



**FEDERATION OF EUROPEAN SECURITIES EXCHANGES (FESE)**

Rue du Lombard, 41  
B-1000 Bruxelles  
P744-2 FINAL

T (0032 2) 551.01.80

F 512.49.05

[www.fese.org](http://www.fese.org)

CESR Secretariat  
M. Fabrice Demarigny

11-13, avenue Friedland  
F-75008 Paris  
France

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**Response by FESE to  
CESR's Second Round of Consultation (04-603b)  
on the First Mandate for MiFID Implementation Measures**

1. FESE is the representative organisation of Europe's Regulated Markets and Derivatives and has incorporated EACH, the European Association of Central Counterparty Clearing Houses. Our Membership comprises all Members States of the EU, old and new, as well as the countries of the EFTA.
2. We welcome that CESR has followed up to its first consultation paper (04-261b) by publishing a second paper, thus providing a feedback to the comments received as well as a clearer indication of the thinking of CESR Members as to the shape of the forthcoming advice.
3. We are aware that several of our Members have made individual comments. We expressly refer to these submissions; they do in certain cases focus on particularities in these Members' environment and may therefore provide additional specific insight to CESR.
4. In this submission, we focus on the issue of transaction reporting including the question of the most relevant market and the particularities of transaction reporting by and/or on behalf of remote members.

**Determination of the most relevant market in terms of liquidity**

5. We appreciate the further work that CESR has done to identify workable procedures to determine the competent authority that should be charged with collecting European transaction reports in respect of any given security. The proxies proposed by CESR seem widely workable and have, as we understand been tested by CESR Members.<sup>1</sup>
6. We would like to make the following technical comments:
  - In par. 3 of CESR's advice, it might suffice and be clearer to state that the equity-linked derivative follows the underlying equity. Although the foreseen revision procedure caters for the case of an equity issuer's withdrawal from its "first" RM (and hence losing its proxy as defined in par. 2), this phrasing need not be repeated in par. 3.
  - We wonder whether CESR foresees a challenging and revision procedure also for equity-linked derivatives (other than in the case that the underlying equity changes competent authority).<sup>2</sup>
  - We wonder whether in par. 5 the term "parent company" is unambiguous enough to provide the desired result (e.g. in the case of more complex or deeper group structures).
  - The proxies in par. 6 for interest-rate linked derivatives on government bonds and other bonds focus on the domicile of the issuer. This might create problems in the case of non-EU issuers (of the underlying bond). CESR might consider linking the proxy for the derivative to the proxy for the underlying fixed income instrument (in analogy to equity derivatives).
  - We expressly welcome the practical proposal by CESR relating to commodity derivatives.
7. Most FESE Members appreciate the proposal CESR to abstain from publicly identifying most relevant markets or and/or these market's competent authority. Should any final solution of the "remote member transaction reporting" problem include direct reporting from the RM to the CAL, the question of disclosing the identity of the CAL to the reporting RM must be addressed.<sup>3</sup>

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<sup>1</sup> As CESR is aware, one or few of our Members argue(s) that in the case of shares, any simplistic proxy approach should at least be complemented by more sophisticated tools such as spreads and/or market impact analysis. This argument is based on the consideration that the determination of the most relevant market and its competent authority has its bearings not only on the relatively technical area of transaction reporting, but also (through the cross-reference in Art. 27(2) MiFID) on the classification of shares for the purpose of pre-trade transparency obligations for internalisers.

<sup>2</sup> This could be addressed by amending par. 8(b) of the advice: (b) with respect to a specific non-derivative financial instrument (and all derivatives based thereon), for questioning ...

<sup>3</sup> We emphasise that we make this comment only „in event“ as our main proposal is based on the CAR forwarding the transaction reports to CA and CAL. We would also in no case want to see any obligation for the RM to report anything directly to CAL

8. We also find it highly valuable that CESR Members commit themselves to practical forms of cooperation and mutual agreements when the proxy approach could fail to provide a useful result or where for any reason no proxy approach is feasible.
9. We agree with CESR that details of computing liquidity, of revision practicalities, and of procedures between CESR Members should be dealt with on level 3. As the question of making transaction data available to additional competent authorities (e.g. the one of the market where the transaction took place) could affect or involve FESE Members, we would find it useful and necessary that Regulated Markets be consulted on this issue.

#### **Transaction reporting by and on behalf of remote members**

10. FESE and its Members appreciate that CESR continues to give high priority to the complex issue of reporting of transactions that are carried out by remote members of a market. While in the first consultation paper CESR's main focus of attention was avoiding double reporting obligations by remote members, we find strong reference in the second paper to the problem, of the regulator of the Regulated Market where the remote member trades (see par. 9 on p. 20). The problems created for Regulated Markets who take over transaction reporting obligations from their participants are (again) not specifically mentioned.
11. We acknowledge and highly appreciate, however, that CESR and its Members are continuing their efforts to develop concepts that address the practical problems in this area. The alternative arrangement that we proposed in our first response (RM reports to CAR, CAR forwards reports to CA and – if applicable – to CAL) would provide CESR and the Commission with the opportunity to avoid considerable new costs for investment firms and RMs as reporting channels.
12. By raising the issue of the potential importance for the CAR to receive transaction data, CESR may be seen acknowledging implicitly that (for the transactions carried out abroad in a security for which CA is not at the same time the CAL) the CA may be seen as the relatively “least important one” in the context of market integrity supervision.<sup>4</sup> Similarly, the express mention of the waiver possibility of Art. 25(5) – the competent authority of the home Member State may waive receiving a copy of the transaction data provided by a branch – indicates that CESR Members differentiate between the importance of the respective roles once more than one competent authority is involved.
13. We therefore emphatically reiterate our request to CESR and its Members to continue to work as intensely as possible on establishing the procedural and technical solutions for a swift and

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<sup>4</sup> From this we conclude that a CA may accept receiving reports about transactions done by an investment firm as a remote member abroad via less direct ways of reporting (e.g. through a reporting channel involving the RM and the CAR), even if this should result in a slight delay in reporting (always of course within the legal timeframe of Art. 25(3) MiFID – “no later than at the close of the following working day”). We have no intention to challenge the importance of the CA in the supervision of investment firms in their jurisdiction, e.g. with regard to best execution obligations.

effective exchange of transaction data among themselves. This could, initially also for example on a bilateral basis, allow the CAR to become part of the “reporting channel”<sup>5</sup> that the investment firms uses to make its data about a transaction done abroad (as a remote member of a RM) available to its own competent authority (CA). We are of course aware of the much narrower timeframe for transaction reporting to the CA (Art. 25(3), “close of the following working day”) than for the forwarding of transaction data to the CAL and the additional technical challenges this might create, even when the legal challenges can be solved.

### **Approval of reporting channels**

14. We appreciate CESR’s intention to work towards arrangements that would eliminate to the highest possible degree the burden for reporting channels seeking approval in different Member States. Appropriate level 3 work and further trust building between CESR Members should indeed lead to procedures achieving passport-like results.
15. With a view to the level 1 text of Art. 25(5) where “approval” is only mentioned for reporting channels other than the RM (or MTF) through whose system the transaction was completed<sup>6</sup>, we seek an interpretation of CESR’s “clarification” in par. 8 on p. 12 of its paper. We feel that CESR should more clearly distinguish here and in par. 9 between market operators that report only transactions completed through their systems and those market operators that also report off-exchange transactions, e.g. on behalf of their participants. The former can in our view not be subjected to “approval” – neither by its own (home) competent authority nor by others. Whether a market operator eventually manages to deliver reports in the requested formats and with the requested content (issues addressed in items f and g of par. 1 of the advice on p. 13) is subject to the same sanctions as direct reporting by the investment firm.

### **Content of transaction reports**

16. We have pointed out in our response to CESR’s first consultation paper that not all FESE Members follow CESR’s argumentation that a minimum of changes to existing reporting requirements can best be achieved by leaving the setting of standards and contents of transaction reports to Member States. CESR’s new argumentation that reporting contents should not be harmonised because it could lead to “a step backwards” for one or the other regulator does not fully convince as it is one of the essentials of a Single Market concept that some national particularities have to be shed in the interest of achieving a broad level playing field with its scale effects.

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<sup>5</sup> Acknowledging that another competent authority (the CAR) could be part of the “reporting channel” approved by the CA could provide the tool for solving the legal problem created by Art. 25(3) MiFID.

<sup>6</sup> In the second sentence of that paragraph, there is not even the restriction that it must be the RM/MTF where the transaction was completed.

17. We note with some concern the tenor of the discussion (as described in par. 4 on p. 23) whether certain data fields (notably the customer/client ID) are necessary or useful for CESR Members to fulfil their supervisory duties. From the viewpoint of Europe's Regulated Markets, we would like to repeat two arguments that we have brought forward earlier:

“(C 26.)<sup>7</sup> CESR's proposal to fully harmonise the content of reports that they exchange among themselves is in our views supported by the absolutely correct argument. Arrangements should indeed be such as to “... facilitate the exchange of information ..., (assure) the comparability of reports, provide regulators with adequate data ..., and that they are proportionate.” Europe's Exchanges claim the same advantages for themselves and therefore urge CESR Members to do the utmost to minimise or even eliminate divergences in reporting requirements across Europe.”

“(C 29.) ... From the viewpoint of Exchanges that offer transaction reporting services to their participants, we would also like to raise a competition argument: In a time of competition between Exchanges and investment firms for order execution, participants may not be inclined to deliver to their competitor (the Exchange) information about the trading activity of their clients. This would, as a consequence, require the set-up of an alternative reporting channel – certainly not line with CESR's overall intention to minimise changes and costs.”

18. It is with some consternation that we note that information about clients/customers suddenly becomes less of a priority when CESR Members are challenged to exchange information among themselves: “Competent authorities would only report this information (*customer client ID*) if it is available ...” (Annex B). We suggest that the same yardstick be used when creating new, costly regulatory requirements for reporting mechanisms.

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We hope that CESR will find our comments useful in its deliberations, we are of course always available for the discussion of any related matters, and we look forward to further good co-operation.

Yours sincerely,

Gregor Pozniak  
Deputy Secretary General  
FESE

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<sup>7</sup> This numbering refers to the numbering of paragraphs in our response to CESR's first round of consultation.