

Response
CESR Technical Advice to the European Commission in the context of the MiFID Review
Equity Markets (CESR/10-394)

I. Introduction

We thank CESR for the opportunity to respond to the current Consultation Paper. The Federation of European Securities Exchanges (FESE) represents 45 exchanges in equities, bonds, derivatives and commodities through 20 full members from 29 countries, as well as 7 Corresponding Members from European emerging markets. FESE is a keen defender of the Internal Market and many of its members have become multi-jurisdictional exchanges, providing market access across multiple investor communities. FESE represents public Regulated Markets, which provide both institutional and retail investors with transparent and neutral price-formation. In line with the interests of the broader market, securities admitted to trading on our markets have to comply with stringent initial and ongoing disclosure requirements and accounting and auditing standards imposed by EU laws.

In April 2010, FESE members had up to 8,874 companies listed on their markets, of which 8% are foreign companies contributing towards the European integration and providing broad and liquid access to Europe's capital markets. Many of our members also organised specialised markets that allow small and medium sized companies across Europe to access the capital markets; 870 companies are listed in these specialised markets/segments in equity, increasing choice for investors and issuers.

II. Executive Summary

As a general matter, we support CESR's recommendation in favour of **a more rule-based approach**.

In addition, below we provide a summary of our views on the structure of the equity markets:

- We are grateful that CESR has included a section entitled 'regulatory boundaries and requirements'. We believe that this is the most important challenge to confront in the revision of MiFID. Since this is complex and critical, we provide our detailed views on the **market structure** in a **separate section below**. In this Executive Summary, we especially wish to stress the following:
 - We believe that it is very important for EU regulation to be **exhaustive** in the sense that all trading in equities is captured by proper regulation, wherever the trading takes place.
 - There has been a lot of discussion on OTC and its components over the last year, some of it concerning figures, some of it business models. CESR's CP is a **welcome step** in the right direction in that it includes an estimate of OTC trading and also discusses some aspects of the business models of crossing networks. We urge CESR to shed more light on the OTC activities both during the **MiFID Review** and as part of its **Level 3 process**.
 - There may be a number of **alternative ways** to ensure that the framework is comprehensive and regulates all like activity with like rules. We are in principle open minded about the specific methods chosen. Our principal recommendation is that the EU regulation should ensure **price formation, fair and orderly markets, and a level playing field**. These are very important objectives laid out by MiFID which in some cases need re-strengthening. Moreover, in the context of the ongoing financial crisis, it is very important to uphold these principles if we want to re-install **investor confidence** in equity markets.
- In terms of the comparison of the requirements imposed on RMs and MTFs (handled under the 'regulatory boundaries' section of the CP), we support the elimination of all comparative disadvantages faced by RMs vis-à-vis MTFs.

- In terms of **post-trade transparency**, we support to retain the decentralised data consolidation process introduced by MiFID, complemented by regulatory/supervisory steps taken to improve the availability, timeliness, quality and consistency of OTC data.
- We support the application of the Directive to **equity-like instruments**, provided that a number of detailed questions are addressed and solved, e.g. most of all a clear definition of the asset classes mentioned above as well as the liquidity of the instruments in question.
- On MiFID options and discretions, we are in favour of as much consistency as possible at a European level.

The rest of this response is structured as follows:

- Our views on the Market Structure;
- Answers to CESR's specific questions.

III. FESE Position on Equity Market Structure

1. **Regarding venue structure: FESE members believe that the venue structure should ensure principles of price formation and 'same business, same rules'.**
 - FESE believes that it is essential to tackle the issues around OTC pragmatically, since the level of opacity is the most significant distortion to market regulation. In particular, crossing networks should be fully described and brought into a MiFID-regulated environment. FESE encourages CESR to study, in a level 3 work stream, whether the business models of Crossing Networks (CNs) should come under the current SI or MTF regime. In addition, regarding the MiFID review, several solutions should be studied, such as revising the current SI or MTF regimes with a view to capture OTC platforms when they are functionally similar to MiFID venues in order to ensure the level playing field and orderly markets. Such a move is an important step in creating greater clarity on the nature of OTC in Europe.
 - Whatever the chosen solution, FESE believes that the overall approach of MiFID must be safeguarded. MiFID makes a useful distinction between bilateral and multilateral trading which must be retained.
 - Multilateral trading should in principle be regulated as a Regulated Market or an MTF (e.g. if bilateral platforms link to one another, this should be considered de facto as multilateral)
 - All bilateral trading should be adequately captured and regulated within the MiFID framework. This could be done for instance by widening the SI definition in which case the obligations on SIs would be modified (though not necessarily radically) to bring them in line with the new definition.
 - OTC would also be defined to create more clarity; OTC would be essentially for larger trades.
2. **The EU must adopt a policy to safeguard price formation and must ensure that the supervisory framework can implement it to ensure fair and orderly markets**
 - The aim of MiFID was to increase the transparency to address the risks of the fragmentation of trading. As currently implemented, MiFID falls short of this policy aim. The amount of trading in Europe without pre-trade transparency (i.e. 44% according to CESR's findings) is very high in absolute terms.
 - Europe needs to set policy goals in terms of how much of the market should remain pre-trade transparent to guard price discovery for orderly markets and investor protection.
3. **CESR should advise the Commission to investigate how much trading is happening in the OTC space and its impact on price discovery, fair and orderly markets as well as market integrity**
 - OTC trading is a type of dark trading (because there is no obligatory pre-trade transparency); however it is 'unregulated dark trading' and therefore poses concerns for the market if it goes above a certain level.

- OTC has a legitimate role in the market and the MiFID framework needs to maintain it, provided such trading is subject to proper rules.
- However, the current level in Europe seems high based on the best publicly available data. CESR's CP shows that 38% of the market is OTC. From the perspective of the long-term quality of European markets, we consider the information contained in the CESR CP concerning the magnitude of the OTC market in Europe very significant.
- The EU should have a clearer policy regarding the OTC activity and specifically the information that EU supervisors need to have to monitor the fair and orderly functioning of the market.
- To enforce such an EU policy, supervisors need access to better and comparable data on the activities in this space (e.g. order sizes, client types, etc) as is the case in the US and other well-supervised markets. As the supervisors' knowledge increases, there may be additional policy initiatives needed for regulating and supervising OTC.

4. Threshold for Crossing Networks?

- The MiFID Review should ensure a fair level playing field among trading venues that are competing against one another.
- Depending on the results of the analysis of the OTC activities, including Crossing Networks, there might be a merit to considering whether to impose a threshold for Crossing Networks or apply the full SIs or MTF rules (or the rules of a new category) to them, irrespective of business volume (i.e. same business, same rules).
- This approach would apply equally to all OTC platforms.

IV. Answers to CESR's Specific Questions

2. Transparency

2.1 Pre-trade Transparency

Question 1: Do you support the generic approach described above?

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

As a general principle, the rationale behind the four waivers available for RMs/MTFs is that of the necessary protection of large-in-scale orders from adverse market impact whilst safeguarding price discovery. Any deviation from pre-trade transparency disclosure must be well justified to protect price formation and avoid distortions to the level playing field. Having said this, we agree with CESR that there have been difficulties in the application of the waivers, these problems are twofold. Firstly, they are caused by the way pre-trade transparency waivers were designed. Secondly, they are caused by the way pre-trade transparency waivers were interpreted and enforced across the EU. Going forward, after a recast of the pre-trade transparency waivers, we would encourage CESR / ESMA to move towards a rule-based approach in order to provide greater clarity to market participants and to ensure that rules are applied in the same way across the EU.

- **Large in scale waiver**

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

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

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

Our main principle is that orders that are not large should contribute to price discovery. We need to ensure that only those orders that truly need protection from market impact are kept dark, while all other orders contribute to price formation. We believe that the current calibration for LIS orders is appropriate and we encourage CESR to maintaining the LIS threshold as it is. Finally, with regard to Question 5, we support Option 2, whereby the LIS waiver would not apply to stubs, so that it would be clearer that the waiver threshold only applies to the initial orders, and not to any residual orders that have been partially executed. Thus the remaining stubs would have to be disclosed in the order book or cancelled.

- **Reference price waiver**

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

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

The reference price waiver was originally intended for large orders, but it is being used for all orders and has thus become a loophole to avoid MiFIDs transparency requirements. This loophole is exploited by some market operators to design their services around the individual client's need to hide their orders from others (e.g. $\frac{1}{4}$ spread models, IOIs). To protect price formation and to stay true to the original intentions mentioned above, the reference price waiver should be a very firm and clear criterion and apply to a minimum size threshold (or be fully abolished in the proper context of price formation on fragmented markets). CESR could consider proposing as a minimum size as a percentage of the size of the LIS, for example 80% the size of LIS.

- **Negotiated trade waiver**

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

The negotiated trade waiver, as currently interpreted, makes a distinction between systems that have a displayed order book and those who do not. In practice, systems that have a displayed order book can utilise the negotiated trade waiver while systems that do not have a displayed order book cannot utilize the waiver. We are not aware of any policy rationale for this distinction and we invite CESR to consider this issue in its advice to the Commission.

- **Order management facility waiver**

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

No comments.

- **Systematic Internaliser regime**

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

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

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

Lack of clarification in the definitions of any of the alternative venues competing with RMs - i.e. MTF or SI – could be one of the reasons why the current level of OTC is high (about 38% according to the CP). As was originally intended by MiFID, all functionally identical trading should be regulated in the same way to ensure the same protection for investors and a level playing field ('same business, same rules').

As we stated in the section, 'FESE position on equity market structure', the revision of the SI regime might be one of the options for capturing some of the OTC activity which is escaping MiFID venue regulation today. Therefore this question needs to be assessed in the broader context of the other changes made to the venue framework. Whatever is done, the principle should be that the venue structure ensures price formation and 'same business, same rules'.

Also stated earlier, the overall approach of MiFID must be safeguarded. MiFID makes a useful distinction between bilateral and multilateral trading which must be retained. Multilateral trading should in principle be regulated as Regulated Market or an MTF (e.g. if bilateral platforms link to one another, this should be considered de facto as multilateral).

All bilateral trading should be adequately captured and regulated within the MiFID framework. This could be done for instance by widening the SI definition in which case the obligations on SIs would be modified (though not necessarily radically) to bring them in line with the new definition. The SI regime occupies only 2% of the market, whereas OTC is a total of 38%. There is definitely merit in looking at whether the SI regime is comprehensive. Finally, OTC would also be defined to create more clarity; OTC would be essentially for larger trades.

To capture all systematic, frequent, organised bilateral trading in the SI regime, as intended by MiFID, it would be useful to delete the 'materially commercial' criteria and the reference to 'non-discretionary' in the SI definition (Level 2). Moreover, all SIs should be subjected to tightened pre-trade transparency rules (e.g. a higher SMS structure for all shares.) This is because in certain instances, these could allow an OTC platform which otherwise does the same business as an SI not to be considered as an SI regime. The other two criteria stated in 21(1) (b) (personnel or automated technical systems) and (c) (regular or continuous basis) are fully sufficient to define an SI.

Another possible difficulty in the proper application of the existing categories is that some current OTC platforms may be combining multilateral and bilateral business models, which makes their classification difficult. It would be useful to consider how EU regulation can achieve an outcome whereby multilateral and bilateral trading would be separated more clearly and each would be submitted to proper classification.

In parallel, as stated in the section above, one of the ways in which the MiFID venue structure can be made more exhaustive is by ensuring that all OTC platforms that have multilateral characteristics are included in the MTF definition. To make this happen, i.e. to include all multilateral, automated trading, one would have to amend the MTF definition by excluding the words 'discretionary' from the definition

so as to avoid confusion, but maintaining it in the MTF obligations article (as already the case). The effect would be that all platforms currently run in the OTC space which do multilateral trading should be classified as MTFs.

In addition, we believe it would be useful to have an express definition of the residual OTC in the Directive (bilateral only; ad hoc, irregular, unsystematic, with wholesale counterparties; and always above a certain order size) following and clarifying the intention of Recital 53. Such trading should be subject to appropriate rules such as post-trade transparency identical to that of RMs and MTFs and proper venue surveillance.

Finally, orders below a certain threshold should always be executed on properly regulated MiFID venues. The residual category of OTC should not be allowed for these smaller sizes (as was the intention of MiFID).

Question 11: 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?

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

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

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

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

Question 16: Do you have any comments on other aspects of the SI regime?

In general, we have the impression that the pre-trade transparency provided by SIs is not sufficient. Therefore, we welcome the proposals above, specifically:

- SIs to maintain quotes in a size that reflects the business they are prepared to undertake;
- The rules to maintain the price improvement restriction (since this would be bad for the price formation process overall);
- SIs to identify themselves in real time (and not just on a quarterly basis) and
- SIs to also make the information public as to where they publish post-trade information.

All these changes/decisions would be an important contribution to improving pre- and post-trade data and overall transparency.

2.2 Post-trade transparency

Question 17: Do you agree with this multi-pronged approach?

FESE generally supports CESR's approach as outlined in a, b and c. However, we would not deem it appropriate to adapt MiFID as described above. MiFID as a legal text already provides all necessary pre-requisites regarding post-trade transparency as well as consolidation. Cementing standards in a legal text will take out all necessary flexibility as markets evolve.

Establishing an APA regime for OTC Post-Trade data will provide sufficient room for introducing standards which should apply on a Pan-EU level, and which should foster data quality and easy consolidation of that data. In case markets evolve and standards change, it would not be necessary to adapt multiple national regulations, but only the relevant requirements for APAs.

Indispensable pre-requisites for any successful consolidation are: EU wide harmonized and clear reporting rules (which is currently not the case and which results in non- over- and/or under-reporting of OTC trades!), respective compliance enforcement, and standards to be adhered to by APAs (of course including RMs acting as APAs).

In particular, to facilitate the consolidation of market data, the industry should work together to standardise remaining differences with regard to market data publication . RM data is already easily consolidatable; FESE , however, is taking additional actions to consult the market and if necessary to work on removing remaining differences in RMs data publication where possible and (i.e. flags and possible mapping of identifiers)

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

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

Yes we agree and no we do not think it will be costly.

Question 20: 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?

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

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

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

We do not have specific comments, other than to reiterate our view that post-transparency provided in the OTC space has been poor, untimely, and inconsistent. To the extent that a simpler and tighter deferral regime can contribute to better OTC data, we support. In particular, we want to see a strengthening of the principle that all trades are disclosed once the risk is offloaded.

3. Application of transparency obligations for equity-like instruments

Question 24: Do you agree with the CESR proposal to apply transparency requirements to each of the following (as defined above):

- 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.

Question 25: If transparency requirements were applied, would it be appropriate to use the same MiFID equity transparency regime for each of the 'equity-like' financial instruments (e.g. pre- and post-trade, 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?

Question 26: In your view, should the MiFID transparency requirements be applied to other 'equity-like' financial instruments or to hybrid instruments (e.g. Spanish participaciones preferentes)? If so, please specify which instruments and provide a rationale for your view.

As noted by CESR, transparency requirements are already in place for all instruments (equity, equity-like and non-equity) traded on-exchange. With regard to the proposal to applying MiFID transparency to equity-like instruments also if traded off-exchange, we are of the view that it would be appropriate to apply the MiFID transparency requirements to equity-like financial instruments such as depository receipts, exchange traded funds, exchange traded commodities and certificates on the condition that they actually trade on-exchange like shares. This condition is important so as to avoid inadvertently applying transparency requirements to financial instruments, such as collective investment undertakings, that facilitate investments via subscriptions and redemptions, rather than by on-exchange trades. The definition of 'Exchange Traded Funds' in footnote 12 is too broad and should, in our view, clearly exclude collective investment undertakings which are admitted to trading on a Regulated Market but which facilitate investments via subscriptions and redemptions. Another important caveat however is that certificates are typically not liquid and their inclusion might lead to additional post-trade reporting problems.

Finally, it is important to stress that the problem with transparency in the EU does not lie in the equity-like space but in the non-equity space. As we explain in our response to the CESR CP on non-equity transparency, we believe that there is a strong need to define mandatory transparency rules for bond markets and we recommend pre- and post-trade transparency for all bonds, whether admitted to trading on a RM/MTF or not.

4. Consolidation of transparency information

4.1 Regulatory framework for consolidation

4.1.1 Multiple approved publication arrangements

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

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

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

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

Answer to question 27:

We believe that the accreditation of Trade Data Monitors or APAs analogous to the one introduced by the FSA could solve various problems regarding the current short-comings in the area of OTC post-trade transparency:

- A company which intends to become an Accredited Trade Data Monitor should adhere to various standards, e.g. regarding format, flagging, feed logics, quality checks – similar to those standards suggested by CESR, but more detailed. These standards could be developed by the proposed CESR/Industry Working Group.
- Accreditation / Operation license shall only be granted in case all requirements are fulfilled. Of course, accreditation could only be granted if the Trade Data Monitor makes available all data fields required by MiFID, e.g. “execution time”. Without question, OTC Trade Reporting Services offered by RMs would also need to apply for accreditation.
- Reporting via internet would not represent the fulfilment of the accreditation requirements. Instead usage of a Trade Data Monitor for disclosure of real-time post-trade data should be mandatory.
- A Trade Data Monitor could be requested to provide the Competent Authority with relevant information (on a daily, monthly or yearly basis) necessary to enforce compliance of OTC Trade Reporting. For example, Deutsche Börse creates a full OTC post-trade report per customer per day. These reports, which are currently submitted to each respective customer of the MiFID OTC Post-Trade Transparency Service, could be made available to the respective Competent Authority on request.
- A Trade Data Monitor should be able to provide the Competent Authorities with the respective data necessary to calculate ADTs. This would solve the problem currently experienced by CESR, where again only RM data and selected MTF data is used for these calculations.

Answer to question 28:

We think that there is no need to amend the respective MiFID obligation. Consolidation with data from other sources is achievable under the current regime. Pre- and post-trade market data from Regulated Markets have been published and consolidated without any problems long before the advent of MiFID.

RMs provide very high quality pre- and post-trade data for a reasonable price and make it available to a full range of users on a non-discriminatory basis, as required by MiFID and in many aspects going beyond their legal obligations (e.g. by providing certain data for free, even when its economic value is significantly higher).

We are convinced that current shortcomings of OTC data quality with regard to consolidation can be fixed by improvements of standards, harmonized regulation on EU level, and compliance enforcements. Generally, as soon as these pre-requisites are established, enhanced consolidation can be achieved.

Answer to question 30:

- Pre-requisites are generally the same for multiple approved channel publication arrangements as well as EU mandated consolidated tape.
- Decentralised approach is perfectly in line with MiFID, routing data from one place to a consolidator and then back again, introduces additional latency in a time where latency really matters.
- The existing infrastructure can be re-used, no additional costs for a complete new (and redundant) system necessary.
- Investment firms could efficiently use existing channels to report their trades and would not need to additionally invest in further lines, technical interfaces and additional maintenance for an additional new channel. Current users of trade reporting facilities usually already are connected to the trading venues in order to trade and could use the same infrastructure.
- A plan would introduce a single point of failure.
- Physical location of a Central data consolidator would be a major political issue, as it would advantage some trading venues against others in terms of latency.

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

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

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

Answers to questions 31/32:

FESE sees no further specification in MiFID as being necessary, especially if this question is only targeted at market data fees levied by trading venues. The EU data market is based on competition and any introduction of more detailed guidelines on pricing would constitute price regulation, which would contradict the principle of a competitive market.

First of all: unlike the US where market participants mandatorily are required to purchase equity market data from all trading venues in order to comply with REG NMS (including Trade Through Rule and Best Execution requirements trade by trade / and “price only” being the sole variable to measure), the regulatory set-up as well as the market structure is a completely different one in the EU. Here market participants have a choice regarding their trading connections to various liquidity pools as well as their consumption of the respective set of data. Thus, unlike in the US, Data Fees in the EU are a function of choice and demand, depending on the quality of the underlying market and its price finding process.

Besides real-time and delayed data RMs offer various data product versions (push / pull mode / feeds / internet access) which correspond with different price points. So, e.g. besides prices for wholesale data products, RMs have price structures for retail customer data products as well. The Best Execution requirements in the EU only require post-trade data for verification which is made available by the RMs already for free after 15 minutes (terminology: delayed data). Although that is the case, currently a few single voices demand post-trade data being disaggregated from pre-trade data. Although seriously

questioning the logic behind this recent demand (due to the fact that RMs offer data free of charge after 15 minutes) FESE and its members are currently evaluating such an additional product version. Some RMs already provide this sort of packaging as of today.

Furthermore, we would like to point out that the ESME report “Fact finding regarding the availability of post-trade data in equities in the EU”, 2009, explicitly states that data fees seem to be reasonable, although one OTC post-trade data source had been identified as having substantially high fees. This data source, in the meantime, has reacted to market pressure and substantially lowered their market data fees.

Answer to question 33:

FESE supports the market industry standard of 15 minutes. RMs allow free access to their data to all end users after 15 minutes. Markit Boast recently adjusted their period from 2 hours to 15 minutes as well due to market pressures. By contrast, market data vendors ask for a fixed annual license fee.

Having said this, FESE does not see the necessity of the proving of 15 minute (or any other) data to become regulated. The value of data should be set by the market. Even at 15 minutes, data from price-forming venues has value. How this data is provided should continue to be left to industry best practice.

4.1.2 EU mandatory consolidated tape

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

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

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

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

Answer to question 34)

Already today, RMs and MTFs are requested to make data available to the respective competent authorities. Some OTC Trade Reporting Venues could already provide data as well as of today. We see no reason, why this should not be the case as well for APAs. We strongly support CESRs view.

Answer to question 36)

FESE members believe that a mandatory consolidated tape will be altogether a step back in the evolution of our markets and represent an unjustified and disproportionate regulatory intervention with largely foreseeable negative consequences for efficiency, fairness and quality.

The main three problems with data consolidation are:

- OTC has poor quality.
- OTC data is not easily available.

None of these problems will be resolved by the introduction of a mandated consolidated tape a la US only for the following reasons:

- The centralized, US Style Tape, should not be seen as a ‘magic wand’ for the current consolidation challenges in the EU landscape. Whatever the structure, whether utility or commercial, the underlying challenges will be there and have to be dealt with.
- Commercial vendors already offer a complete consolidation , for the part of the market where it is possible (RMs and MTFs). Problems arise with regard to OTC trade data. Solving these problems is a pre-requisite for any sort of consolidation, be it via a centralized plan or via a decentralized set-up, in the spirit of MiFID.
- In fact, a tape will take away the competitive element in data provision, and eliminate all incentives to meet the diverse needs of clients.

Even if we would assume that the US plan is suitable for the US Reg NMS structure (and even here there are question marks as the plan is often criticized), the US approach is not without its own shortcomings:

- o Allocation formula for market data revenue seems to strongly influence market microstructure, impact on best execution has not yet been verified;
- o Single point of failure;
- o Trade gaming possible as trade has higher latency than actual process via direct feeds (very likely to have negative impact on best execution);
- o In the European trading landscape, a centralized consolidated tape would introduce additional latency and that at a time where latency increasingly matters. Data provided by a central plan would be much slower and thus deviate from process being available to traders.
- o Physical location of the central data consolidator would be a major political issue as it would advantage some trading venues against others in terms of latency, and thus execution likelihood and business on these venues.

FESE does not deem this to be a desired solution for EU Financial Markets.

5. Regulatory boundaries and requirements

5.1 Regulated Markets vs. MTFs

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

Question 39: Do you consider that it would help addressing potential unlevel playing field across RMs and MTFs? Please elaborate.

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

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

We see merit in the proposal to apply the same organisational requirements to RMs and MTFs. MTFs have the same rights as RMs, they should also have the same obligations. For this reason, we fully agree with the proposal that MTFs be adequately equipped to manage the risks to which they are exposed, to implement appropriate arrangements and systems to identify all significant risks to its operation and to put in place effective measures to mitigate risks. We believe that, at present, enforcement with regard to MTFs is not as strict as it is for Regulated Markets. Thus, measures in order to reduce discretion of

competent authorities will help to ensure that rules apply equally across RMs and MTFs as well as across different jurisdictions.

Another concern refers to the differentiation MiFID makes between RMs and MTFs in the authorisation of new products. Currently, RMs wishing to trade an instrument admitted to trading on another RM must wait 18 months before being authorised to trading it. The same rule does not apply to MTFs and we urge CESR to address this situation.

Shareholder to report on a monthly basis the trading executed on an MTF it co-owns? Yes.

5.2 Investment firms operating internal crossing systems/processes

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

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

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

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

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

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

As stated in the section, "FESE position on equity market structure", FESE believes that it is essential to tackle the issues around OTC pragmatically, since the level of opacity is the most significant distortion to market regulation. In particular, crossing networks should be fully described and brought into a MiFID-regulated environment.

FESE encourages CESR to study, in a level 3 work stream, whether the business models of CN should come under the current SI or MTF regime. The current CP does not have the necessary degree of detail in terms of business models. We encourage CESR to do more work on this aspect in Level 3 to determine what kind of activities are undertaken in the OTC space today and how they compare with the current MiFID categories of RM, MTF and SI. This work does not have to wait for the MiFID Review. In fact, it would be optimal not to wait for the Review and instead see what can be done at a supervisory level today.

In addition, regarding the MiFID Review, several solutions should be studied, such as revising the current SI or MTF regimes or creating a new category with a view to capture OTC platforms when they are functionally similar to MiFID venues in order to ensure the level playing field and orderly markets. Such a move is an important step in creating greater clarity on the nature of OTC in Europe.

As also stated, we believe that the EU must adopt a policy to safeguard price formation and must ensure that the supervisory framework can implement it to ensure fair and orderly markets:

- The aim of MiFID was to increase the transparency to address the risks of the fragmentation of trading. As currently implemented, MiFID falls short of this policy aim. The amount of trading in Europe without pre-trade transparency (i.e. 44% according to CESR's findings) is very high in absolute terms.
- Europe needs to set policy goals in terms of how much of the market should remain pre-trade transparent to guard price discovery for orderly markets and investor protection.

CESR should advise the Commission to investigate how much trading is happening in the OTC space and its impact on price discovery, fair and orderly markets as well as market integrity

- OTC trading is a type of dark trading (because there is no obligatory pre-trade transparency); however it is 'unregulated dark trading' and therefore poses concerns for the market if it goes above a certain level.
- OTC has a legitimate role in the market and the MiFID framework needs to maintain it, provided such trading is subject to proper rules.
- However, the current level in Europe seems high based on the best publicly available data. CESR's CP shows that 38% of the market is OTC.¹ From the perspective of the long-term quality of European markets, we consider the information contained in the CESR CP concerning the magnitude of the OTC market in Europe very significant.
- In this context, it may also be instructive to compare the market structure of the EU with that in the US. The SEC Concept Release of January 2010 includes the following information:
 1. Undisplayed trading in the US is 25%, whereas in the EU it seems to be 44% (38% OTC plus 6% regulated dark trading); and
 2. broker-dealer internalisation in the US is 17.5%, whereas in the EU it seems to be 38% (of which only 2% is systematic internalisation according to public sources).
- The figures for the EU need further improvements in comparability. However, they are sufficient to draw some broad conclusions, and suggest that OTC is too high in the EU and that largely as a result undisplayed trading may also be too high.
- 5. The EU should have a clearer policy regarding the OTC activity and specifically the information that EU supervisors need to have to monitor the fair and orderly functioning of the market.
- 6. To enforce such an EU policy, supervisors need access to better and comparable data on the activities in this space (e.g. order sizes, client types, etc) as is the case in the US and other well-supervised markets. As the supervisors' knowledge increases, there may be additional policy initiatives needed for regulating and supervising OTC.

Threshold for Crossing Networks?

- The MiFID Review should ensure a fair level playing field among trading venues that are competing against one another.
- Depending on the results of the analysis of the OTC activities, including Crossing Networks, there might be a merit to considering whether to impose a threshold for Crossing Networks or apply the full SIs or MTF rules (or the rules of a new category) to them, irrespective of business volume (i.e. same business, same rules).
- This approach would apply equally to all OTC platforms.

¹ While the CP does not explicitly mention either the volume of OTC or its share in total trading in any of the tables, we note that the OTC volume implicitly used in the tables shows that 38% of all trading in Europe is done on an OTC basis. This figure was also confirmed by the CESR (UK FSA) representative at two recent public events, who noted that OTC is about 30-40% of the market. In other words, CESR's figures confirm that a single recital in Level 1 (recital 53) has ended up accounting for up to 40% of the overall trading.

6. MiFID options and discretions

a) Waiver of pre-trade transparency obligations

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

No specific comments.

b) Determination of liquid shares

Questions 47: Which reasons may necessitate the application of both criteria?

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

Questions 49: If CESR were to propose a unique definition of 'liquid share' which of the options do you prefer?

a) apply condition a) and b) of the existing Article 22(1), or

b) apply only condition a), or

c) apply only condition b) of Article 22(1)?

Please elaborate.

No specific comments.

c) Immediate publication of a client limit order

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

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

No specific comments.

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

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

We strongly believe that the option granted to Member States in connection with Article 36(2) should be retained.

We agree with the views of the CESR Member States outlined in paragraph 125. 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.

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.

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.