

Equity Markets

NYSE Euronext responses

Executive Summary

1. NYSE Euronext welcomes the opportunity to contribute to the formulation of CESR's views on the future of MiFID. As the debate evolves over the coming months, we see this contribution as part of an ongoing and open dialogue with all our key stakeholders, including our trading customers and issuer firms. It is evident that each party, including ourselves, has their own vested interests in the debate. However, it is only by keeping **the interests of the end investor** at the forefront that we will reach the right solutions.
2. In our view, the 'investor in the street' has yet to benefit from competition and lower fees in equities trading. What we have in fact seen is a reshuffling of economic rents and bargaining power between market infrastructures and intermediaries. As players have repositioned themselves, various new trading mechanisms, including opaque trading, have been launched by infrastructures and intermediaries alike, **with uncertain benefits for the overall public good**.
3. In any market, the integrity of the price formation process depends crucially on well organised *pre-trade* transparency. We welcome recent initiatives on the part of some banks to publish post trade information for their crossing networks. However, **we do not believe that post-trade transparency is a substitute for pre-trade transparency** in price formation.
4. Market practices with respect to OTC trading differ widely across Europe and MiFID took some steps to include certain parts of OTC trading (SI regime). OTC trading meets legitimate trading needs. However, important public debates about the appropriate size of 'non-accessible liquidity' are obscured by a lack of quality data and definitions. Those investors who participate in public price formation have a right to know how much of the market depends on the price formation that they provide. **It is time for 'recital 53' of MiFID to be transformed into a clear, harmonised and appropriately regulated framework**.
5. Despite boundaries blurring between intermediation and execution, **the same functional activity should be regulated in the same manner**. The alternative is an unequal treatment of investors between platforms. The current MiFID categories of RM, MTF and SI depend on each meeting a set list of criteria such as 'systematic', 'bilateral', multilateral and so on. However, categories which were designed to regulate a certain functional activity are often rendered meaningless when a firm simply claims that they do not meet one of the set criteria (when functionally they are performing the same activity as other regulated execution venues¹). At the heart of these issues

¹ See section 5.1 for examples.



lies a lack of clarity on what constitutes ‘intermediation’ on one hand, and ‘execution’ on the other. Explicit definitions of ‘execution’ and ‘intermediation’ in MiFID would make the criteria for categories such as MTF and SI far less open to interpretation.

As a starting point for discussion, we propose that the following definitions be incorporated into MiFID II and that they be applied *before* the category (RM, MTF, SI) of execution venue is adopted. We believe doing so would go a long way to providing ‘like regulation’ for ‘like activity’. Below, we refer to functional activity and not entity: it is perfectly reasonable for an intermediary to offer execution services provided that this functional activity is regulated as ‘execution’.

Proposed Definitions of Intermediation and Execution

MiFID already differentiates “execution of orders” and “investment advice” under Section 4(1.)(4) and 4(1.)(5):

(4) “Investment advice” means the provision of personal recommendations to a client, either upon its request or at the initiative of the investment firm, in respect of one or more transactions relating to financial instruments;

(5) “Execution of orders on behalf of clients” means acting to conclude agreements to buy or sell one or more financial instruments on behalf of clients;

However, a broader definition, incorporating the concept of best execution should be considered to clearly classify all functional activity:

Intermediation. A firm provides intermediation services when it receives or acknowledges a client instruction to purchase or sell an amount in a security² and seeks to provide best execution for that client based on the best execution policy set by the intermediary and agreed to by the client. This added value service includes the transformation of the client instruction into executable orders, which are then sent by the intermediary to an execution venue for execution, or traded on the OTC market. This can include, but is not limited to, the automatic slicing of large orders by an algorithm to avoid market impact.

Execution. A firm providing execution services collects orders from different market participants, organises them in an order book and executes trades using matching algorithms based on the rules set forth by that execution venue. The orders are executed exactly as they are entered into the system, according to the matching rules of that venue. Once a functional activity has been defined as execution, the appropriate venue classification should be applied (RM, MTF, SI, OTC).

6. MiFID has created a competitive environment between lit markets and this is a healthy form of competition. However, **it was never the intent of MiFID to create competition between opacity and transparency.** It is vital that competition between dark markets, on one hand, and between lit and dark markets on the other, has even regulatory treatment. In this MiFID review, we propose a levelling of the playing field.

² This instruction can include a multi-legged strategy over several securities or basket of securities



7. In particular, in order to preserve the integrity of price-forming markets, any dark trading taking place under the reference price waiver, be it on a Bank Crossing Network (BCN), dark MTF, SI or RM, should be provided with **an equivalent regulatory regime**. In summary:
 - a. Both BCNs and dark MTFs would be able to benefit from an identical level of pre-trade opacity up to a low threshold of market share in each security (empirical evidence has led the SEC to consider a figure of 0.25% in the US).
 - b. Below this threshold, BCNs and dark MTFs benefit from the same reference price waiver.
 - c. To ensure that investors are treated fairly, the same mid-point reference price should apply to both dark MTFs and BCNs.
 - d. Above this threshold, BCNs and dark MTFs should route to lit books or cease trading.
 - e. Post trade transparency should of course apply to both dark MTFs and BCNs on a real time basis (unless the trade is LIS).
 - f. Any linking or routing between two BCNs means that they have become ‘multilateral’ and must adopt MTF status.
 - g. Finally, CESR should monitor, on a systematic basis, aggregate volumes passing below the threshold across all platforms. Such statistics would provide a concrete base on which to take any future policy action.
8. In a similar vein, we propose a levelling of the playing field between lit MTFs and RMs. We see no reason for a differential regulatory treatment (or local interpretations of rules) for investors whose trades are executed on an RM and those who are executed on an MTF. The proportionality principle should not apply to investor protection. **MiFID should be revised so that MTFs provide identical regulatory protection as RMs.**
9. One of the biggest dangers we see in Europe is the treatment of retail investors. Certain firms in Europe are exploiting loopholes in MiFID (see section 5) to set up closed arrangements where retail flow is being ‘skimmed off’ in quasi-bilateral arrangements. Retail orders form a relatively uninformed flow in the market and, as such, are of enormous value to certain types of sophisticated trader. **Retail flow forms a vital part of the price formation mechanism** and is best served in a large, diversified and lit market, where it can interact with a variety of flows. The impact on the overall market of ‘skimming’ retail flow away from lit books is well documented in the literature³.
10. **We believe that proposals for a mandatory consolidated tape are misguided.** Partly drawing on our experience as administrator of the US tape, we believe that such a system in Europe would distort competition, find no market, and would simply add extra costs to the industry. The concerns with post trade data are being resolved by market forces.
11. Finally, we require **strong leadership to re-establish trust** in financial markets at the European level. As the debate evolves over the coming months, we should not lose sight of the original objectives of the legislation, which was to lower the cost of capital, lower prices for the end investor and drive forward the vision of creating a single European financial market.

³ Barclay and McCormick 2003. ‘Competition among Trading Venues: Information and Trading on Electronic Communications Networks’, *Journal of Finance* 58 (December 2003), 2637-2666.



Section 2: Transparency

Introductory comments

There is a natural tension in markets between those who prefer more transparency and those who prefer less. The regulators should strike a balance between these two interests, without compromising the overall price formation process.

Pre-trade opacity can meet justified trading needs

NYSE Euronext recognises that there are circumstances where pre-trade opacity can be justified:

1. If a firm commits its own capital and takes on a risk position to facilitate a client order, then it can be justified to not *immediately* reveal that position to the market.
2. If the size of an order means that disclosing its characteristics to the market will result in unacceptable price impact, it is reasonable to benefit from a certain level of pre-trade opacity.
3. CESR notes that some market participants see waivers as conducive to *innovation*. NYSE Euronext would urge regulators to have a clear understanding of what the innovation is and to ensure that the innovation is of clear benefit to the end investor and not the platform itself. Automating existing dark trading practices cannot be considered as an innovation.

Protecting price formation must remain the priority

As an operator of large lit books, NYSE Euronext favours transparency over opacity.

Each order that is executed outside transparent lit order books is an order that does not contribute to public price formation. We do not consider that post trade transparency is a substitute for pre trade transparency. In an order book, prices are formed ex-ante by the interaction of supply and demand of investors. The post trade data generated by this interaction obviously informs the *next* increment of price movement.

Furthermore, only large players have the scale to operate efficiently in a fragmented and less transparent market. A maximum of pre-trade transparency is in the interest of smaller players and helps level the playing field with larger players.

Thresholds should be put in place for dark platforms

For this reason, we agree that regulators should impose a limit on the amount of business that can be conducted in the dark. The main features of this limit should be as follows.

1. In line with the principle of ‘*same activity, same regulation*’, the same threshold should apply to all dark trading taking place under the reference price waiver on bank Crossing Networks (BCNs), MTFs and RMs.
2. A limit should be implemented on *an individual instrument basis* for the amount of dark trading that can take place on any individual trading venue.



3. The limit should be based on *concrete empirical evidence* of European trading (note the SEC threshold of 0.25%)⁴.
4. Above the threshold, any dark orders (except LIS) should be routed to a lit book.
5. Dark orders under this reference price waiver should only be executed at the mid-point (see question 41).

Pre-trade transparency

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

We broadly agree with this generic approach.

We strongly support a rule based approach applied consistently across national jurisdictions. Current discrepancies between national regulators create the scope for regulatory arbitrage, different interpretations and unlevel playing fields between platforms. This lack of consistency and certainty is seen by trading platforms and their users as endangering the level playing field. A clear, rule-based approach should be implemented with decisions on waivers taken by one central European body such as ESMA (if empowered to do so).

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

Trading in the dark is of particular benefit when facilitating the execution of a large transaction. However, we do *not* consider that it is in the best interests of retail flow to be executed in the dark.

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.

The large in scale waiver remains a valid route to avoid price impact. However, it has not been used as extensively as anticipated. CESR notes that some platforms have attributed the non-use of the LIS waiver to the widening gap between the LIS threshold and the average order size has widened because the average order size has fallen, “consequently, participants don’t get adequate protection from market impact when submitting orders”⁵.

We see no evidence of institutional order sizes declining. Trade sizes reported to NYSE Euronext’s block reporting facility have remained relatively constant since the introduction of MiFID. The issue is not the calibration of the thresholds, nor falling order sizes, but rather market practices which have changed. In particular, sell side firms have developed algorithms to slice large “parent” orders into “child” orders to more efficiently manage price impact.

It is our understanding that the LIS threshold was not originally designed on the basis of average order sizes in mind, but rather with respect to potential market impact and liquidity of the security.

⁴ Barclay and McCormick 2003. ‘Competition among Trading Venues: Information and Trading on Electronic Communications Networks’, *Journal of Finance* 58 (December 2003), 2637-2666. In this article, Hendershott explains the “cream skimming” of crossing networks that only send imbalances to public markets thus reducing liquidity and possibly welfare. In addition they note that this effect could be large even if the volume is small. In fact, to limit the negative effect of the CN, it should become bigger but at that moment the RM become considered as the “market of last resort” which reduce its liquidity and we shift into a dealer market very rapidly.

⁵ Paragraph 24 in consultation document.



Irrespective of smaller trade sizes, there is no indication that the market is less liquid today than it was three years ago. We therefore do not consider that the execution of a large order would generate more market impact than before.

For the purposes of MiFID, a child order should not carry the same attributes as its parent order with respect to the large in scale waiver (provided the child order falls below the LIS threshold).

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?

We see no justification for changing the current thresholds (see question 3). The following calibration already as stated in the MiFID implementation Regulation under Section 20 should be maintained:

“20. An order shall be considered to be large in scale compared with normal market size if it is equal to or larger than the minimum size of order specified in Table 2 in Annex II. For the purposes of determining whether an order is large in scale compared to normal market size, all shares admitted to trading on a regulated market shall be classified in accordance with their average daily turnover, which shall be calculated in accordance with the procedure set out in Article 33.”⁶

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.

As mentioned above, the LIS waiver is to protect from price impact and should be applied at the point where the order could generate price impact, that is, when it is to be sent to a platform for execution.

If the unexecuted portion of an order falls below the LIS threshold, it should not be able to benefit from the waiver because it will not generate market impact. These orders should contribute to price formation. We therefore favour option 2.

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.

No. The reference price waiver currently exempts small size orders, which would not generate any market impact, from pre-trade transparency. In many cases, the protection from market impact is in fact provided by the intermediary who has broken a larger order into small orders. Introducing a minimum threshold in the reference price waiver implies that the purpose of this waiver is to avoid market impact. The LIS waiver already provides the necessary protection from market impact for large orders.

⁶ This average daily return is calculated in MiFID on the following basis : “In respect of each share that is admitted to trading on a regulated market, the relevant competent authority for that share shall ensure that the following calculations are made in respect of that share promptly after the end of each calendar year: (a) the average daily turnover; (b) the average daily number of transactions; (c) for those shares which satisfy the conditions laid down in Article 22(1)(a) or (b) (as applicable), the free float as at 31 December; (d) if the share is a liquid share, the average value of the orders executed.”



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

In order to (i) implement a level playing field between dark trading venues and (ii) ensure equal treatment of investors, the same reference price rules should be implemented for any dark platform falling below the threshold.

Only the mid-point of the reference price should be used in the dark

There are currently several ways in which a reference price can be imported from a price forming platform (best bid or offer, mid-point, at some other point within the spread). We recommend that the following principles be respected when considering how reference prices should be imported from price forming books.

- Opaque trading should only exist where there is the likelihood of unacceptable price impact. If an order is not large in scale, it should in principle be transacted on a transparent pool. However, if such an order is sent to a dark platform, it should only be executed at mid-point.
- No execution should take place on a dark reference price system at a price that is already publicly displayed on a lit order book (i.e. at best bid or offer). Those investors who have publicly displayed their intention to trade in the lit book, thereby contributing to price formation, are in effect providing a free option to those other investors using lit book reference prices to execute in the dark. By sending orders which would otherwise match against these 'lit' investors to the dark, the latter are being penalised.
- In practice it appears difficult to avoid retail orders being sent to dark books. Nevertheless, a level of protection can be afforded by providing equal treatment of the prices at which retail investors are executed.

The following reference prices should not be permitted:

- *Best bid or offer.* Using a reference price waiver to execute at the best bid or offer in the dark diminishes price formation on public books. Furthermore, one investor is disadvantaged to another. If there is an intention to trade at the best bid or offer, then the order should be executed against a publicly posted best bid or offer.
- *Anywhere in the spread.* Executing at another price point in the dark means that directional price information is contained within the dark reference price system. Furthermore, retail investors are being treated unequally. Trading anywhere in the spread would be also detrimental to efforts to harmonise tick sizes: an investor could be executed in the dark at any tick size increment. There should be a coherent approach between the lit and the dark.

We consequently believe that the only reference price permitted should be the *mid-point* of the reference market or EBBO. Any other price is parasitical on price forming lit books.

Finally, in terms of enforcement, the practice of including fees within the spread (e.g. rebating a ¼ of the spread to "makers") has already been forbidden by CESR yet is pursued by certain MTFs. This should be monitored closely and each new mechanism should be approved by EMSA.

In accordance with the previous sections and explanations provided, NYSE Euronext suggests the following redrafting to Section 18 of the MiFID Implementation Procedure as follows:



18. Waivers in accordance with Article 29(2) and 44(2) of Directive 2004/39/EC may be granted by the competent authorities for systems operated by an MTF or a regulated market, if those systems satisfy one of the following criteria: (a) they must be based on a trading methodology by which the price is **determined by the mid-point** of the best bid and offer generated by ~~another system~~ **an RM, MTF** or a third party, where that reference price is widely published and is regarded generally by market participants as a reliable reference price;

More specifically, in order to (i) implement a level playing field between dark trading venues and (ii) ensure equal treatment of investors, the same reference price rules should be implemented for any dark platform falling below the threshold and as prescribed under **Section 18(1) and 19** of the MiFID implementation Regulation for MTFs and RMs.

Negotiated trade waiver

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

No. We agree with CESR that this waiver should be retained.

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?

We agree in principle that this waiver should be retained. However, there should be a level playing field with respect to the transparency requirements for orders held within the order management systems of intermediaries and matching venues. *Totally hidden* orders should not be allowed to benefit from the waiver.



Section 2.1.2: Systematic internaliser regime

Introductory comments

The SI regime should be better defined and enforced

The SI regime in MiFID was an important first step in bringing a small part of OTC business into a more appropriate regulatory framework. However, many market players currently view the SI regime as something of a 'voluntary code'. The SI definitions are drafted in such a way that it is easy for market participants to avoid declaring themselves as an SI. Indeed, the absence of intermediaries exploiting the SI status reveals that there may be some room for improvement in the regulation.

An important first step is to establish exactly which type of business the SI status is intended to cover. In any event, an investment firm systematically taking the other side of any client order is *performing the functional activity of execution* and should be regulated as such. The definitions must be improved to ensure that:

Any firm committing capital on a systematic basis, to bilaterally match client flow against its own account, should publish quotes visible to all and become an SI.

For the investor wishing to execute an order, an SI offers an alternative to RMs and MTFs. The regulatory environment should therefore ensure similar levels of pre-trade transparency for SIs as for RMs and MTFs. These quotes should be accessible to *all* and an investor should be able to trade against them.

Regulators should

- (i) Oblige all current SIs to display their quotes; and,
- (ii) Restrict SIs from only displaying their quotes to a limited group of intermediaries. The experience of flash trading in the US has highlighted the dangers of providing price information to small groups before the rest of the market.

With a more appropriate regulatory foundation laid, the rules applicable to the Systematic Internaliser status should then be enforced and the all pre-trade transparency rules abided by under strong regulatory scrutiny. As mentioned in the Investor Protection & Intermediaries review (Q18), we are in favour of imposing stringent publication rules to Systematic Internalisers.

A revised SI regime should be part of a larger effort to bring greater clarity and harmonisation to OTC in Europe.

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**

No, we are not in favour of removing the non-discretionary element from Article 21 (1) (a).

However, we are very much in favour of (i) clarifying the difference between execution and intermediation and (ii) a better definition of 'best execution' as suggested in the Investor Protection



and Intermediaries review. This, in our view, is crucial in an environment where there is no unique definition of best execution and where each intermediary sets out their own best execution policy. Please refer to our definitions as proposed in our introductory remarks on page 2 of the present document.

Once established, the implementation of a broker's best execution policy can not be on a discretionary basis. Financial intermediaries should be in a position to prove that their best execution policy has been strictly followed by providing data to that effect, as we have set this proposal forward in our response to the Investor Protection paper.

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.

Section 21 of the MiFID implementation procedure should be maintained as follows, only adding the details pertaining to the scope of "material commercial role" which, without clear directive can have an subjective interpretation:

1. Where an investment firm deals on own account by executing client orders outside a regulated market or an MTF, it shall be treated as a systematic internaliser if it meets the following criteria indicating that it performs that activity on an organised, frequent and systematic basis:

(a) the activity has a material commercial role for the firm, as stated in section 15 of the Recital of the present Procedures⁷, and is carried on in accordance with non-discretionary rules and procedures;

(b) the activity is carried on by personnel, or by means of an automated technical system, assigned to that purpose, irrespective of whether those personnel or that system are used exclusively for that purpose;

(c) the activity is available to clients on a regular or continuous basis.

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. On the basis that SIs are alternative execution venue to RMs and MTFs, in the interests of transparency and in order to ensure that best execution principles are upheld, we agree that SIs should display quotes in a size that better reflects the size of their intent to trade.

Appropriate waivers, such as those applicable to Iceberg orders, exist in order to avoid price impact on lit books. The order management facility waiver offers all necessary features in order to enable Systematic Internalisers to display more, if not all, the size of the business they are prepared to undertake and therefore we agree with CESR's proposal and suggest that the minimum quoting size be fixed at the average traded size observed in the previous month on a security by security basis.

⁷ Recital 15 of the MiFID Implementation Procedures states that: "An activity should be considered as having a material commercial role for an investment firm if the activity is a significant source of revenue, or a significant source of cost. An assessment of significance for these purposes should, in every case, take into account the extent to which the activity is conducted or organised separately, the monetary value of the activity, and its comparative significance by reference both to the overall business of the firm and to its overall activity in the market for the share concerned in which the firm operates. It should be possible to consider an activity to be a significant source of revenue for a firm even if only one or two of the factors mentioned is relevant in a particular case."



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

See answer to question 11.

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.

No.

Retail orders should participate in the price formation mechanism and should only be routed to the Systematic Internaliser if the price is guaranteed to be better there in order to ensure best execution. Therefore the Systematic Internaliser must display its best price at all times if it is to capture that flow and also open non-discriminatory access to its platform. Price improvements on these types of platforms equate to flash orders as they provide a potential improvement to only a select type of investor.

It is important to note that the *Implementation Directive* of MiFID states that for Retail orders, price is the main criteria when assessing Best Execution. This is stated as follows in Recital (67) of the Directive:

For the purposes of ensuring that an investment firm obtains the best possible result for the client when executing a retail client order in the absence of specific client instructions, the firm should take into consideration all factors that will allow it to deliver the best possible result in terms of the total consideration, representing the price of the financial instrument and the costs related to execution. Speed, likelihood of execution and settlement, the size and nature of the order, market impact and any other implicit transaction costs may be given precedence over the immediate price and cost consideration only insofar as they are instrumental in delivering the best possible result in terms of the total consideration to the retail client.

As expressed in our introductory remarks, a Systematic Internaliser bypasses completely the concept of anonymity, which is the corner stone of centrally cleared markets, in doing so, the Systematic Internaliser excludes the retail order from the price formation mechanism on the basis that they can identify this flow as being uninformed. The basis then for any price improvement would be the ease of hedging the retail order in question. If the SI could in fact offer a tighter spread than that of another execution venue, then all market participants should be able to benefit from it.

We believe that the level of the threshold (€7,500) used to define retail orders is appropriate and does not need revisiting.

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?

Please refer to our answers concerning post trade transparency in section 2.2.

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.



We have no use for this table as an Exchange, however it has been reported to us that this yearly updated list is difficult to use and sometimes bears inconsistencies due to the referential data base that is used to construct it.

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

Overall we see that SI activity can be positive for end investors. The SI status also provides a route to attract OTC business into a more regulated environment. We are therefore in favour of amendments that will enable this status to truly reflect the needs of those banks performing systematic internalising functions with an objective to provide investor protection. We trust that, with a more clearly defined and more adapted SI status, intermediaries, who propose OTC solutions to their clients, will endorse the Systematic Internaliser status. We are in favour of tighter surveillance in order to ensure that the SI pre-trade transparency principles are met for the benefit of end investors.



Section 2.2: Post-trade transparency

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

Yes, we agree with the general approach of more explicit standards on trade reporting. The lack of quality in trade reporting by all market players under MiFID is responsible for the deterioration in quality of OTC trade report data. Any venue that wishes to be an OTC reporting facility should be provided with an appropriate regulatory status, with an appropriate set of obligations.

We welcome the emphasis on data monitoring and a return to more *explicit* trade reporting standards for both the reporters and the reporting service providers. We would complement CESR's analysis with the following points:

- Standardisation of both data content and form are required. Timestamps are a good example and are critical to standardise across markets, both in terms of the format and level of precision. At NYSE Euronext for example, all trade reporting is performed in micro-seconds, as we consider that this is necessary to ensure good execution quality measurement. The same standards should apply to all execution venues.
- When the systems used for *trade publication* and *matching* are the same (lit RMs and MTFs) there are no issues with double counting and data quality: the trade is automatically published. The issue arises when the trade publication system and the trade matching system are separated (e.g. a voice brokered trade). In this case, the publishing venue cannot be responsible for the integrity of the data: the responsibility falls to the intermediary. The publishing venue does not have the ability to confirm all the details of the trade, such as currency units (pence vs pounds). They cannot block the publication: all they can do is flag as potentially 'suspicious'.
- Clearly action is needed to reduce the risk of double or non-reporting. We recommend that feedback be sought on experiences in the UK experience, where detailed guidance and oversight are provided.
- A minimum number of trade types should be identified, with the flexibility for each reporting platform to offer more detail if they wish. For example, when a VWAP is being executed on different markets, the individual trade should each be published following size and counterparty conditions. The global trade should not be published a second time.
 - o For example, NYSE Euronext identifies in message 242 all block trades (i.e. negotiated deals on NYSE Euronext listed securities that are LIS), other negotiated deals on NYSE Euronext securities, delta-neutral NYSE Liffe trades, VWAP trades and out of market trades⁸. Similarly, in message 243 we include all trade publication on non NYSE Euronext listed securities with a dedicated flag ('Delayedindicator') to inform the market about the potential deferred publication.
- All this detail should be relayed by data vendors to end users, who should have the say in what they use or not. Today, certain data vendors do not to carry all this information for commercial reasons. They should be required to do so.

Under Section 27 (1) a) of the MiFID Implementation procedure, post-trade reports must, among other things:

⁸ See on UTP MD documentation on our web site (<http://www.euronext.com/fic/000/056/492/564922.pdf>) at page 66



27 (1) a) [...] identify the instrument (share), the price notation and the venue where the transaction took place

In addition, MiFID requires (i) an instrument to be identified using a unique code; (ii) the price notation to identify the currency in which the price is expressed; and (iii) the unique harmonized identification code of a venue to be used". MiFID specifies the exact format for identifying a transaction executed outside the rules of a RM or MTF, but does not specify the unique code to identify an instrument, how to identify the currency or the unique code to be used to identify a venue.

Although CESR published Level 3 recommendations in February 2007 to promote the use of consistent formats, contents and protocols across the EEA, different identifications for instruments, price notations and venues are used in the marketplace. We therefore support the proposition to require the use of International Standards Organization (ISO) standard formats for post-trade transparency information (for more details, please refer to our answers under the Reference data section in Annex II).

NYSE Euronext also supports the proposal to establish a joint CESR/Industry Working Groups to finalize the development and clarifications of standards amendments and its harmonization by July 2010.

Timing of publication of post-trade information

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.

We believe that more stringent requirements on post-trade publication are required. To ensure the highest level of market transparency we propose the following framework.

- (i) All transactions (whether executed on RMs, MTFs, SI or any other system) should have the *same requirement* to be published in *real time*, with the following two exceptions:
 - a. On an exceptional basis, a delay of one minute after the agreement of the transaction may be used as a proxy for real time. In this case, the exception should be justified, disclosed to regulators and must not take place on a systematic basis, as occurs when reporting systems are programmed to automatically report just before the deadline (e.g. 59 seconds).
 - b. The only acceptable justification for not reporting in real time (or exceptionally up to one minute), is when the firm is *carrying a risk position*. Only a very limited and *closely defined* list of such exemptions should be accepted (as detailed in question 20). In particular, 'riskless principle' trades carry no risk and should be reported in real time.
- (ii) It is crucial to define the starting time from which the clock starts ticking. In our view, it should clearly be the time of agreement on the transaction between the parties, that is, the '*trade time*' (as opposed to the '*reporting time*' of the transaction into the system of the both parties). Otherwise, the timing of reporting obligations is rendered meaningless.
 - a. This 'trade time' should also be explicitly published and in sufficient detail in addition to the 'reporting time'.



- b. NYSE Euronext disseminates both trade date and time and reporting date and time. All time formats include microseconds in order to make the execution quality analysis more accurate. All these times correspond to the local time of the competent authority of the securities as defined by CESR.
 - c. The above forms a valuable set of metrics that should be used to:
 - o to assess the execution quality of the intermediary by the final client;
 - o to organise an effective market surveillance of the market;
 - o to inform any market participant about the potential delay.
- (iii) ESMA should have the capacity to enforce the above and to sanction any party that does not comply.

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?

In an environment where considerable investments are being made in low latency technologies to reach markets, we do not consider it unreasonable to require publication in real time. In our view, any additional cost of tightening reporting requirements is *more than outweighed* by the cost of not having the proper level of post-trade transparency. NYSE Euronext already publishes every single transaction done on its RM and MTFs on a real-time basis.

Deferred publication regime

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?

The only justification for deferral we see is when the intermediary is carrying a risk position. We understand the need to organise exceptions to real-time post-trade publication for large transactions in order to give enough time to the parties to cover their risk, for example, managing inventories, hedging and unwinding positions.

However, the existing system of exemptions based on both the size of the trade and the liquidity of the stock seems too complex. This complexity, combined with the lack of initial trade date and time publication, as well as the absence of specific flags to identify that the publication was deferred, makes it fully opaque to market participants and unusable.

We are therefore in favour of simplifying the matrix, even adopting the same approach as for pre-trade waivers for large transactions. We propose to align the deferred publication regime on both the Liquid Share classification and the Large in Scale concept. We are convinced that simplicity and coherence between the different pre and post-trade exemption would make it even more transparent, user-friendly and limit the risk of error.

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.

We recommend to keep the current 3 days for small and mid caps and to reduce to 1 day for blue-chips.



We understand the needs of investors to have a complete end-of-day picture of market activity, but market participants need to have enough time to cover their risk/position when trading a Large in Scale order.

We recommend to use a T+1 before opening rule (or at least a delay cut-off time after 8:00 pm CET). In any case, it also raises the key question of whether the end-of-day cut-off time needs to be harmonised across trading venues. For example, today at NYSE Euronext, all clients can make their real-time publication from 7:15 am to 8:00 pm CET, but there are no industry standards.

For the special case of small and mid-caps, shortening the deadline too much could make large transactions more difficult to execute or, alternatively, increase the cost of executing because of the higher risk taken by the intermediary.

Finally we have observed since MiFID that most LIS transactions done on our RM are published in real time. We therefore feel that the monitoring from regulators (to ensure that intermediaries do not use batches to systematically take advantage of the maximum delay) is sufficient to comply with real time constraints on a 'best efforts' basis.

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?

To avoid any mis-interpretation of the real-time publication waivers, the rule should concern each individual child order (execution) and not the original parent order (intermediation). That is, in no case can a large parent order benefit from real-time publication waivers if it is executed in several small sized executions. Any waivers should apply to each individual execution.

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.

Not directly, although more analysis is needed. We can see how reducing the delay of trade publication in certain cases could lead to some indirect costs for some participants as less time is afforded them to hedge positions.



Section 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

Yes, we agree with the proposal to include DRs, ETFs, ETCs and Certificates (as defined in footnote 14 of the CESR consultation document) into the scope of the pre- and post-trade transparency requirements.

We support CESR's approach, which is to not focus on specific legal characteristics of the product, but rather to establish whether the instrument is, from an economic point of view, equivalent to shares, which we believe to be the case for the abovementioned products.

Additionally, investors looking at products that have been listed on a regulated exchange have an expectation of transparency and disclosure; they are due a fair and orderly market and an efficient price formation mechanism. We are therefore in favour of imposing pre- and post-trade transparency principles to all instruments admitted to trading on a Regulated Market, notably those listed above (please refer to question 26).

If you do not agree with this proposal for all or some of the instruments listed above, please articulate reasons.

Not applicable.

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?

It would be appropriate to use the same MiFID transparency regime for the reasons stated 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.

We believe that all products admitted to trading on a Regulated Market should be subject to MiFID transparency requirements, notably Exchange Traded Notes, Warrants and Certificates (complex debt instruments that yield a return based on a formula disclosed at time of listing as opposed to the definition in footnote 14 of the consultation document).

We also feel that other instruments such as subscriptions rights and corporate warrants should also fall under the same transparency obligations, as we believe that from an economic point of view, they are equivalent to shares.



Section 4: Consolidation of transparency information

Introductory comments

As a pan-European exchange, a significant OTC trade reporting venue and operator/administrator of the US Consolidated Tape, we believe that we have a unique perspective to contribute to this important debate, as well as a role to play in restoring transparency for our customers.

NYSE Euronext agrees with the need for greater transparency for post trade data, but believes that transparency enhancements should not come at the expense of competition. MiFID has successfully created competition among markets, inevitably fragmenting liquidity. In our efforts to restore transparency, it is critical that we treat the *causes* of these problems rather than the *symptoms* in order not to further exacerbate the issues we are facing and potentially upset competition.

The Causes

Through our consultations, we understand that our customers' concerns regarding transparency relate primarily to *post-trade* information (trade prices and supporting details). These underlying problems inhibit their ability to consolidate post-trade information in order to perform important activities, such as accurately measuring transaction costs and monitoring the fulfilment of their best execution obligations. We understand the cause for these problems to be related to:

- (i) *Quality.* The quality of OTC trade reports varies and depends on somewhat ambiguous guidance provided under MiFID. Being non-prescriptive, they are subject to differing interpretations by trade reporters, resulting in inconsistencies and the omission of important details.
- (ii) *Lack of standards.* The lack of standards regarding security identifiers, market identifiers, currency denominations and trade conditions (i.e. trade flags).
- (iii) *Cost.* Both the explicit *and implicit* costs related to acquiring the necessary post-trade data can be prohibitive. These costs include the fees charged by the markets for post-trade data as well as the additional fees imposed by data vendors and other intermediaries.

There are also serious problems regarding the *accessibility* of some post-trade data which is reported to websites (and sometimes rather obscure venues). This data does not provide a convenient source or means of consolidation.

Summary of our position

- NYSE Euronext agrees with the approach to develop standards, along with a regulatory framework similar to the proposed APA regime as a means of improving OTC trade report quality and to reduce the burdens involved with data consolidation.
- NYSE Euronext regards a mandatory consolidated tape for all post-trade information as a short-sighted response, which will in fact further deteriorate information quality, add significant cost and distort the competition that MiFID has successfully created.



Regulatory framework for consolidation

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?

We support the proposed APA framework and believe that it is the best way to treat the issues related to OTC trade reporting. However, the enforcement role of APAs requires additional analysis and raises some important questions:

- If an APA is expected to intervene on the quality of the reports they receive, how will they be empowered to affect the quality?
- How will APAs be held responsible for adherence to consistent levels of quality, so as not to create a situation where incentives are created for APAs to impose lesser standards in order to attract lesser quality trade reports which seek ‘a path of least resistance’?
- If APAs are not expected to intervene on the quality of reports submitted to them, then how will the Competent Authorities otherwise assume this role of enforcement?

The identity of the reporting parties behind an APA will be considered sensitive information to both the APA and to the reporting parties. More clarification is needed on the obligations of an APA to publicly disclose these arrangements.

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?

Yes, we believe these obligations should be amended to provide specific guidance for the conditions requiring a trade to be reported, by whom it should be reported, to whom it should be reported, the timeliness of the reporting, the information included with the report, the format of the information, exceptions to these conditions as well as what should *not* be reported. In order for this transparency information to be effective, it must be made available centrally, through official publication agents rather than websites and similar locations.

We agree with the working group approach to define and propose standards for the publishing of the information both in terms of form and content: we look forward to participating.

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

Yes, but at what cost? We do not support any amendments to article 32(b), as the development of standards and the APA regime themselves will enable data to be consolidated easily and at a reasonable cost.

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)?

In a word: competition. Under a competitive framework, investors would retain choice in determining the provider of post-trade data, the markets and instruments they wish to source post-trade data for/from and the frequency, format and method of consumption. Competition will drive markets and



APAs to compete on the basis of the quality of their prices, which in turn, will improve the quality of the markets themselves and reward those who provide the best value.

A single source of post-trade prices effectively means that investors must consume all prices and presumably, any revenue allocated would be on the basis of turnover/market share. The result is that markets which produce prices of lesser value earn disproportionate revenue for these prices and in some cases *will create trading activity only for the purpose of generating market data revenue*, further diluting the information value of the post-trade data.

Cost of market data

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

No, once data quality is restored and standards make data consolidation easier, competition will drive costs to appropriate levels, so long as choice is provided to investors and post-trade data is available separately.

That said, we *do* believe that the issue of market data cost is much broader than the fees charged by exchanges and markets. Any changes considered for these provisions should take these costs into consideration. Our analysis indicates that the costs imposed by intermediaries are many times greater than the collective fees imposed by the data originators. This issue becomes clear in the case of delayed data which are absent of exchange fees.

CESR refers to cost figures provided by data providers which highlight the differential between the US and Europe:

“Market data providers have estimated that a total fee for a full data set of pre- and post trade data of all EU venues would cost about € 450 per user per month. In comparison, the cost of consolidated post-trade data in the US is US\$ 70 (around €50) per user per month.”[Para 95]

The subtle, but significant, difference is the comparison between combined pre-trade and post-trade data vs. post-trade only data. Once all markets offer post-trade data separately, these costs will be in line with one another. The cost comparison above also ignores the fundamental differences between US and Europe market structures: where the US is actually a single national market, Europe is made of multiple markets. For this reason alone, choice should be provided, so that investors are able to seek only the prices they need from the markets they participate in.

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, NYSE Euronext has for many years offered its post-trade data separately from its pre-trade data, which means anyone who chooses only to purchase our last sale prices separately pays €16 and is not required to purchase pre-trade BBO1 product at €59. We believe that a broad adoption of this policy will dramatically reduce the cost of obtaining consolidated post-trade data.

Some other markets have adopted this practice already and others have already announced that they intend to do so. However it is important that *vendors and other intermediaries* be capable and willing to make this data available separately.



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.

NYSE Euronext along with most other markets provides 15 minute delayed data without fees today. It seems logical that APAs would do the same without a requirement, as Markit BOAT has done.

Delayed data is an important choice for those investors who do not require, or cannot afford, real-time information, either due to the explicit costs related to exchange and vendor fees, or the implicit costs to support the receipt and use. It is important to note however that while 15 minute delayed data carries no exchange fees, vendors who make this data available to investors normally do impose service fees which can be significant. It is important that these costs are considered in the analysis relating to the cost burdens on market participants.

MiFID transparency calculations

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, but the calculations should be made separately for the accessible liquidity available through public markets. Timing issues should also be considered, as latency varies amongst markets and does not always provide equal opportunity for access to liquidity.

EU mandatory consolidated tape

Question 34: Do you support the proposed approach to a European mandatory consolidated tape?

No, we believe an EU mandatory consolidated tape is a short-sighted solution which will in fact add cost and further exacerbate the issues of transparency. More importantly, we believe an MCT will reduce the competition which MiFID has successfully created.

NYSE Euronext believes that the prices contained in post-trade information are the direct result of a price discovery process which is a core function of competing markets. The quality of these prices is an increasingly important basis for how markets compete with one another and should continue to be an important basis for competition.

An MCT effectively means that investors must consume all prices and presumably, any revenue allocated would be on the basis of turnover/market share. The result is that *markets which produce prices of no value still earn revenue for these prices and in fact, are incentivised to generate prices only for the sake of generating market data revenue*, further diluting the information value of the post-trade data.

NYSE Euronext operates and administrates the US Consolidated Tape (CTCQ) and has for a long time believed that it has outlived its usefulness and has in some ways damaged US market structure. The European markets are fundamentally different from the US and we believe these differences make a European tape even less useful and potentially much more damaging. *For examples, please refer to Caglio and Mayhew 2009, "Equity Trading and the Allocation of Market Data Revenue", Office of Economic Analysis, U.S. Securities and Exchange Commission.*

It is understandable why many MTF operators see a mandated tape as a potential source of revenue in order to sustain otherwise unsustainable business models. Few MTF operators are able to generate



market data revenue on their own and an MCT provides the basis for them to earn revenue generated from investors who are forced to consume prices they would otherwise not pay for. This revenue is critical for sustaining payment for order flow models (i.e. maker/taker rebate pricing) which is common practice for attracting orders or trade reports they wouldn't otherwise receive. It is also understandable why RMs would object to regulators enabling this type of competition particularly since these *MTFs are already importing their prices* to conduct their trading activities.

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

We believe a competing consolidator framework, together with post-trade data standardisation, is the right approach. Providing investors with choice means competition will be maintained and market quality will continue to improve driving further efficiencies for all market participants.

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?

The only benefit we can see would be the standardisation of post trade data. However, this benefit can (i) be achieved through alternative means and (ii) would come at the expense of competition, which we believe is not worth the cost.

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.

Yes, as we have observed in the US, most professional investors do not rely on the Consolidated Tape for the purposes of trading, as they are competitively forced to source data directly from the markets in order to achieve the necessary latency performance. Pre-trade information from is usually required to be sequenced with post-trade information making direct sources for both pre-trade and post-trade data a requirement. Not only does this result in additional costs but also creates potential conflict in monitoring, fulfilling and proving best execution obligations when prices are available directly *before* they are available via the Consolidated Tape.

Also, the absence of a trade-through rule in Europe or a mandate to purchase data from an MCT leaves questions as to why investors would choose to purchase data from the MCT. This would leave a smaller market across which the costs of the MCT would be distributed, creating greater overall costs for participants.



Section 5.1: Regulated markets vs. MTFs

Introductory comments

The impact of regulatory changes should be situated in the actual context of industry structure and the economic dynamics operating between different players. With respect to MiFID, there are a number of very different business models, cost pressures and ownership structures between regulated markets, MTFs, bank crossing networks and systematic internalisers.

Cherry picking

In order for the benefits of competition to be passed on to the end investor, it must take place on a level playing field.

MiFID has opened up one small part of the value chain to competition, that is, *execution on blue chips*.

However, Regulated Markets undertake a large number of costly or low margin activities in addition to the blue chip trading offered by MTFs. Such activities include listing, corporate events processing, maintaining large numbers of small caps, full disaster recovery, non-real time market integrity investigations and so on. They are part of the cluster of activities that help ensure the integrity of the price formation process.

In the business models of regulated markets, the revenues from blue chip trading typically subsidise these other these activities that are of such value to the rest of the market. These services and the prices formed are of immense value to national economies, to the rest of the market and particularly to MTFs who import their reference prices from regulated markets.

In the past, when exchanges were state or user owned quasi-monopolies, these activities were naturally performed for the public good. However, in a competitive market, regulators should be mindful of maintaining a system of economic incentives for market operators to continue to perform activities in addition to the business of blue-chip trading.

An unsustainable business model

The lit MTFs that have appeared since MiFID certainly have lower cost bases than exchanges. While a small part of this cost difference in cost bases can be imputed to a lack of legacy systems, it is in fact because they do not bear all the costs of running a regulated market (see above).

MTFs also offer heavily discounted fees to exchanges, meaning that revenues are modest. Given that execution platforms are still largely fixed cost businesses, the standalone business case for a typical lit MTF, netting a 0.05bps per side of a transaction, is marginal and would only approach profitability once a substantial share of the pan-European market is reached. We estimate that this break-even market share to be around 15-20% of CESR liquid stocks.

Indeed, based on 2010 volumes to date, if 100% of European volumes (CESR liquid stocks) were executed at typical lit MTF prices, this would only create a total revenue pool of €85m per year for all players. We do not consider this would provide enough to cover the costs of maintaining the full market integrity and surveillance that regulated markets currently provide to the rest of the market.

However, it should be recognised that MTFs have developed very different business models to the main European exchanges, which are largely for profit companies with diverse shareholder bases. The



user-shareholders of MTFs recoup their investments in other ways, such as earning maker rebates or in the form of lower fees on regulated markets (gained as a result of greater competition).

The proportionality principle

In order to facilitate new entrants, MiFID has allowed for a proportionality principle in terms of regulatory obligations on new market entrants. The aim was to reduce the cost base of entrants and provide scope for innovation.

- (i) In reality new market entrants are not the neutral, start-up venture-capital driven firms seen in other industries. New entrants are in fact market users situated further up the value chain from execution platforms. In general, these firms dispose of significant financial resources, IT and human capability compared to standalone start-ups and most “pure” operators of execution platforms.
- (ii) Given the above, we believe that regulators should revise regulatory treatment of new entrants and bring it on a level with regulated markets. In analogous fixed-cost network industries such as the airline industry, regulators do not allow new low cost providers to operate differing safety standards. The same principle should apply, within reason, to all venues matching client orders. In any event, certain MTFs are now matching volumes well in excess of most regulated markets in Europe.
- (iii) The same functional activity should be regulated in the same way. A summary of our proposals to level the playing field for investors trading on MTFs and RMs is outlined below:
 - a. All MTFs should have identical obligations to regulated markets (see below).
 - b. Identical standards for market integrity, both real time and non-real time should be applied to MTFs and Regulated Markets.
 - c. In an environment where execution venues are chosen by intermediaries, to avoid conflicts of interest, where intermediaries are also shareholders of MTFs, full transparency and disclosure should apply.
 - Either:
 - User-shareholders of platforms publicly disclose on a monthly basis the volumes routed to the platforms in which they have a shareholding.
 - Or:
 - Limits are placed on the ownership of platforms by users.

Privatising retail flow: ‘multilateral’ should mean ‘multilateral’

We oppose the recent development of execution venues by investment firms, acting on an OTC basis, *outside the scope of the MTF or Systematic Internaliser status*, that aim at systematically take on their house account the other side of each client order.

Indeed the current definition of OTC in MiFID (ad hoc, irregular and carried out with wholesale counterparties) should clearly prohibit this type of activity from being classified as OTC. Such activity should be functionally considered as *execution* and regulated as such.

Furthermore, these execution venues target one specific type of client flow and act as an order aggregator, taking one side on a systematic basis. Because retail flow is more often that not uninformed flow, rarely benefiting from state-of-the art trading tools and subject to greater latency than professional market participants, it should participate in the price formation mechanism.



Specifically because this flow is uninformed, it is more likely to not benefit from the best execution conditions if it faces one unique informed counterparty exclusively.

This brings us back to the principle of anonymity. If a professional market participant knows that the incoming flow is of one nature and one nature only (in this case uninformed), then it is much easier for them to make a market on a systematic and quasi- riskless basis. Indeed the cost of hedging will be far less if the professional party knows that they are systematically taking the other side of an uninformed order. In fact it is only because the flow is identified as uninformed that there is an opportunity for tighter spreads or price improvements.

While this may seem appealing for the retail client who benefits from the better execution, the long term effects of creating niche markets by client type are negative. These venues still rely on the efficiency of the price formation mechanism of other Regulated Markets and MTFs to run their systems. But with niche fragmentation, where entire order flow types are being lifted off the order book, the efficiency of this process may be endangered. The efficiency of price formation relies on the *diversity* of order flow, as it has recently been observed during the 6th May market crash.

If the price formation mechanism is no longer efficient on the market of reference, these venues will also have to widen out their spreads again in order to leave space for increased hedging risks.

These venues should (i) be classed as execution and (ii) become *multilateral* with *equal and fair access* to allow for interaction with different counterparties.

An example of playing with definitions to privatise retail flow

One example of an execution venue falling outside of MiFID definitions is the TOM initiative in the Netherlands. TOM has a broker license and is owned by a leading retail broker and a leading electronic market maker. In this JV, retail orders of approximately 300,000 clients (mainly retail) can be routed to the TOM platform. The functional activity of this entity should be clearly regulated as execution and not intermediation (a brokerage license should not be sufficient). TOM operates a technical system that combines many retail orders and limit orders from the professional market maker. The platform itself is not bilateral (it is a 'neutral' market place), not OTC (there is no crossing of client orders on an occasional basis) and TOM has no active or discretionary role in the system and or/trading cycle.

TOM states that it only matches the orders of its only two clients. However, they do not fit into the Systematic Internaliser definition since TOM does not deal on own account. TOM also states that it does not fit in the MTF definition because the fact that it has only two participants does not make it *multilateral*. TOM doesn't even fit in a 'Crossing Network' definition, since there are no 'own account' activities and there is no discretionary interference in the trading cycle. The result is that approximately 300,000 investors do not have the protection they could and should have on an MTF or RM⁹.

The above is just one example and many other 'definition dodging' techniques can and are being used. Such issues would be avoided if MiFID included a clear upfront distinction between execution and intermediation (before classification as SI, MTF, RM etc).

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

⁹ TOM became operational in 2009 but in the mean time another TOM entity ("TOM 2") has acquired a MTF status but TOM 1 is still allowed to match retail order on a large scale.



Yes, NYSE Euronext agrees with this proposal and believes the regulators should go further to provide equal treatment for investors trading on both MTFs and RMs. Even if both MTFs (Section 13) and RMs (Section 39) have organisational requirements pertaining to conflicts of interest, risks and transparent procedures, these obligations are clearly less detailed and less explicit for MTFs than they are for RMs.

- NYSE Euronext believes that the *same wording* as the one used for RMs in section 39 should apply to section 13 pertaining to MTFs.
- In addition, given that the proportionality principle is not required, we believe that MTFs should be subject to two further obligations that apply to RMs, as listed under Section 39 (paragraphs e and f). These obligations are the following:

Additional obligations to MTFs

(e) to have effective arrangements to facilitate the efficient and timely finalization of the transactions executed under its systems;

(f) to have available, at the time of authorization and on an ongoing basis, sufficient financial resources to facilitate its orderly functioning, having regard to the nature and extent of the transactions concluded on the market and the range and degree of the risks to which it is exposed.

These requirements will therefore apply uniformly to MTFs and RMs making their understanding and legal interpretation more adapted to the primary objectives of MiFID.

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

Yes, NYSE Euronext believes that the unlevel playing field, including the concept of “proportionate approach” should be addressed in order to make these requirements equivalent for MTFs and RMs.

NYSE Euronext supports the proposal and recommends that section 13(4) be deleted and replaced by the equivalent wording of section 39 a), b) and b) as applied to RMs.

Member States shall require the MTF:

39 (a) to have arrangements to identify clearly and manage the potential adverse consequences, for the operation of the regulated market or for its participants, of any conflict of interest between the interest of the regulated market, its owners or its operator and the sound functioning of the regulated market, and in particular where such conflicts of interest might prove prejudicial to the accomplishment of any functions delegated to the regulated market by the competent authority;

39 (b) to be adequately equipped to manage the risks to which it is exposed, to implement appropriate arrangements and systems to identify all significant risks to its operation, and to put in place effective measures to mitigate those risks;

39 (c) to have arrangements for the sound management of the technical operations of the system, including the establishment of effective contingency arrangements to cope with risks of systems



disruptions;

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?

The main benefit of this proposal is that *investors* would receive the same regulatory protection and security between markets that are offering the same service.

The main benefit for Investment firms and MTFs is to have clearer and easier to follow rules regarding the management of their organisational requirements including the management of risks and conflicts of Interest. The proposal states explicitly that “arrangements” have to be put in place for organisational requirements and not only the intention to do so.

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.

If the business models of MTFs do not enable them to bear the additional costs of equivalent regulation, then these business models should be revisited.



Section 5.2: Investment firms operating internal crossing systems/processes

Introductory comments

Although the amount of business passing through such networks is still relatively modest, the issues have created much debate since they go to the heart concerns about (i) opacity versus transparency, (ii) the blurring of boundaries between execution and intermediation and (iii) level playing fields between venues.

We recognise that the trading of securities away from a central marketplace can meet the legitimate needs of certain market users, and as such we support the existence of broker dealers operating crossing networks *subject to adequate regulation and a level playing field*.

It remains in the public interest to have as much transparency as possible without negating/damaging the legitimate need for the transfer of risk in the wholesale market. This is true to the original objective of MiFID and we recognise the benefits that have been brought to the market and end investor as a result.

We do however feel it fair for all participants for there to be harmonisation of the regulatory framework across like-for-like businesses/trading activity. MiFID had established a clear vision of three types of execution platform (RMs, MTFs and SIs), with the bulk of OTC activity channelled into MTFs or SIs. Business carried out on crossing networks falls between two definitions:

- *OTC*. Under MiFID OTC business is categorised as ad-hoc, irregular, carried out with wholesale counterparties in deals above market size (cf recital 53). Trading activity carried out on crossing networks is not systematically ad-hoc or irregular.
- *MTFs*. MTFs bring together multiple third parties in accordance with non-discretionary rules. Operators of crossing networks state that they are discretionary.

Internalisation via crossing networks is subject to regulation by virtue of each bank's intermediary status. The issue is that the matching venues they operate are not regulated as *matching venues*: under current legislation, there is no requirement for operators of crossing networks to establish orderly and non-discretionary execution systems.

Crossing networks mix two types of activity:

- (i) *Risk business*. We believe that investment banks committing capital to clients and facilitating their trading needs is a legitimate business practice. Indeed, it has been held as a basic principle of public markets since trading began.
- (ii) *Basic crossing functionality*. Within crossing networks, client orders are matched with each other.

In principle we acknowledge that '(ii) basic crossing functionality' should subject to the same transparency rules as MTFs and RMs. However, taking a pragmatic approach, we acknowledge the following realities of the market:



- (i) Crossing networks are deeply embedded within the internal order management systems of banks. Obliging client-client matching to be split off will impose inefficiencies on intermediaries.
- (ii) Aggregate volumes currently passing through crossing networks remains very small.
- (iii) Any potential outcomes should under no circumstance stifle innovation and competition, and should always benefit to the end user.

We therefore propose that a level playing field be introduced between crossing networks and dark MTFs:

- (i) The amount of business passing through any individual crossing network or dark MTF in a particular security benefiting from pre-trade opacity must not exceed a certain threshold.
- (ii) The actual threshold figure should be determined bearing in mind the size and structure of European markets and should be based on firm empirical evidence. (Note the SEC figure of 0.25%).
- (iii) Above the threshold of ADV, the crossing network or dark MTF must respect the same pre-trade transparency requirements as lit MTFs and RMs.
- (iv) Safeguards should be put in place so ensure that the amount of aggregate business done on all crossing networks and dark MTFs does not exceed some overall threshold (for example controls on parent company ownership of multiple dark platforms / some overall % ADV cap on dark pool business).
- (v) As soon as two crossing networks interact (e.g., routing or linked), the crossing networks should automatically be obliged to assume MTF status.
- (vi) In all cases, dark MTFs and crossing networks must publish post trade data to a similar high standard of quality as lit.
- (vii) If the crossing network or dark MTF operates under the reference price waiver, then only the mid-point price of the reference price market should be used. This point is crucial to ensure that:
 - a. a level playing field exists between dark MTFs and crossing networks;
 - b. no price formation (or even directional price information) exists in the dark;
 - c. investors are treated the same, be they buyers or sellers;
 - d. the price forming role of lit books is preserved.

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. By introducing definitions of ‘execution’ and ‘intermediation’ as the first level of definition into MiFID, crossing networks would immediately be defined as the functional activity of ‘execution’. NYSE Euronext supports the proposal of incorporating the definition of broker internal crossing into MiFID and specifically into Section 4 of MiFID in order to more clearly address the nature and scale of business executed by broker dealers in their internal crossing systems/processes.



The inclusion of crossing networks in MiFID should be a small step in creating greater clarity and trust around OTC business, whilst allowing innovation.

This definition should be broad in order to address a larger number of Investment firms operating these systems. The definition should be drafted to include the concepts of internal electronic matching systems operated by an investment firm that executes client orders against other client orders or house account orders.

The following definition could be added under Section 4 of MiFID:

A “Broker internal crossing process” is an international electronic matching systems operated by an investment firm that executes client orders against other client orders or house account orders.

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

A crossing network fits the functional definition of execution. However, beyond this, it is vital for the remainder of OTC business to be more clearly defined and regulated in Europe, *in parallel* with the amendments to the current definitions.

Dark pools have a significant competitive advantage due to their lack of pre-trade and post-trade obligations. More detailed disclosure of order routing statistics should be required to allow for better assessments of order routing decision making and to provide investors with sufficient information to make informed decisions about whether to seek access to dark pools. Therefore the requirements should ideally be in a stronger form than through a bespoke requirement. They should be included in a clear rule as a specific additional Section in MiFID.

NYSE Euronext also supports the implementation of these requirements on a *coordinated European level* in order to ensure the highest level of liquidity and integrity across exchanges, MTFs and crossing networks.

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)?

Above a certain threshold (the same for crossing networks and dark MTFs), the platform should either:

- (i) Route incremental flow to a lit book; or
- (ii) Cease trading

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.

- (i) There should be a threshold at the level of the individual security per platform. CESR should undertake a study to produce clear, empirical grounds for threshold level.
- (ii) In addition, CESR may consider monitoring overall volumes passing under threshold to provide a concrete quantitative basis for any future public debate.



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.

Yes. In order to (i) ensure a level playing field between venues and (ii) avoid encouraging growth in dark trading, as soon as two crossing networks are interacting, the crossing networks should be considered to be multilateral and should immediately become an MTF.

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.

This is for the operators of crossing networks to answer.



Section 6. MiFID options and discretions

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.*

Depending on the flexibility that ESMA will have, for certain issues it could be beneficial to replace the waivers with legal exemptions, thus ensuring that supervision and sanction will be without controversy. One of the added advantages being that these can be put in place much faster, as no transposition is required.

From a purely competitive point of view it is important that there be no room for interpretation concerning these waivers as they shape the actual market model built by the different types of trading venues, an MTF exploiting a waiver differently from a Regulated Market may result in creating a price formation discrepancy that would attract only one sort of order flow, leading to niche fragmentation.

Determination of liquid shares

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

We feel it is important to maintain both criteria as these criteria bear different significance in different market segments and in different times. The addition of either of these criteria to the free float criteria seem appropriate and will allow markets where the average daily turnover is quite low yet where trading is active (number of trades) to be regarded as liquid shares in accordance to the free float criteria.

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

We are not in favour of removing this discretion as it offers flexibility which is necessary in the European landscape where stock market practices vary immensely from member state to member state.

We therefore support that Section 22 (1) should remain as follows:

22 (1) A share admitted to trading on a regulated market shall be considered to have a liquid market if the share is traded daily, with a free float not less than EUR 500 million, and one of the following conditions is satisfied:

- (a) the average daily number of transactions in the share is not less than 500;
- (b) the average daily turnover for the share is not less than EUR 2 million.

However, a Member State may, in respect of shares for which it is the most relevant market, specify by notice that both of those conditions are to apply. That notice shall be made public.

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.

See question 48.

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?

We currently see no difficulties in this discretion.

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.

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.

No comment.



ANNEX II – PROPOSED STANDARDS FOR POST-TRADE TRANSPARENCY

Reference data

Question 1: Do you agree to use ISO standard formats to identify the instrument, price notation 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.

Yes. This should be consistent with transaction reporting and is already implemented on NYSE Euronext regulated markets.

Exchange of shares determined by factors other than the current market valuation of the share and non addressable liquidity

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

In principle, we are in favour of such identification and we already identify most of these transaction types. These transaction types are part of our trading manual and the user community has already integrated them in the software they have developed. Changing this would add costs to intermediaries and changing would be a long and costly process.

We propose that a translation table be developed for existing trade types. This would also allow each individual service offer to be more granular if needed. For example, today, NYSE Euronext offers greater detail in LIS or differed trades that it has identified. Offering a lookup column or table, where existing codes could just be placed into a bucket, would be more efficient in terms of cost and effort. Existing clients would not be impacted and data users would have the information they require.

It is also important that vendors make the necessary developments on their side to exploit all these tags. NYSE Euronext already has cases today where some vendors do not use and re-disseminate this available information to their final clients. Data vendors should not have the option to pick and choose only certain trade flags on the basis of commercial importance to their client: they should offer the whole set of trade types with the possibility for the client to filter what they wish to use.

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.

No, we do not believe so.

Identification of dark trading

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

As stated above we strongly recommend using distinct MIC codes for lit and dark trading, even if it is organised by the same operator. It is also important that on a real-time basis all market participants



could be informed of the dark nature of a trade. This real-time flagging would of course only concern small trades that did not benefit from real-time publication waivers.

The importance of the flag is crucial for the transparency to final clients.

For this same reason, an intermediary executing a VWAP trade on behalf of a client may be expected to deliver an execution based on dark prints that are unavailable to that intermediary.

Finally, in the interests of a level playing field, this real-time dark trade flagging should concern all dark transactions on any RM, MTF, SI or Crossing Network that benefits from a pre-trade transparency waiver.

However we recognize a potential risk linked to real-time identification of the dark pool and consequently agree to make the dark trade reporting in real-time *without the platform MIC code* on the condition that a global activity report is made public *for free at end of day per each dark pool and per instrument with MIC code*.

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.

In any case it should be made public on trade-by-trade basis in real-time and meet the authorised deferred publication delay. The potential for aggregate end-of day could be a possibility, as mentioned in question 5 above.

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?

The same MIC code (platform) should not be able to mix both lit and dark trades.

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.

In principle we agree that the use of a unique transaction identifier is needed. At a platform level, this is obviously something NYSE Euronext has applied for many years.

The real added value would be to have this unique identifier on the intermediary side and per execution (i.e. not at parent order level). This is the best way to ensure no consistent duplication of publication on consistent track record between parties and along the whole chain.

Applying the unique identifier at a venue/APA level would not solve all the issue about multi-reporting.

Cancellations

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

Yes.



NYSE Euronext has always included in its standard message a trade cancellation identifier. For example, message 242 contains the field ‘*TradeCancelIndicator*’¹⁰ that takes the value 0 for valid trade and 1 for cancelled trade.

Amendments

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

So far NYSE Euronext does not allow any amendments of trade publication. The initial trade needs to be cancelled and a new trade needs to be created.

Negotiated trades

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

Yes, in principle these trade need to be flagged. NYSE Euronext identifies two types of negotiated trades under the field ‘*BlockTradeCode*’ in message 242: the letter B for block trades (i.e., trades on the NYSE Euronext-listed securities that meet the Large in Scale criteria) and the letter N (for other negotiated trades).

¹⁰ See UTP MD documentation on our web site (<http://www.euronext.com/fic/000/056/492/564922.pdf>) page 66