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CONSULTATION PAPER

CESR TECHNICAL ADVICE TO THE EUROPEAN COMMISSION IN THE CONTEXT OF THE MIFID REVIEW—EQUITY MARKETS

This document is the result of the Report issued by CESR in June 2009 (Ref: 09/355) which evaluated the effects of the entry into force of the Markets in Financial Instruments Directive (1-XI-2007).-

Following publication of that report, CESR cross-checked the aspects and/or issues referred to in the report with the different participants involved. The Consultation Paper set out certain aspects which merit reflection, in view of participants' proven experience. The goal of the document is to enable CESR to advise the European Parliament and Council on specific aspects of the MiFID, which will be amended in the MiFID revision.

The initial assessment of the document is positive, since it focuses on three main principles:

a) reinforcing disclosure requirements and, therefore, enhancing market transparency.

b) establishing a level playing field, avoiding segmentation derived from competition between trading venues with different rules, and
c) strengthening the regulatory framework with more specific content. Avoiding non-uniform application of the MiFID by the different market participants.

The aspect and/or issues dealt with in the document are basic and essential to the securities market structure, and refer to:

- Pre-trade transparency regime for RM/MTFs.
- Definition of, and obligations, for systematic internalizers.
- Post-trade transparency obligations for equity-like instruments.
- Regulatory framework for consolidation and cost of market data.
- Regulatory boundaries and requirements.

The document includes a heading-summary and seven sections:

1) Introduction
2) Transparency (pre- and post-trade and systematic internalizers)
3) Transparency obligations for equity-like instruments
4) Consolidation of transparent information
5) Legal limits and requirements
6) MiFID, discretionary aspects
7) Conclusions and next phases.

Annex I includes proposed clarifications to pre-trade transparency waivers. Annex II covers proposed standards for post-trade transparency. Annex III offers clarifications of the post-trade transparency obligations. Annex IV discusses proposed guidance for Approved Publication Arrangements (APAs).

The aspects and/or issues indicated at the beginning of this document are discussed in sections 2 through 5. They maintain the same structure, are based on a diagnosis of the current situation and include various proposals and a questionnaire on the proposals. Section six is comprised of specific questions with a view to eliminating certain options and discretions in MiFID. Section seven summarises the objectives of the document and outlines proposed next steps.

The Advisory Board of the National Securities Market Commission is the Commission's advisory body. The Advisory Board consists of representatives of market members in the official secondary markets, securities issuers, investors and bodies with powers in the area of the securities markets. CESR has issued a consultation paper on technical advice to the European Commission in the context of the MiFID review dealing with certain aspects of investor protection and intermediaries.

SECTION TWO: TRANSPARENCY (PRE- AND POST-TRADE AND SYSTEMATIC INTERNALIZERS)

PRE-TRADE TRANSPARENCY.-

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

Yes. Pre-trade transparency is an essential part of the securities market structure. The best execution principle requires extensive price information.

There is no objection to the fact that certain orders may be subject to waivers from pre-trade information due to their size or type.

The Advisory Committee believes that, in order to maintain a level playing field, more specific and detailed waivers are needed so as to avoid disparate interpretations that would distort market functioning rules. Nevertheless, the rules should be flexible.

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

Although more than 90% of trades in the EEA are executed within the scope of the pre-trade transparency framework, the number of orders executed without pre-trade transparency has risen; therefore, there should be greater supervision of this type of transaction, which is an exception to the basic principle of transparency.

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

Yes. Experience shows that the current calibration for LIS/block trades has functioned well. From the standpoint of the Spanish securities market, it is unnecessary to reduce those volumes.

Establishing smaller volumes would devalue the order book and negatively impact information available to investors. It would also negatively affect operators with automatic and/or algorithmic trading programmes, which would be under greater pressure and thereby reduce the size of the orders entered by such systems.

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 orders sizes and articulate the rationale for your proposal?

No. We refer our reply to question 3.

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 yours views.

We believe that Option 2 (paragraph 3) is the most appropriate. Pre-trade transparency waivers should be based on specific criteria and be applied in a limited way since they are, by definition, waivers from the basic, essential principle of transparency.

However, it is does not make sense for pre-trade transparency waivers to apply to partial executions.

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.

Yes. The pre-trade transparency waiver is based on the idea that certain orders may impact the market in a way that distorts price discovery. Therefore, establishing a minimum threshold above the standard order size is an essential aspect of the waivers; without a threshold, the order book would not accurately reflect the market situation.
We believe that volume thresholds should be the same as those established for block trades.

This also entails a reduction in book order transparency, which is detrimental to the best execution principle.

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

Before commenting on Annex I, we prefer to answer question 46 first (Section 6).

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

Yes, and for obvious reasons of coherence and harmonisation of market functioning rules. Creating scope for discretion has the undesirable effect of allowing regulatory competition between Member States and/or trading venues. Therefore, a more regulated approach to defining the waivers from pre-trade transparency will benefit the entire market.

Regarding question 7: The Advisory Committee views the clarifications in Annex I as very positive, especially regarding EBBO, in that the reference price and its components should be published.

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

The Advisory Committee believes that the existence of a large in scale waiver eliminates the need for a waiver for negotiated trades.

The existing waiver for negotiated trades is justified on the basis of VWAP orders, which can be entered into the market via the mechanism for block trades.

However, we understand that the waiver may apply as long as the volume threshold for block trades or large in scale orders is met.

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

We view the clarifications in Annex I (12 to 24) as very appropriate. Although the distinction is clear between existing orders in the system administrator and orders introduced in the book and their configuration and nature are completely different, we view their description and distinguishing elements as positive.

ICO and FOK orders are not orders sustained by the order management system; rather, they are orders for immediate execution or cancellation via the book.

Therefore, this waiver refers to stop orders and to dark orders which meet the waiver requisites.

2.1.2. Systematic Internalizer Regime.-

Question 10 : Do you consider the Systematic Internalizer 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.**

i. The Advisory Committee does not see any positive effects in eliminating the phase "non-discretionary rules" from the systematic internalizer definition. The implied justification is that SIs should always have to decide whether or not to execute a customer order against their own account based on application of the best execution principle. The Committee does not believe that this justification is enough to warrant elimination of the phrase "non-discretionary rules".

   Clearly, compliance with the best execution rule is a legal obligation and, therefore, in no way clashes with the phrase "non-discretionary rules".

ii. Establishing quantitative thresholds so that SIs "have a material role for the firm" is very complex. That role of that threshold must be twofold: it must be large enough with respect to the firm's business as a whole and with respect to the market as a whole.

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 ?

Yes. The SI should decide the volume it is willing to take on for each trading price. The SI knows perfectly well the volume of shares it will be able to trade, which should not impede it from showing a significant volume with respect to its overall position. Otherwise, the image portrayed by the SI to its clients would be inaccurate.

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

Yes.

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.

We do not believe that it would be beneficial, nor is it justified. Retail orders of below-standard size should conform to the current stipulations in both the Regulation and the MiFID, i.e. at the quotes provided by the SI.

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 ?

We consider it appropriate for SIs to directly identify themselves regardless of the size of the trade.

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.

There are currently no SIs operating in the Spanish securities market and, therefore, we cannot respond meaningfully to this question.

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

See the reply to question 15.

2.2. POST- TRADE TRANSPARENCY

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

Yes.

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.

Yes.

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 ?

We don't believe it would incur significant costs. The necessary technological adjustments to implement the systems and adapt them to the new standard might lead to one-off costs, but we would expect them to be small.

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?

Yes.

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.

Yes.

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 ?

We do not believe any additional modifications are necessary aside from the ones mentioned above.

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.-

No. Reducing deferred publication delays does not entail an increase in current costs. There may be a minimal increase in costs in the beginning, as indicated in the answer to question 19.

We completed the questionnaire in **Annexes II and III** below, as the questions are directly related to the issues within the scope of post-trade transparency.

ANNEX II

Question 1 : Do you agree to use ISO standard formats to identify the instrument, price rotation and venue? If not, please specify reasons.

Yes.

Question 2 : 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.

No. CESR claimed justification is that the ISO 4217 currency code uses Euros as opposed to Euro cents. That is not sufficient justification for not publishing prices in Euro cents, which, for obvious reasons, more accurately reflect the trading price.

Question 3 : Do you agree that each of the above types of transactions would need to be identified in a harmonized way in line with Table 10? If not, please specify reasons.

Yes. We consider harmonisation to be appropriate since the transactions indicated vary in nature and, in certain situations, they could require greater specification.

Question 4 : 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.

See previous reply.

Question 5.- Would it be useful to have a mechanism to identify transactions which are not pre-trade transparent ?

Yes.

Question 6.- 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.

The Advisory Committee believes that information should be made public trade-by-trade in real time with a view to providing accurate, reliable information.

Monthly disclosure would reduce post-trade transparency, and there is no apparent reason to justify it.

Question 7.- 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 ?

A unique transaction identifier.

Question 8.- 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.

Yes.

Question 9.- Do you agree with CESR's proposal ? If not please specify reasons.

Yes.

Question 10.- Do you agree with CESR's proposal ? If not please specify reasons.

Yes.

Question 11.- Do you agree with CESR's proposal ? If not please specify reasons.

Yes.

ANNEX III

Question 1.- Do you agree with CESR's proposal ? Are there other scenarios where there are difficulties in applying the post-trade transparency requirements ?

Yes.

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 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.

Yes. However, in the case of ETFs, their UCITs-like qualities impose transparency requirements which should broadly suffice. In cases where the ETF allows for subscriptions and/or reimbursements through delivery of the basket of securities, there advisability of certain ad hoc transparency regulations in this case should be considered.

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 aspects of the MIFID equity transparency regime would need to be modified and for what reasons?

We believe that the same MiFID equity transparency regime should apply. Regardless of their legal nature, they are comparable with shares and, therefore, they should be treated similarly. With respect to the ETFs, we consider specific rules to be appropriate, as we indicated above.

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.

Yes.

4. CONSOLIDATION OF TRANSPARENCY INFORMATION

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.

Yes. However, we consider that publication of information via the internet should be expressly ruled out since it does not meet the requirements for consolidation.

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 requirements ?

Yes. European securities market experience has evidenced dysfunctions and/or irregularities in information consolidation.

The MiFID should regulate basic aspects of an information system's structure, such as identification standards, protocols, formats and/or "computer languages" which are all mutually compatible.
The main problems detected are related to information on OTC transactions reported by investment firms in proprietary formats and via mechanisms which, in many cases, impede consolidation (e.g. via the web).

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

Yes.

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)

The benefits of APAs in the current context are obvious. APAs imply standardisation that is open to supervision by the Authority, and this provides for information which is more reliable, secure and better controlled than the current situation.
APAs are also more advantageous than MCTs for two reasons. First, they give rise to competition at reasonable costs and a service that is valued by the market itself. Second, MCTs are highly complex and, from a technical standpoint, their structural solidity and the assurance of information service provision are questionable.

Question 31.- Do you believe that MIFID provisions regarding cost of market data need to be amended ?

No. MiFID has created a competitive environment in securities markets that in no way justifies price controls which go beyond current provisions (reasonable commercial terms).

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.

Yes. The target public for pre-trade information is much more restricted and qualified than that of post-trade information. The latter is a more broad-ranging group, in contrast with traditional users of pre-trade information.

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.

Yes. See the answer to the previous question.

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?

Yes

Question 34 bis.- Do you support the proposed approach to a European mandatory consolidated tape?

The proposal of a MCT could be viewed as having a positive initial effect, for obvious reasons; however, we don't believe such a tape is viable in Europe (the CESR document itself discusses the distinct configuration and structure of the USA). Europe's diversity makes the MCT too complex and expensive to be run as a not-for-profit entity. Therefore, as part of a pro-competition policy, we consider it logical and reasonable for the service to be provided by RMs, MTFs or APAs.

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

We do not propose any changes, because we understand that this service can only be executed by the above-mentioned entities.

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 ?

Please see replies to the previous two questions.

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.

Providing trade reports to an MCT would clearly imply costs due to a) starting up and/or adapting to the protocols, formats, message language and reliable, secure communications lines; and for b) maintenance and oversight, and would require high-quality equipment and human resources which are difficult to evaluate.

5.- REGULATORY BOUNDARIES AND REQUIREMENTS

5.1. REGULATED MARKETS VS. MTFS

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

Yes.

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

Yes. One of the objectives of MiFID is to establish trading venues for financial instruments which are efficient and driven by competition derived from the existence of various trading venues.

A fundamental requirement for free competition is that the operating rules and the conditions in which activity takes place are the same for all participants.

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

In addition to our answer to the previous question, the proposed requirements entail: A) regulation of conflicts of interest and, therefore, greater transparency and trust (essential elements for the market to function properly); B) greater risk control and preventive procedures, which improves system reliability; and C) contingency plans that ensure compliance with one of the MiFID mandates, i.e. continuity, which strengthens the system itself.

Question 41.- In your view, do the proposals lead to additional cost 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.

The costs that may arise from the implementation of the proposed measures are minimal. The three factors analysed are required of investment firms for authorisation and provision of services under MiFID. Accordingly, the measures indicated do not entail significant additional costs.

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?

Yes.

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

Yes.

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.

We consider both criteria to be justifiable for requiring a crossing system/process to become an MTF. Regardless of a percentages and/or linking methods, the activity of those systems should be heavily restricted because their existence poses serious risks for compliance with the best execution principle and for the prevention of market abuse.

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.

No.

6. MIFID OPTIONS AND DISCRETIONS

Question 46.- Replied to under Section II.

Question 47.- Which reasons may necessitate the application of both criteria?

We consider it appropriate, in this case, to maintain the content's discretionary nature, which allows for the possibility of applying either of the two criteria established in MiFID.

Question 48.- Is a unique definition of liquid share for the purposes of article 27 necessary?

The addition of another definition or alternative definitions does not provide any advantages.

On the contrary, doing so would increase complexity and have unwanted effects in that it would allow for discretionality in classifying a share as liquid, according to each Member State's criteria.

Question 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.

We prefer a), i.e. both conditions, for the above-mentioned reasons.

Question 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?

The Advisory Committee is unaware of any difficulties or divergence.

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 ?

Yes.

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.

The Advisory Committee is of the opinion that the discretion referred to in Article 36 (2) of the MIFID Implementing Regulation should be deleted. On the grounds of minimum legal coherence, the securities mentioned in that article cannot be listed in a regulated market if the UCITS in question has not received all the pertinent authorisations and been registered in the pertinent register.

Once the UCITS has been registered, the RM can decide to list it.
The reasons are obvious, most notably the requirement of a minimum degree of legal certainty for a security to be listed in a RM.