CESR/07-047: CESR LEVEL 3 GUIDELINES ON MIFID TRANSACTION REPORTING – ABI RESPONSE TO CESR CONSULTATION PAPER

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1. The ABI is the trade association for Britain's insurance industry. It has nearly 400 member companies who hold up to a sixth of all investments traded on the London Stock Exchange as well as having substantial holdings of equities across main EU markets.
2. We welcome the opportunity to respond to CESR consultation on transaction reporting and we are very supportive of CESR's efforts to find practical solutions to problems raised by the implementation of MiFID provisions. CESR's role in developing a common set of guidelines is fundamental in ensuring a harmonised approach.
3. However, we believe there are several areas where additional comment from CESR would be useful. In particular, the position of portfolio managers in the chain of transaction reporting needs to be clarified.

Q1: Do respondents agree with the proposed guidelines?

Q2: Do respondents consider that guidance is needed on which transaction is executed by a Branch or by its head office for the purpose of reporting it to the relevant competent authority? If yes, do respondents consider that transactions executed by a branch should be understood as those transactions booked by a branch?

4. We agree with the proposed guidelines but we do consider that guidance is needed on which transaction is executed by a branch and which by its head office.
5. We strongly support CESR's views on the practicalities of branch reporting. It would be very difficult for branches to split their reporting between two competent authorities. The costs would, in our view, significantly outweigh the benefits, especially considering that CESR's work on Transaction Reporting Exchange Mechanism will mean that regulators are able to share and access all the relevant information.
6. We are aware of discussions about the legal interpretation of Article 32(7) and the meaning of the phrase 'within its territory'. If the outcome of those discussions does not provide sufficient clarity, we agree that the solution put forward by CESR, which relies on the 'place of booking' test, has the advantage of being practical. We would therefore support its adoption as the criteria for deciding which unit of the firm has to transaction report.

Q3: Do respondents agree with the proposed guidelines?

7. CESR's analysis appears to be a pragmatic attempt to resolve some of the complexities of instituting a common transaction reporting regime across the EU.
8. In particular, we support CESR's analysis that MiFID regime is based on reporting of executed transactions and not on information on individual orders.
9. We believe this is supported by Article 25 of MiFID which makes a clear distinction between all investment firms (and the obligation to keep record of all transactions which they have carried out) and those investment firms which execute transactions (and the obligation to report details of such transactions to the competent authority).
10. We are therefore pleased that CESR members have committed to including in transaction reports those transactions which are conducted by the immediate market-facing firms and those where the investment firm is undertaking the transaction for its own account.
11. We are aware that a question about what constitutes execution of a transaction has been posted on the Commission's Q&A website. Irrespective of the interpretation that may follow, we hope CESR will continue to pursue the most practical option for both firms and regulators.
12. There are several areas where further clarification from CESR would be helpful. In particular, the meaning of 'market-facing' should be clarified in the context of services provided by portfolio managers.
13. Our members believe their position can be described as 'market-facing' only in a very limited set of circumstances. In majority of cases, portfolio managers are clients of brokers or dealers with whom they trade and are therefore not positioned at the end of the transaction chain.
14. This is most evident in straightforward agency broking where a broker will direct the order to another venue (or venues) to be executed. But it is less clear when a portfolio manager transacts with a broker-dealer who is dealing on own account. We do not believe portfolio managers should be required to report transactions in those circumstances.
15. There are two reasons for this. First, if a portfolio manager is regarded as 'market-facing' when trading over-the-counter, this would in effect mean that both he and the dealer dealing on own account would be required to transaction report. This would result in an unnecessary duplication of effort.
16. CESR itself highlights the risk of multiple reporting in paragraph 12. Its proposed solution is based on the notion of a chain which suggests that a single transaction report will be submitted to the regulator. As the OTC transaction will already be reported by the dealer dealing on own account, the exclusion of portfolio managers from the reporting

obligation does not seem to us to detract from the supervisors' goal of detecting and pursuing suspected instances of market or client abuse. The costs to portfolio managers of installing new systems to report transactions would be very large while there would seemingly be no commensurate benefits to the regulators or the market.

17. It is also worth emphasising that portfolio managers never undertake transactions on own account, as they always trade as agents for the underlying clients.

18. Second, even in agency broking the transaction chain is frequently less linear and more complex than described by CESR. A portfolio manager will sometimes not know where his order is being executed, as the broker may send one part of it to another venue and execute a part on own account. Clearly, it would be difficult to argue that the portfolio manager is 'market-facing' for the second part of the order only and the broker would have the obligation to report under CESR's analysis.

19. We would therefore urge CESR to take these points into account and clarify that portfolio managers passing orders to brokers or trading over the counter with dealers dealing on own account will not be required to report transactions to the regulator.

20. We are strongly opposed to CESR sanctioning member states' ability to unilaterally extend the scope of transactions reporting obligations as suggested in paragraph 23. This would, in our view, undermine not only the aims of transaction reporting but also of MiFID itself. It would make firms subject to varying degrees of regulatory scrutiny – and therefore ultimately cost. CESR should restrict the amount of flexibility that can be exercised by member states and seek to impose a common EU solution.

Q4: Do respondents agree with the proposed guidelines?

21. We agree. CESR member states should take account of any prior approval by another member for reporting channels and attempt to streamline the process as much as possible.