparency initiatives for equity-like instruments were highlighted as workable examples which may be further developed.

***CESR view***

168. CESR is of the view that the MiFID transparency regime should apply for the following equity-like financial instruments admitted to trading on a RM:

a. DRs (whether or not the underlying financial instrument is an EEA share);

b. ETFs (whether or not the underlying is an EEA share, a fixed income instrument or a commodity); and

c. Certificates.

169. In practice, this would mean that the MiFID transparency obligations would apply whether the instrument is traded on a RM, MTF or OTC[8].

170. Although proposed in the CP, after further consideration, CESR does not think that it would be appropriate to extend the transparency regime for shares to all ETCs as some ETCs have significantly different characteristics to shares. However, where an ETC takes the form of an ETF it would be covered by the proposed extension of the transparency regime. Likewise exchange traded notes (ETNs) and contracts for difference (CFDs) are considered as having different features compared to shares and are therefore more appropriately placed into the non-equity universe.

171. CESR is aware that there is a different understanding of the term "certificates" in some jurisdictions in the sense of (structured) products with a derivative component. CESR does not consider these instruments to be equity-like and are not meant to be covered by the above used term. CESR considers that equity-like instruments should only be those instruments that are very similar to equities from a secondary trading point of view. Thus, CESR regards as certificates in a narrow sense only those securities issued by a company that rank above ordinary shares but below unsecured debt for the repayment of the investment in the company. These securities either do not have voting rights attached, or have voting rights that are less than those of ordinary shares on a unit-by-unit basis. They may pay a fixed coupon or a higher dividend than ordinary shares, and shareholders have the right to receive dividends ahead of ordinary shareholders in the company.

172. CESR considers the point made about only covering true ETFs to be quite valid. In this context the same above mentioned rationale applies that an ETF is only equity-like if it is comparable to equities from a secondary trading point of view. Therefore, CESR defines ETFs in the following descriptive way: ETFs are open-ended collective investment schemes admitted to trading on an RM. ETFs attempt to replicate an index (or other defined set of assets) and, as

[8] In the case of DRs this may include distinctions depending upon whether the underlying financial instrument is an EEA share for the purpose of the market transparency calculations.

a consequence, provide investors with an economic exposure to the assets. ETF issuers provide a process for the issuance and redemption of units in the fund. ETF investors, other than authorised participants, transact in the units of an ETF through purchases and sales on the secondary market rather than through subscriptions and redemptions in the primary market. Market makers provide ongoing liquidity in ETFs on RM, MTFs and OTC. A list of the underlying assets held by the ETF and their net asset value (NAV) are usually published daily to the market. Trading value is usually close to net asset value, with any tracking error being the result of trading and rebalancing costs associated with holding the underlying index constituents optimising portfolio. ETFs may be physical (where the fund invests directly in the underlying assets that compose the portfolio) or synthetic (where the ETF gains exposure to the index by entering into a swap agreement with a swap counterparty).

**Q25: 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, 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?**

173. There was a broad agreement among respondents to use the same MiFID equity transparency regime as for shares, but with a few adjustments suggested, for example with regard to the threshold of the LIS-waiver for DRs. A few respondents pointed out the need to differentiate between primary trading activity in form of creation/redemption of instruments by market makers/intermediaries and genuine secondary trading. Other issues mentioned for further consideration, possibly through an Industry Working Group, were deferred publication and determination of ADT.

***CESR view***

174. CESR recognises the need to differentiate between primary and secondary trading and emphasises that transparency obligations should only apply to the secondary trading of ETFs and not to primary market transactions (as explicitly excluded from MiFID under Article 5(c) of the MiFID Implementing Regulation).

175. CESR agrees with the view put forward by market participants to generally apply the equity transparency regime for equity-like instruments and that therefore the existing calibration regime for shares is likely to be broadly appropriate for equity-like instruments. Additionally, CESR is of the view that additional work needs to be done to determine the appropriate thresholds for the application of the pre-trade large-in-scale waiver and post-trade deferred publication regimes.

**Q26: 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.**

176. The majority of respondents did not propose to add other equity-like financial instruments, with the exception of CFDs which was suggested more than once and support by a few respondents for the inclusion of structured products like (corporate) warrants, turbos and even subscription rights.

177. It was also stated that certificates and participaciones preferentes should have their own regime and that there might have to be a nationally customised solution for peculiar instruments. It was also suggested to have an Industry Working Group on the concrete instruments to be covered and to have a periodical review on this issue.

***CESR view***

178. CESR does not view CFDs or structured products as comparable to equities due to their different features, legal construction and trading behaviour. These instruments rather fall into the non-equity universe and may be categorised as derivatives or structured finance products.

179. Likewise, Spanish participaciones preferentes are to be categorised not as equity-like instruments but as corporate bonds due to their special structure and nature of secondary trading in Spain.

## 5. Consolidation of transparency information

180. Prior to the implementation of MiFID, in the vast majority of Member States, trading in shares was concentrated regulated markets. Alternatively, where trading was permissible away from an RMs system, it was typically reported to an RM. These arrangements had the effect of concentrating trade information for each share in one (or a few) places, providing market participants with a consolidated view of trading in a particular share. MiFID, on the other hand, has fostered the rise of new trading venues and introduced competition in trade publication services by giving investment firms, when trading as SIs or OTC, choice in where they publish their transparency information. As a result, data can now be available from a number of different sources, depending on where it is published. Fragmentation of transparency information, if not addressed properly, raises concerns because it could undermine the overarching transparency objective in MiFID, and may result in less transparent markets than was the case pre-MiFID. In order to achieve efficient price discovery and facilitate the achievement and monitoring of best execution, trade information published through different sources needs to be reliable and brought together in a way that allows for comparison between the prices prevailing on different trading venues.

181. With the implementation of MiFID there was an expectation that market forces would provide market participants with a way of accessing a consolidated set of data and a number of initiatives have been put in place with this aim. Data vendors are currently offering consolidated data in some form, but these services are not of a standard that fully satisfies market participants.

182. While market participants generally agree there is a need for consolidation of post-trade information that is affordable and of good quality, different views have been articulated about how best to achieve consolidation. Some have argued that consolidation can be achieved through commercial initiatives, while others have argued that authorities should create a designated entity that operates a mandated consolidated tape.

183. In spite of these divergent views, most market participants agree that the improvement of the quality of the trade data itself is a necessary precondition, without which meaningful consolidation is not achievable. Market participants' concerns focus on the quality of post-trade information in particular. While they have indicated that some concerns also exist in relation to the fragmentation of pre-trade information, they have generally argued that regulators should focus first on the quality of post-trade transparency information and the existing barriers to its consolidation.

184. Below are CESR recommendations to ensure the quick development of a European consolidated tape for transparency information at a reasonable cost. CESR is of the view that regulatory intervention (in addition to addressing issues surrounding the quality of transparency information) is necessary in order to facilitate consolidation. CESR agrees that the focus should be on post-trade transparency information as a priority.

*Regulatory framework for consolidation*

*Background*

185. A recurring theme in the analysis of why consolidated data is not being delivered to the market to the standard it needs is the inadequate quality and consistency of the raw data itself; the inconsistencies in the way in which firms report it for publication; and the lack of any formal requirements to publish data through bodies with responsibilities for monitoring the publication processes.

## 5.1. Multiple approved publication arrangements

186. The first recommendation for improving the quality of data consolidation sets out to supplement the introduction of new standards to improve data quality and achieve greater consistency in trade publication practices by requiring investment firms to publish their trade reports through Approved Publication Arrangements (APAs). Under this proposal, competent authorities would approve entities wishing to act as an APA, and APAs would be required to operate data publication arrangements to prescribed standards. More details are set out below, addressing the standards that would be set for APAs and the adequacy of the present provisions for requiring publication arrangements to facilitate consolidation.

*Requirements for investment firms*

187. Investment firms that execute transactions in shares OTC would be required to make public the post-trade transparency information using an Approved Publication Arrangement (APA).

An APA could be:
a. an RM;
b. an MTF; or
c. another organisation.

188. Investment firms should be allowed to use any APA in the EEA and may, if they wish, use more than one APA, although they would need to ensure that each transaction is not published more than once by a primary publication arrangement. As is currently the case, investment firms would be responsible for ensuring that post-trade data provided to an APA is reliable and monitored continuously for errors.

*Requirements for APAs*

189. An APA would need to be approved by its competent authority. Before approving an APA, competent authorities would need to ensure that the applicant met stringent criteria. Proposals for these criteria are set out in Annex I of the Technical Advice.

190. In addition to having to demonstrate that they meet these requirements at the time of approval, APAs would be subject to ongoing monitoring by the competent authority in respect of continuing compliance. The competent authority would also ensure that the APAs were undertaking appropriate checks to ensure they were publishing data with all relevant fields appropriately completed and accurate, and that the error-checking mechanisms each APA had in place were appropriate.

191. APAs would be required to provide access to post-trade information submitted by an investment firm upon request by the firm's competent authority. To meet this obligation, APAs would need to maintain post-trade information for 5 years after the APA has disseminated the post-trade transparency information to the public. In addition, APAs would be required to provide ad hoc and periodic information to an investment firm's competent authority relating to the quality of data provided by the investment firm.

192. It is also proposed that ESMA maintain and publish a list of APAs. APAs would be required to provide ESMA a list of investment firms using their facilities to publish trade reports and keep it up to date. This information would be available only for ESMA members.

193. In its CP, CESR had asked market participants to offer their views on the proposed regime for Approved Publication Arrangements:

**Q27: Do you support the proposed requirements/guidance (described in this section and in Annex IV of the Consultation Paper) for APAs? If not, what changes would you make to the proposed approach?**

**Q28: 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?**

194. An overwhelming majority of respondents supported the proposed requirements and guidance as well as amendments to the MiFID obligation concerning the facilitation of data consolidation. Many respondents stated the need for greater standardisation and consistency in reporting post-trade transparency information, with clear and strict requirements for APAs. Additionally, several respondents argued that compliance with the new regime by APAs and other market participants could only be assured if the enforcement powers of competent authorities were to be clearly defined, and continuous monitoring were to be assured. Other respondents specifically warned against inconsistencies between divergent national regimes that may follow from any ambiguous definitions. They argued that ESMA should enforce the regime and ensure the desired level of regulatory convergence.

**Q29: In your view, would the approach described above contribute significantly to the development of a European consolidated tape?**

195. A clear majority of the respondents agreed that the APA regime would help to develop a European consolidated tape. Respondents cited the consistent standardisation and submission of trade data as the essential prerequisite to any consolidated tape. Respondents generally agreed that a strict implementation of the reporting requirements would meet this condition. Those who did not support the APA proposal cited, in the main, their preference for a *mandated* consolidated tape as reason for their opposition. Also, a few respondents did not see any need for the APA regime given recent industry initiatives to address issues surrounding the publication of post-trade data.

**Q30: 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 of the Consultation Paper)?**

196. There was almost unanimous support for the proposed APA regime; a clear majority of the respondents saw more benefits associated with the proposed APA regime than with the mandatory consolidated tape. None of the respondents considered the current situation to be preferable. Most respondents believed that the APA regime would help to improve the quality of post-trade transparency information and prevent the reporting of trades in unusual locations (i.e. in locations not usually used by the investment firm) or in formats that prevent the consolidation of post-trade transparency information across Europe. Other benefits associated with the APA regime that were cited included the fact that it i) would facilitate execution analysis through making consistent and standardised trade reporting data more transparent and more readily available; ii) would increase timeliness, efficiency and cost-effectiveness; iii) would retain user choice and allow for specifications according to individual user needs; iv) would offer a relatively low latency solution. Respondents were split, however,

on whether the proposal would, in fact, result in the development of a European consolidated tape.

197. Most of those who did not support the APA regime specifically cited the perceived shortcomings of a commercially driven and decentralised approach to data aggregation as the reason for their opposition. Additionally, some respondents saw the APA regime only a first step towards a mandatory consolidated tape.

***CESR view***

198. In light of the general agreement with the proposed approach, CESR recommends implementing the APA regime and the framework and standards provided in Annex I of the Technical Advice.

**5.2. Cost of market data**

*Background*

199. MiFID currently requires that transparency information be made available to the public on a non-discriminatory basis at reasonable cost. Some European data vendors have recently cut their data prices significantly. However, concerns remain that the cost of real-time market data is restricting the availability of affordable consolidated European post-trade data.

200. CESR made two proposals in its CP. The first was to prevent platforms and APAs from requiring market participants to purchase both pre-trade and post-trade transparency information in a bundled format. The second was to require all platforms and APAs to provide their post-trade transparency information to market participants for free 15 minutes after the initial reporting of the trade.

201. In its CP, CESR had asked market participants to offer their views on the cost of market data:

**Q31: Do you believe that MiFID provisions regarding cost of market data need to be amended?**

202. A significant majority considered costs for market data currently to be too high. Amending MiFID was considered to be a feasible way to achieve market data at more affordable costs.

**Q32: 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.**

**Q33: 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.**

203. There was a significant majority for both of these proposals. A majority of respondents believed unbundling pre-trade and post-trade transparency information would reduce the cost of post-trade transparency information. However a number of respondents did not believe it would reduce the cost, or believed that, without appropriate controls in place, the combined cost of pre- and post-trade data might increase if this proposal were to be implemented. While market participants noted that most venues (RMs, MTFs and APAs for OTC data) already provide post-trade transparency information for free 15 minutes after publication, there was majority support from respondents for implementing this proposal.

***CESR view***

204. CESR believes these proposals are likely to reduce the cost of market data. The proposal to unbundle pre-trade and post-trade data would be likely to improve the competitiveness of the market for data by ensuring that market participants could choose whether to purchase pre-trade data or post-trade data, while platforms could still offer a package including both. CESR also believes that the proposal to require data to be provided for free after 15 minutes would ensure a consolidated tape of post-trade transparency information could be produced for free on a 15 minute delay basis.

205. CESR recommends that the Commission require the unbundling of pre-trade and post-trade transparency information. CESR also recommends that all post-trade transparency information must be made available free of charge after a delay of no more than 15 minutes. CESR has noted that the latter is widespread industry practice already. However, an important consideration for recommending to *require* the free distribution after 15 minutes is that the non-cooperation by even only a few reporting venues would seriously compromise the quality of the consolidated data.

206. CESR believes it must be made clear under MiFID that any third-party used to re-sell or disseminate data (such as data vendors or APAs) should meet the requirements set out above. This means that RMs, MTFs and APAs would need to ensure that data vendors unbundle pre-trade and post-trade transparency information provided by each of these data providers. CESR also notes that the requirement for these data providers to provide post-trade transparency information for free would not require them to provide the data initially and then separately 15 minutes later. The dissemination free of charge could also be achieved by ensuring that the data vendor that disseminates the information does so for free 15 minutes after the initial publication.

## 5.3 MiFID transparency calculations

*Background*

207. For the purposes of MiFID transparency calculations for each share, competent authorities currently use data provided by the primary RM trading each share (and in some instances, MTFs). In order to ensure the continued accuracy of these calculations, each competent authority should use all post-trade transparency data for each share, including information from RMs, MTFs and OTC reporting arrangements (e.g. APAs). In order to do this, each RM, MTF and OTC reporting arrangement would be required to provide data to the relevant competent authority for this purpose.

**Q34: Do you support the proposal to require RMs, MTFs and OTC reporting arrangements (e.g. APAs) to provide information to competent authorities to allow them to prepare MiFID transparency calculations?**

208. There was virtually unanimous support for this proposal and it was considered a sensible improvement upon the current regime.

***CESR view***

209. CESR recommends requiring each RM, MTF and OTC reporting arrangement to provide data free of charge to the relevant competent authority and, where appropriate, ESMA for the purpose of MiFID transparency calculations.

### 5.4 EU mandatory consolidated tape

*Background*

210. CESR noted in the CP that the proposals to improve data quality could be supplemented by the development of a *mandatory* consolidated tape that would provide comprehensive consolidation and offer market users a single point of access to post-trade information. CESR outlined in the CP the key characteristics of such a consolidated tape, covering among others the data it should provide, its operation, fees/charges, and posed a broad range of general and specific questions:

**Q34: Do you support the proposed approach to a European mandatory consolidated tape?**
**Q35: If not, what changes would you suggest to the proposed approach?**
**Q36: 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?**
**Q37: 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.**

211. A majority of respondents to CESR's Consultation Paper did not believe it was necessary to introduce a consolidated tape led by the authorities/regulators until the other proposals in the Consultation Paper (such as those regarding APAs and the cost of market data) had been implemented and it was seen whether they were sufficient to facilitate the development of an industry-led consolidated tape. A minority of respondents believed that the aim of an industry-led European consolidated tape could not be achieved and so a consolidated tape led by the authorities was now necessary. A small number of respondents believed as a matter of principle that an authority-led consolidated tape should not be developed. While a majority of respondents expected higher costs associated with the mandatory consolidated tape, neither opponents nor proponents provided conclusive quantifiable calculations for their answers.

212. Respondents who supported the mandatory consolidated tape offered the following observations about the expected benefits of the MCT:

i) lower post-trade data costs (because of greater efficiency and regulated and not-for-profit nature);

ii) increased data quality (because of easier standardisation, and increased efficiency by offering one central facility for data consolidation); and

iii) mitigation of market fragmentation (increased transparency, facilitation of market monitoring, better price discovery and best execution analysis).

213. Respondents who opposed the mandatory consolidated tape cited the following expected disadvantages: i) not necessary because APAs are expected to be sufficient; ii) an authority-led initiative would limit free competition, user choice, market efficiency, and innovation; iii) higher cost and lack of commercial viability; iv) technical constraints (latency issues, complexity of IT structure); v) the diversity of the EU market place would not be properly served.

***CESR view***

214. CESR strongly believes that it is necessary to develop a consolidated tape of European post-trade transparency information. CESR does not believe that this currently exists in a form that is at a reasonable price or useful for the vast majority of market participants.

215. CESR is of the view that an obligation to establish a European consolidated tape as well as the rules for and the main features of the tape need to be outlined in MiFID. The European consolidated tape should have at least the following features:

a. For all shares admitted to trading on an EEA RM, a European consolidated tape must provide post-trade transparency information for all transactions taking place on an EEA RM, MTF or through an investment firm as an OTC transaction (as required by MiFID), irrespective of where within the EEA the trade was executed.

b. To ensure a high quality of data, all information on the consolidated tape must come from either an RM, MTF or APA (i.e. it cannot come directly from investment firms).

c. It must disseminate information that is provided by each RM, MTF or APA in real-time and in as low latency a form as is reasonably possible.

d. The operator of the consolidated tape must receive post-trade data from RMs, MTFs and APAs on an unbundled basis (i.e. separate from pre-trade data, as discussed above).

e. The consolidated tape must be offered to users on a share-by-share basis so they have the option of purchasing transparency information about only those shares in which they have an interest. This would not prevent the operator of the consolidated tape from also offering packages of shares (such as share indices). Similarly, users should be free to purchase transparency information without having to buy any value-added products.

f. The consolidated tape must be available to all market participants in a format that is conducive to data analysis, including execution quality or transaction cost analysis.

g. The consolidated tape must be easily accessible to markets and investors and be available at a reasonable cost. A reasonable cost may differ depending on the user of the data (e.g. an individual user may be charged a different sum to an investment firm), although the cost must be the same for all participants within the same class of user.

h. The consolidated tape would need to meet certain standards covering but not limited to security, dissemination (i.e. publication of information), operating hours, resources, operational reliability, contact arrangements, transparency of charges, conflicts of interest, outsourcing and monitoring. The operator of the consolidated tape would be responsible for the detection of possible multiple publication (same transaction being sent to more than one primary source).

i. The operator of the consolidated tape would need to keep the published data available for at least a period of 5 years to assist in the MiFID transparency calculations. The operator of the consolidated tape would need to provide access to trade reports to the competent authority for the share in question for a period of 5 years after the reporting of the trade. The operator of the consolidated tape would need to make its services available to any person wishing to subscribe to its data.

216. CESR is of the view that the proposed improvements to the quality of post-trade transparency information, including the proposed APA regime and the requirements for the unbundling of trade data, should offer a realistic framework for the technical realisation of the European consolidated tape to be developed as a project by the industry. Such an approach places the emphasis on the users, creators and disseminators of transparency data to design a solution that best meets their collective needs (including the necessary IT infrastructure and data formats) and gives the industry scope to determine a fair allocation of costs and charges associated with delivery of the solution.

217. However, CESR is aware of some market participants' concern that an industry-led consolidated tape may not be realised in an adequate and timely manner. With these (and many other) market participants CESR shares the view that the establishment of a proper consolidated tape is essential. For that reason, CESR has recommended that there should be a clear and relatively short timetable for the industry to deliver the consolidated tape, which should be in full compliance with the legally mandated features that are to be set out in an amendment of MiFID. ESMA should have the power and mechanisms to launch the process through which the European consolidated tape is built by the industry with appropriate interim milestones, and to monitor progress, implementation and operation of the consolidated tape thereafter. As part of this role, ESMA should also be allowed to intervene with respect to prices charged for market data.

218. CESR believes that the Commission and ESMA should be responsible for eventually determining if at least one European consolidated tape containing the features outlined in MiFID had been achieved. In case of default at any point in the process (including a failure to achieve a firm commitment of the industry), MiFID should identify a clear course of action and require the establishment of a mandatory single European consolidated tape. In the case that a mandatory consolidated tape is established, it is to be run as a not-for-profit entity on the basis of terms of reference and governance to be set out by ESMA.

## 6. Regulatory boundaries and requirements

### 6.1 Regulated markets vs. MTFs

*Background*

219. While the MiFID provisions governing RMs and MTFs are to a large extent similar, RMs are concerned that they are subject to more stringent - and costly - regulatory requirements than their MTF competitors. However, a key difference between requirements for RMs and MTFs operated by investment firms, which may be a potential source of unlevel playing field is the concept of "proportionate approach" for organisational requirements that apply to MTFs and the discretion that may be attached to such test of "proportionality" by competent authorities.

220. In this regard, an extension of requirements applicable to RMs to investment firms or market operators operating an MTF may provide more clarity that RMs and MTFs should be subject to the same organisational requirements as regards the operation of their trading platform. CESR considered the following requirements in addition to the requirements laid down in Article 13:

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 these 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.

**Q38: Do you agree with this proposal? If not, please explain.**

221. The respondents overwhelmingly supported the proposal made by CESR to address the unlevel playing field created between the requirements applicable to RMs to investment firms or market operators operating an MTF. They believe that the same type of activity should be subjected to the same regulatory regime. Some believe the proposal does not go far enough and that further harmonisation of the differences is needed as the proposal does not address all issues where an unlevel playing field is identified. A couple of respondents agree that RMs and MTFs should be treated in the same way but want to see some flexibility and proportionality applied for junior markets, smaller platforms and new entrants. One respondent agreed with the intent of the proposal but suggested an alternative approach where a threshold should be set above which an MTF operator should be required to apply for RM status.

222. Few respondents disagreed with the proposals and saw no added value in these additional requirements. Their main argument was that they have not experienced or seen any evidence of the existence of an unlevel playing field. They would be interested in understanding better the rationale for the proposal or receiving further detailed guidance and explanation of the expectations in these areas.

**Q39: Do you consider that it would help addressing potential unlevel playing field across RMs and MTFs? Please elaborate**

223. The overall majority of respondents agreed that the proposal would help in addressing a potential unlevel playing field across RMs and MTFs. Some believed the proposal should go further. Others pointed out that the requirements should not provide an unfair competitive advantage to either MTFs or RMs and should be made equivalent for both. Some however believed that some regulatory flexibility and proportionality should be applied within each category independent of the RM or MTF status.

224. A few respondents did not agree as they believe there is a need for these requirements. One respondent believed the unlevel playing field rather originates from differences in enforcement than from differences in regulatory requirements.

**Q40: 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?**

225. Respondents listed the following benefits: alignment of best practices; help to remove suggestions of MTFs being subject to different standards; higher level of transparency; better risk control; improvement of system reliability and continuity of the service; contributes to the maintenance of appropriate standards of regulation across the markets generally and boost investor confidence.

226. Few respondents saw no benefits in the proposed requirements.

**Q41: 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.**

227. Not all respondents expressed their views. However, most believed the additional costs should not be high as the proposed requirements are, either, already complied with by MTFs, or investment firms already have similar regulatory obligations in place.

228. Some respondents believed this approach would result in additional costs. They argued that the implementation of an additional control framework and technical infrastructure will result

in incremental costs being incurred by the MTF and suggested conducting a detailed gap analysis to determine these incremental costs. Identified additional costs relate to both capital investment (e.g. technical infrastructure) and on-going operating expenses (e.g. incremental headcount).

***CESR view***

229. Most respondents supported CESR's proposal to further align certain RM and MTF requirements. As some respondents were in favour of setting similar requirements and obligations where a similar business or activity is conducted, CESR retained its recommendation that the areas identified in the CP should be further aligned. This may result in some additional costs. However, CESR noted that these costs would be outweighed by the resultant benefits or be rather minimal since existing MTFs already comply with similar requirements.

### 6.2. Investment firms operating internal crossing systems/processes

*Background*

230. A number of investment firms in the EU operate systems that match client order flow internally. Generally, these firms receive orders electronically, utilise algorithms to determine how they should best be executed and then pass the business through an internal system that will attempt to find matches. Some systems match only client orders, while others (depending on the client instructions/permissions) also provide matching between client orders and 'house' orders.

231. It is noted that investment firms operating these systems are subject to client-oriented conduct of business rules, including best execution, rather than the market-oriented rules designed for RMs and MTFs. These transactions have to be published under the post-trade transparency regime for OTC transactions in shares admitted to trading on an RM.

232. Recently, there has been a debate about the nature and scale of business executed by broker dealers in their internal crossing systems/processes and the way it is regulated, including the level of transparency which is different from systems of RMs and MTFs. To establish a factual context, CESR conducted a fact finding towards the end of 2009. The data supplied indicates that the proportion of trading in these systems is very low, ranging from an average of 0.7% in 2008 to an average of 1.15% in 2009.

233. Some CESR members consider that the current legal framework does not support a requirement for investment firms to register their internal crossing networks as MTFs. In particular, these systems do not have participants in the way that a standalone MTF does.

234. For the purposes of the fact finding conducted by CESR, 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.

235. CESR put forward proposals to introduce bespoke requirements for firms operating internal crossing systems and to impose a limit on the amount of client business that could be executed in a broker crossing system (BCS) before it would be required to become an MTF.

**Q42: 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?**

236. A clear majority of respondents agreed with the definition proposed by CESR. Most supported this proposal fully as this would allow the crossing activity to be identified as separate activity

distinct from RMs and MTFs and to regulate it under a specific regime. Four respondents believed that the proposed definition is too broad or goes too far by capturing the execution of client orders executed against house account orders as well.

237. Eight respondents believed that the crossing activity should instead be brought under the current regime of and be regulated as MTF. A couple of these respondents believed no change is needed as this activity already falls within the scope of the definitions of an MTF or SI. Others suggested amending the existing definitions of MTFs (and SIs) slightly to more explicitly capture this crossing activity.

238. Six respondents did not agree with the proposal. They reckoned that there is no reason to introduce new requirements as the degree of business activity is low, In their view, MiFID should be allowed to mature further before considering whether there is a regulatory gap that would need to be addressed by further regulation.

***CESR view***

239. As supported by a clear majority of respondents, it was considered appropriate to extend the definition of internal crossing systems/processes to executions against occasional house account orders and not to limit it to executions between clients. CESR is of the view that this approach should allow to capture additional transactions taking place via the internal crossing system. At the same time, it would help to identify these types of transactions currently reported as unspecified OTC transactions.

**Q43: Do you agree with the proposed bespoke requirements? If not, what alternative requirements or methods would you suggest**?

240. The overall majority of respondents agreed with most of the proposed measures and requirements and believed them to be broadly adequate and acceptable. There is one exception. Of the 31 respondents that agreed with the bespoke requirements, 15 respondents disagreed with the requirement for an investment firm to add the identifier for its crossing system to its post-trade information for all transactions executed on such systems. These concerns essentially related to the fact that this requirement would subject clients to unnecessary market impact and has the potential to damage liquidity provision. As an alternative solution, some suggested the use of a generic broker crossing identification with end of day reporting of these trades.

241. Seven respondents did not believe these bespoke requirements are needed. They believed that the activity is either already covered by the existing MTF and SI regime and requirements, the volume of the crossing activity is too low in volume to warrant significant changes, or the crossing activity is a different business model and should not be regulated by the same requirements as RMs and MTFs.

***CESR view***

242. CESR has taken the view that a broad definition of broker crossing activity with its own specific regime would respect the different business model applied by investment firms operating internal crossing systems whilst creating additional transparency and a level playing field. Whereas the majority of respondents agreed with the approach proposed by CESR, the proposal to introduce a requirement for investment firms to add the identifier for their crossing systems to their post-trade information for all transactions executed on such systems was not well received based on the eventual market impact it would have. CESR is still of the view that additional identification is needed to separate crossing activity from OTC activity. However, the concerns raised in the consultation are taken into account by recommending a requirement for investment firms to add only a generic BCS identifier to their

post-trade transparency information for all transactions executed on the BCS and to publish aggregated information at the end of the day specifying the specific BCS[9].

243. Based on fact-finding conducted by CESR, the proportion of trading in internal crossing systems is very low, ranging from an average of 0.7% in 2008 to an average of 1.15% in 2009. However, in order to separate this type of transactions from the bulk of OTC transactions, CESR is of the view that a specific regime with bespoke requirements should be recommend to the European Commission.

**Q44: 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.**

244. Respondents expressed divergent views on the proposal to place a limit/threshold on broker crossing activity before it would be required to become an MTF.

245. Those respondents that did not agree emphasised the difference in business models. Some respondents suggested a way for determining a threshold, others suggested that if a threshold was to be set, it should be set at a high level, be objective and reviewed on a periodic basis by using a set of clearly defined conditions. One respondent suggested that thresholds should apply to all OTC activity and not only to one specific OTC activity such as crossing network activity.

246. With respect to the linkages, views were divergent. Some suggested taking into account any linkage; others were of a contrary view.

***CESR view***

247. CESR believes that internal crossing systems share some of the features of MTFs but they do not have to comply with the same requirements. This raises issues of level playing field that need to be addressed. CESR is also of the view that these systems have a potential impact on the price formation process and that pre-trade transparency should be warranted when they execute a certain level of business. Taking into account these arguments, CESR retained its view to recommend setting a limit/threshold on BCS business before it would be required to become an MTF. Taking into account the suggestions made by some respondents for setting an objective limit/threshold based on factual criteria, CESR agrees that further work should be done to set out that threshold and avoid potential adverse effects.

248. Taking into account that there were mixed views on whether linkages should be taken into account for setting a limit/threshold, CESR retained its view that such limit/threshold should include combinations with other crossing systems/processes with which a BCS has a private link.

[9] For details, please see CESR Technical Advice to the European Commission in the Context of the MiFID Review – Equity Markets: Post-trade Transparency Standards (Ref. CESR/10-882), p. 8.

**Q45: 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.**

249. Not all respondents expressed views on this question. Of those that did, most thought that the introduction of the bespoke requirements, with the exception of the specific crossing network trade identifier, may result in some additional one-off and ongoing costs. With respect to the requirement to become an MTF, once a limit/threshold would be breached, most believe this would result in significant costs linked to the need to change their business models and execution policies.

***CESR view***

250. As the responses received indicate that the introduction of bespoke requirements may not result in significant additional costs, CESR retained its original view and recommended the introduction of such requirements except for the specific BCS identifier. Regarding the BCS identifier, CESR noted the view that the requirement to become an MTF once a certain limit/threshold is breached may result in significant costs.

## 7. MiFID options and discretions

251. CESR has done 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 which has been endorsed on a political level by the ECOFIN Council. Regarding some options and discretions which are related to the work on the MiFID Review on equity markets, CESR therefore wishes to take the opportunity to ask for the view of market participants on eliminating certain options or turn certain discretions into rules. A few other options and discretions granted to competent authorities in the MiFID provisions relating to equity markets might rather be addressed by further harmonisation of supervisory practices within the regular CESR Level 3 work if considered appropriate after internal discussion among CESR members[10].

***Waiver of pre-trade transparency obligations***

252. Articles 29(2) and 44(2) of MiFID and Articles 18 to 20 of the MiFID Implementing Regulation foresee discretion for Competent Authorities to waive the obligation for RMs and MTFs to provide for pre-trade transparency under Article 29(1) and 44(1) of MiFID based on market models or the type and size of orders.

253. Some of the waivers such as the order management facility waiver for Iceberg and stop orders in Article 18(2) of the MiFID Implementing Regulation are used in a wide variety of Members States while others, e.g. the reference price waiver, are used in a more limited number of countries. This does not necessarily point at a divergent application of the waiver but rather results from the fact that the business models of RMs and MTFs in the Member States vary. Furthermore, the practice of granting waivers varies in Member States. While in most jurisdictions, the waiver provisions in MiFID have been implemented in a way that requires approval of individual arrangements, either by individual decision or by approval of (amendments to) the rules of a RM or MTF, in other Member States there is no such requirement.

[10] This covers the following discretions of competent authorities: to waive the obligation to make public limit orders that are large in scale compared with normal market size in Article 22(2), to authorise RMs and MTFs to defer publication of details of transactions based on their type or size in Articles 30(2) and 45(2) of MiFID and Article 28 of the MiFID Implementing Regulation,

**Q47: Do you think that replacing the waivers with legal exemptions (automatically applicable across Europe) would provide benefits or drawbacks? Please elaborate.**

254. Most of the respondents identically stated that replacing waivers would on one hand improve legal uniformity across EU member states but on the other hand would cause lack of flexibility. Globally 2/3 of respondents were in favor of replacing the waivers with legal exemptions.

255. As benefits were mentioned greater clarity in interpretation and consistency in application of the transparency rules, legal certainty, lower costs and improved level playing field across the whole market.

256. As drawbacks were mentioned rigidity, smaller diversity of trading venues and difficulties to encode these exemptions into hard law. One respondent considers that a principle based approach to the use of waivers should be retained with national competent authorities retaining discretion on application within broad parameters. One respondent is afraid that prescriptive rules based approach will lead to significant rigidity in the application and use of waivers and will restrain the ability of organised markets to innovate and provide products that serve users of markets, to differentiate themselves and compete in quality of ideas and services. Another respondent indicated as main drawbacks that there will be no room for negotiation or for pragmatism to be applied, the legislation may not be able to keep up with market developments, causing inflexibility or increased costs and burden of constantly updating the Level 2 MiFID Regulation.

257. Some respondents argued that CESR should provide clear guidelines. The new regulatory framework should ensure consistent application across member states and ongoing monitoring.

***CESR view***

258. Despite the feedback from respondents, CESR considers it appropriate to retain the existing discretion regarding the use of the pre-trade transparency waivers. This subject is elaborated in details in the part 2 and in the Annex I of this document.

***Determination of liquid shares***

259. Article 22(1) of the MiFID Implementing Regulation specifies the conditions for determining liquid shares for the purposes of the SI-regime in Article 27. In particular, it sets the conditions which must be met before a share admitted to trading on a regulated market can be considered to have a liquid market. In order to be liquid, a share must be traded daily and have a free float of not less than EUR 500 million, and one of the following conditions must be satisfied:

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.

260. 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*. Up to date, only a limited number of Member States have exercised this discretion.

261. Generally, the use of discretion by some Member States but not by others may lead to deviations in the determination of a liquid share and may thus influence the scope of application of the SI-regime under Article 27 of MiFID. CESR is therefore considering whether a deletion of this discretion is desirable. If it is considered desirable, the question arises as to what the future harmonised criteria for the definition of a liquid share should be: both criteria (a) and (b) or only one of the two criteria.

**Q48: Which reasons may necessitate the application of both criteria?**

262. Some respondents indicated that national authorities are best place to comment on the reasoning why they do not apply both criteria. No specific reasons were mentioned.

263. Two respondents considered that volatility and liquidity are not absolute concepts; rather they depend on specific markets and market situations. Another respondent stated that any definition based on the average daily number of transactions is so dependent on the trend in frictional costs that setting a threshold based on current market conditions may soon prove to be outdated and irrelevant and idem for average daily turnover which is so dependent on the proportion of HFT.

**Q49: Is a unique definition of liquid share for the purposes of Article 27 necessary?**

264. A majority of respondents saw advantage in having a unique definition for liquid shares. The opposite view was expressed by four respondents.

**Q50: 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.**

265. A broad majority of the respondents selected option a) – apply both conditions a) and b).

***CESR view***

266. As already mentioned by CESR in the consultation paper, to date only limited number of Competent Authorities employed this discretion. According to responses to the consultation this seems to have operated without significant difficulty. The preference expressed in the responses to the CP would result in a significant change to the population of shares considered liquid, particularly for smaller EEA countries. Given these two points, CESR would recommend that the existing discretion be retained.

***Immediate publication of a client limit order***

267. The order handling rules under Article 22(2) of MiFID prescribe that investment firms have to take measures to facilitate the earliest possible execution of a client limit order in respect of shares admitted to trading on a regulated market, when the order is not immediately executed under prevailing market conditions. The firm is required to make public immediately that client limit order in a manner which is easily accessible to other market participants, unless the client expressly instructs otherwise.

268. MiFID creates 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.

269. The vast majority of CESR members apply this discretion. In practice, clients also often expressly instruct their investment firms not to disclose the limit order immediately to the public as foreseen in MiFID. CESR is therefore considering to propose to the Commission within the MiFID Review to replace the discretion with a rule under Article 22(2) which allows investment firms across Europe to comply with the obligation to make the client limit order immediately public in an easily accessible manner to other market participants if the order is not executed immediately under prevailing market conditions, by transmitting the client limit order to a RM and/or MTF.

**Q51: 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?**

270. No practical relevance for this discretion was identified. The respondents encountered no difficulties with cross-border business due to a divergent use of this discretion in various Member States.

**Q52: 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?**

271. There is no consensus on whether the discretion shall be replaced with a rule or not. Most of the respondents mentioned that professional clients have agreements with investment firms, that none of their unexecuted limit order shall be made public therefore it seems that provision of Article 22(2) is used exclusively for retail orders. It is questioned whether after replacing the discretion by a rule, the option currently used by professional clients would remain possible.

***CESR view***

272. CESR considered that it would be beneficial to the interests of the market as a whole for the unexecuted client limit orders to be published to the RM and/or MTF. Therefore, CESR recommends that the Commission embeds the discretion discussed above as a rule in MiFID. However, this should not impact on the option of clients to instruct their investment firms not to display their unexecuted limit orders.

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

273. Article 36(2) of the MiFID Implementing Regulation grants discretion to Member States to provide that it is not a necessary precondition of the admission of units in collective investment undertakings to trading on a RM that the RM satisfy itself that the collective investment undertaking complies or has complied with registration, notification or other procedures which are a necessary preconditions for the marketing of collective investment undertakings in the jurisdiction of the RM.

274. CESR is considering whether this option should be retained since few Member States have made use of this discretion to date. In particular, CESR members from those Member States consider that the admission of units in collective investment undertakings to trading on a RM in a Member State and the marketing of a collective investment undertaking in that Member State are two separate and distinct activities. They also believe that marketing of units of collective investment undertakings to domestic investors is adequately controlled by other investment fund and intermediary legislation, and that there is no evidence that operation of the discretion has raised any concerns. A deletion would entail that compliance with local provisions for the marketing of units in a collective investment undertaking would be assessed by the RM before units can be admitted to trading on that RM.

**Q53: 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.**

275. Only nine respondents provided answers to this question, with six supporting the retention of this option.

276. Most of the respondents supported CESR's reasoning contained in the consultation paper, saying that the marketing of units of a collective investment undertaking is a separate and distinct activity from the admission to trading of units of a collective investment undertaking. The former is governed by separate domestic and European legislation. The requirements in relation to marketing are likely to be further strengthened for non UCITS funds under the upcoming AIFM Directive.

277. It was also mentioned that it is not the case that all collective investment undertakings admitted to trading on a regulated market in a member state are marketed in that member state. Applying local marketing requirements to issuers which are not marketing in that country would not be proportionate nor would it serve any investor benefit as the collective investment undertaking is not being marketed to investors in that country. National marketing requirements should apply in the jurisdictions in which the collective investment undertakings are being marketed.

278. While it is noted that only a small number of member states have availed of the option outlined in Article 36(2) there is no evidence cited that this option is giving rise to regulatory gaps in those member states which have availed of it.

***CESR view***

279. Given the above, CESR recommends that the existing discretion provided to Competent Authorities in MiFID be retained.

**Annex I: Respondents to the consultation (non-confidential responses)**

ABBL - The Luxembourg Bankers' Association
ABI - Italian Banking Association
Af2i
AFG
AFME-BBA joint answer
AIMA
AMAFI
APCIMS
Association of British Insurers
ASSOSIM
Barclays Capital
BATS trading limited
Bloomberg
BME
Börse Berlin
Bourse de Luxexembourg
Bundesverband deutscher Banken
Burgundy MTF
CFA
Chi-x Europe
Citigroup Global Markets Ltd
CNMV advisory board
Crédit Agricole Cheuvreux
Credit Suisse Europe
Danish Shareholders Association
Deutsche Bank
Deutsche Börse Group
EFAMA
ESBG
ESBG
EuroInvestors
European Association of Co-operative Banks (EACB)
European Banking Federation
Euroshareholders
Faider
FBF
FESE
Fidelity
FIX Protocol Limited
Instinet
Intesa Sanpaolo
INVERCO
Investment Management Association
Irish Stock Exchange
ITG
Knight Capital Europe Limited
Liquidnet Europe Limited
London Stock Exchange
Markit
Nadaq OMX

Nomura
Nordic Securities Association
NYSE Euronext
Optiver
Pipeline Financial Group Ltd
QUOTE MTF Ltd.
SIX Swiss Exchange
Société Générale
The Royal Bank of Scotland plc
Thomson Reuters
Wellington Management Company, LLP