APCIMS

Working for the Investment Community

5th December 2008

London Office
22 City Road
Finsbury Square
London EC1Y 2AJ
Tel: +44 (0) 20 7448 7100
Fax: +44 (0) 20 7638 4636
Email: info@apcims.co.uk

Signor Carlo Comporti
Secretary General
CESR
11-13 avenue de Friedland - 75008
Paris
France

Dear Secretary General

APCIMS RESPONSE TO CESR CALL FOR EVIDENCE ON THE REVIEW OF THE SCOPE OF THE MIFID TRANSACTION REPORTING OBLIGATION

Introduction

The Association of Private Client Investment Managers and Stockbrokers (APCIMS) represents firms acting on behalf of private investors. It has around 180 members of which over 125 are private client investment managers and stockbrokers with the remainder being associate members providing relevant services to them.

APCIMS' member firms deal primarily in stocks and shares but also in other financial instruments for individuals, trusts and charities and offer a range of services from execution only trading (no advice) through to full discretionary portfolio management.

Our member firms operate on more than 500 sites in the UK, Ireland, Isle of Man and Channel Islands, employing around 25,000 regulated staff and managing some £400 billion of these countries' assets. APCIMS aims to ensure that legislative, regulatory, tax and other initiatives for change across the European Union are appropriate and proportionate to the needs of the private investment community.

General

APCIMS welcome the opportunity to provide evidence for the review of the scope of the MiFID transaction reporting obligations. Member firms were affected in different ways by these before and after UK implementation of the new requirements in late 2007.

During the pre-implementation period the UK FSA consulted widely and, specifically in the APCIMS context, participated in a seminar presentation and discussion with members about what the changes would entail. APCIMS and its members gave substantial additional consideration to the relevant matters. In the light if this underlying work our firms carefully evaluated what, if anything, they needed to do in practice to comply with the FSA's new régime. In some cases substantial costs were involved in necessary system and related alterations, but this did not affect all firms equally and in other cases transition costs were lower and, in some instances, relatively small.

After one year APCIMS' member firms have gained considerable experience of the new reporting framework. Two sets of issues have arisen. The first concerns the use of the unique client identifier. The deployment of this concept varies throughout the EU and the manner in which the FSA requires it to be put into effect in the UK does not appear to be replicated elsewhere. The second relates to the difficulties created by the fragmented market situation that MiFID has helped to engender in Europe. The multiple venues which may be used to ensure best execution for clients differ in the detail of their reporting requirements under the overall MiFID banner. So not only do firms have difficulty in discovering best price – in the absence, for example, of a consolidated tape – but they also have to ensure compliance with local transaction reporting rules depending on execution venue. And these difficulties are driven by MiFID to the extent that they derive from its best execution requirements on behalf of clients.

1. Have the differences in the scope of the transaction reporting obligation between CESR Members caused problems for you? Please provide practical examples of any difficulties encountered.

APCIMS' members firms overall are primarily UK-focused and as a community their cross-border business within the EU represents only a relatively small proportion of their total activities, although there are individual exceptions. Most of the market transactions on behalf of clients made by our smaller firms take place within the UK and they have been relatively little affected by differences in the transaction reporting obligations between member states. However this does not apply to the same extent to APCIMS' larger members, and where they have executed deals on non-UK venues they have experienced issues arising from having to conform to different sets of standards.

Such differences arise in the main because the MiFID permits considerable latitude to competent authorities in EU member states to interpret the Directive in ways unique to their local environment and to set up reporting requirements which, while within the overall framework set by the MiFID, may have additional or different elements. If the single market aspiration enshrined in the MiFID is to function cost-effectively and efficiently, and without undue cost to firms in, for example, the design of IT systems, it is essential for firms not to have to face multiple reporting obligations to different competent authorities. Requests for transaction information and their handling need to be consistent across the EU. There may be a need to revisit the home/host issue in this area.

The lack of consistency between member states and competent authorities in this area acts as a barrier to business development. The problem was obviously exacerbated at the beginning of the MiFID era by the failure of so many member states to be anywhere close to the implementation deadline of 1 November 2007. This added numerous uncertainties and delays to the situation which were costly in terms of systems development and potentially difficult in terms of legal and regulatory risk.

In the UK one key element applied by the FSA which may have the effect of helping to differentiate the UK transaction reporting régime from that of other member states is the unique client identifier. Article 25(2) of the Level 1 Directive states that "Member States shall require investment firms to keep at the disposal of the competent authority, for at least five years, the relevant data relating to all transactions in financial instruments which they have carried out, whether on own account or on behalf of a client. In the case of transactions carried out on behalf of clients, the records shall contain *all the information and details of the identity of the clients,* and all information required under Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering" (APCIMS' emphasis). There is a close connection between this paragraph and Article 13 and Tables 1 and 2 of the Level 2 Regulation (see below). Article 25(2) relates the need for a unique identification system to the client who will not necessarily be the direct counterparty in a transaction.

As noted, further exposition of this requirement is given in other parts of the MiFID including Article 13 of the Level 2 Regulation and field identifier 20 of Annex 1, Tables 1 and 2 of the Level 2 Regulation. Table 1 makes clear that "where the counterparty is not an investment firm, a regulated market, an MTF or an entity acting as central counterparty, it should be identified as 'customer/client' of the investment firm which executed the transaction". Table 2 adds that "if a unique code or unique harmonised identification code as referred to in Table 1 of Annex 1 is not sufficient to identify the counterparty, competent authorities should develop adequate measures that ensure the identification of the counterparty." The language of Table 1 indicates that counterparties would normally be the firm itself, a regulated market, an MTF, or a central counterparty *but not clients or customers of the firm*, while Table 2 allows alternative identification methods to the unique client identifier concept.

The FSA applies the full scope of these various paragraphs from MiFID: "In line with our current regime we will be continuing to require that, *in providing the identity of the client it is executing a transaction for*, the firm should use the FSA Reference Number (FRN) or Bank Identifier Code (BIC) or, if neither of these is available, a unique internal code allocated by the reporting firm which must be used consistently across all instrument types and platforms" for that client.

The FSA has gold-plated the concept expressed in MiFID Level 1 and Level 2 regulation through its method of application. Its approach has not been replicated across the EU. There is scope for ambiguity and differences of interpretation in the language of the MiFID and it would appear that this is reflected in the different ways the unique client identifier concept had been implemented. Indeed, not all competent authorities require it to be used. Such divergences can cause considerable costs to industry especially where firms have already complied with an interpretation used in one member state which is either unnecessary or invalid in another. If this interpretation is the most developed or onerous of the versions used the financial services industry in that member state will be disadvantaged by regulation in comparison with the industry elsewhere. That is not the intention of the MiFID in any respect, and certainly not in transaction reporting.

As regards market fragmentation the problems arising for firms are different in that they can arise within one jurisdiction and are not confined to cross-border transactions or other business. Nor are they directly a consequence of the transaction reporting obligations of the MiFID. As stated above they derive rather from the aspects of its best execution requirements that make use of competition between trade execution venues as part if securing best price and outcome for clients. In relation to trade reporting matters the key issue remains that of consistency of requirements so that additional burdens arising through numerous differences of detail are minimised. Competent authorities need to eliminate variations in reporting obligations across venues as well as jurisdictions.

2. Please provide information on your practical experiences in reporting transactions that fall under each of the items (a)-(c) above? Is the difference between these three categories sufficiently clear? Do the competent authorities interpret the scope of these categories in the same way? If not, where in particular have you encountered problems?

The key issue of inconsistency and related cost and process burdens has been addressed above, particularly as regards question (c).

3. In your opinion, what are the advantages and disadvantages of competent authorities systematically receiving transaction reports covering the information referred to in item (c) above versus acquiring that information on an ad-hoc basis by other means?

The importance of consistency of approach and avoidance of multiple reporting obligations across the EU has been emphasised. This would suggest a need for a systematic approach to which all subscribe and to which firms can respond without having to introduce significant IT system variations for different jurisdictions.

4. On the basis of their pros and cons, what would be the preferred solution in relation to the possible convergence of the scope of the transaction reporting obligation (regarding what constitutes 'execution of a transaction')? Please provide justifications for your choice. When analysing the pros and cons, please consider also whether there is a danger of regulatory arbitrage if the scope of the transaction reporting obligation is not harmonised between Member States, as well as the implications for transparency calculations on shares considering that in the future these calculations will be conducted on the basis of the transaction reporting data?

The above example of differences over the application of the unique client identifier shows that there is scope for regulatory arbitrage within the EU relating to transaction reporting. This may be intensified by the ability to use different venues to achieve best execution for clients. Greater consistency of approach to interpretations of the MiFID and its implementation in the national context would help to eliminate this problem. While such ambiguities and variations across jurisdictions in the implementation of the MiFID continue there remain legal, regulatory and cost risks to firms which may result in poorer performance for clients. The added burdens of regulatory inconsistency detract from the capacity of MiFID to achieve its goals regarding the opening of an efficient, transparent and liquid pan-European market to investors.

Yours faithfully

John Barrass
Deputy Chief Executive