CESR's Advice on Possible Implementing Measures of the Directive 2004/39/EC on Markets in Financial Instruments

- submission from OMX Exchanges

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1. Introduction

OMX Exchanges is a Finnish company within the OMX Group which controls Stockholm Stock Exchange and Helsinki Stock Exchange, which are operating as exchanges and regulated markets in Sweden and Finland respectively. Also the three Baltic exchanges (Tallinn Stock Exchange, Riga Stock Exchange and partly Vilnius Stock Exchange) are wholly or partially owned by OMX Exchanges.

OMX Exchanges co-operate with the other Nordic exchanges (i.e. Oslo Börs, Copenhagen Stock Exchange and Iceland Stock Exchange) within the framework of the Nordic exchange alliance NOREX. All exchanges within NOREX offer trading on the same trading platform and have harmonized rules for trading in equities. In addition, Stockholm Stock Exchange has developed an exchange- and clearing co-operation with regard to derivatives with the Danish-, Norwegian- and UK-markets.[1]

Stockholm Stock Exchange and Helsinki Stock Exchange are both members of FESE and as such fully subscribe to the views put forward by FESE to the current CESR consultation. In addition to the FESE response, we would like to submit some own remarks to the consultation. Those views are painted out in detail in the following.

However, before going into details, we would like to reiterate the concerns which at a number of occasions has been raised by practitioners so far during the course of the level 2 discussions, namely the problem with the number of details in the level 1 directive as well as the draft CESR advice on level 2. One observation which is evident is that the number of detailed rules in MiFID on level 1 is difficult to combine with the bedrock in the Lamfalussy criteria that the level 1 regulation should be based on “framework principles”. Now, we have to face the fact that MiFID to a large extent is a product of compromises and far to detailed as would have been wanted or expected. We recognize that this puts a huge challenge for CESR in presenting its advice to the Commission. The signals so far is that CESR elaborates with even more details on level 2, and in doing that risks to put the over all objectives of MiFID in danger. In plain language, MiFID is to a large extent aiming at creating a level playing field amongst a variety of trading venues with the objective of promoting efficiency and to foster innovation in order to make the European markets truly competitive in a global environment. To take an example, to envisage only a limited number of market models and to propose detailed rules attached to such models is clearly a way which may effectively stiffle innovation with regard to development of new market models. In fact, CESR does not even acknowledge the existence of hybrid markets, with the particular needs and concerns attached to such markets which, we would claim, are applied by most of the European markets today.

[1] Notably, Oslo Börs and NOS Clearing ASA in Norway, Copenhagen Stock Exchange and Futop Clearing Centre in Norway and EDX.London and LCH.Clearnet in London. OMX Exchanges has also developed a co-operation with regard to trading in derivatives with Eurex.

As we see it, the only feasible way for CESR to promote the objectives for MiFID would be to swift from proposing a number of detailed rules in favour of a more principle based approach. The rationale for such an approach would be to recognize that MiFID include a sufficient number of details, and that a principle based approach on level 2 would be the most efficient way to convert the level 1 rules into an practical environment, without setting the objectives of MiFID aside.

2. Section III – Markets

2.1 Market Transparency

2.1.1 Pre-Trade Transparency

2.1.1.1 Pre-trade Transparency requirements for Regulated Markets (Article 44) and MTFs (Article 29)

As indicated above, we consider the draft to be to rigid in describing different market models. Basically, the draft is based on that the only market models which exist are (i) continuous order driven markets, (ii) market maker markets, and (iii) floor trading. In addition, only one model for auctions is described. To start with, it should be made clear that the models described in the draft are the ones that are most common today, but that there may be combinations, or hybrids, and that new models can develop over time.

We are particularly concerned with regard to auctions. There are a number of auction types used on different segments of the markets (e.g. American auctions, Dutch auctions, open calls, hidden calls, display order by order, display order by level etc.). The structuring of an auction should be up to the relevant market in consultation with its customer, based on market demands, to determine. To streamline the architecture of auctions as in the draft advice is inappropriate and would be counterproductive to the goal of creating efficient and competitive financial markets across Europe. A better way in doing this would be to acknowledge that different arrangements with regard to auctions may apply, and to set forth some minimum requirements on such auctions (e.g. like transparency with regard to the indicative equilibrium price, if any, and the indicative volume that might be executed at a given point in time). A Transparency requirement to display the full order book during an auction, when that trading session is not admitting full immediacy, seems an inefficient and costly requirement.

Questions

***Q12.1**. Do consultees agree with the specific proposals as presented or would they prefer to see more general proposals?*

***Q12.2**. Is the content of the pre-trade transparency information appropriate?*

***Q12.3**. Do consultees agree on the proposal regarding the depth of trading interest and access to pre-trade information?*

***Q12.4**. Do consultees agree on the proposed exemptions to pre-trade transparency? Are there other market models which should be exempted?*

***Q12.5**. Do consultees support the waiver for "crossing systems" as defined in paragraph 13? Could pre-trade transparency for crossing systems have a negative impact on liquidity or create the potential for abusive behaviour?*

***Q12.6**. Do consultees support the same minimum size of trade for the waiver to transparency pre-trade and delayed publication post-trade? Are there circumstances in which the two should be different?*

***Q12.7**: Do consultees have a preference for one of the options proposed for defining the block size, are there other methods which should be evaluated?*

Q12.1: We would prefer more general requirements, since the specific proposal put forward by CESR may put constraints on market driven solutions which may be to the advantage of creating an efficient and competitive European financial market and to foster innovation.

As to one detail, it is uncertain how “market orders” shall be assess, in light of the requirement in Clause 4 in Box 12 that quotes shall be “firm”. CESR should comment on that.

As an example with regard to the number of details, it is not clear what is meant by “designated market makers” under Clause 5 in the same box. To our understanding, different regimes may be applied by different markets. Some exchanges has a distinct legal framework with firm requirements with regard to e.g. quotation obligations for marker makers. That would clearly fall within the scope of the requirement. Other exchanges recognize the existence of Liquidity Providers or alike supporting the liquidity. There may or may not be requirements laid down by the exchange for such entities. It should be made clear that the mere existence of Liquidity Providers or equivalent does not qualify to fall within the requirements attached to designated market makers under the level 2 regulation.

Another example is the proposed requirements with regard to updating and withdrawal of quotes from market makers in Box 12 Clause 4-6. In our opinion, the proposal is far too detailed in that respect and is in fact lacking a practical meaning.

Q12.2: Yes.

We also put a question mark as to which information should be kept available. Clause 2 in Box 12 sets the minimum elements to be displayed, and read in concert with Clause 10 it raises the question as to the distribution of additional information. As an example, where an exchange provides counter party information to its members, it is uncertain whether such information has to be made public to all investors as well. In our opinion, it should be made clear that the requirement in Clause 10 only is catching at minimum information as required in Clause 2. With regard to additional information, it should be up to the relevant trading venue to determine how much and to whom such information shall be distributed.

Q12.3: Basically yes. However, even though members as well as investors may have access to pre-trade information on a real time basis, it should be recognized that such right is conditioned on the existence of "reasonable commercial terms". It should also be recognized that such terms may differ between different categories of interested parties. For example, a RM may have a different pricing structure in relation to members than in relation to investors. There might also be distinctions between different categories of investors, like investors which trades through "on line brokers" and investors which get the information through the channeling of traditional vendors (like Reuters, Bloombergs etc.).

It should also be acknowledged that RMs or MTFs might use different arrangements for making the information available. Such arrangements could e.g. be (i) directly from the trading system, (ii) indirectly through internally adapted price distribution systems, or (iii) indirectly through the facilities of a third party. Depending of which kind of facility is chosen, the requirement to distribute information has bearing on the capacity of the systems. Such systems could have limitations in handling trading data information in relation to large volumes, and any capacity upgrade would come with a cost, which gradually would have to be allocated to the investors. On the same hand, all investors do not have a need to have access to unlimited order depth information. We therefore strongly recommend that the requirement should be set at the five best levels, as indicated in indent 20. It should also be recognized that the information, at least for heavily traded stocks like Ericsson, Nokia etc., could be provided in an aggregate form (also called Market by Level, or, MBL). It should also be possible to provide information to investors in the form of "snap-shots", in order for such investors to receive real time information at a lower cost.

In conclusion, it seems like the current European standard for disclosing pre-trade order book information to all investors is set at aggregated information (Market By Level) with regard to the best five levels. There is no or low demand or need from investors to get more information, and for the average investor it would be of no value to see more. Against this background, to set the requirement to an unlimited number of lines in the order book would clearly be to over-prescriptive and the potential impact on system development costs has not been analyzed in this context. In addition, even where the requirement is determined at five levels, the level 2 rules should acknowledge the fact that even such grade of transparency in exceptional circumstances could be inadequate to the needs of the markets and the participants, and such participants would in such circumstances be happy whatever degree of transparence they would get (also if it where to be displayed on less than five levels). To take an example, in a distress situation (like the September 11 event), where there is a comprehensive degree of uncertainty with regard to the proper pricing of financial instruments, it might prove harmful for investors to provide to much transparency.

Therefore, the advice should have an exit with regard to the requirement, as finally determined, in case of extraordinary market conditions.

Q12.4: Yes, even though we question that "Iceberg Orders" should be viewed as a waiver. In our view, such order type is a facility which e.g. a RM may offer its participants. If that would not be acceptable, most members firms (at least the larger ones) would most probably develop such functionality in their own trading engines, which would give them a competitive advantage compared with those firms which can not develop such functions themselves. However, in practical terms, this is not a problem, since the proposal seems to accept orders of a iceberg type per se, without any requirement for the RM or MTF to seek a prior acceptance from the regulator.

Q12.5: We question whether it would not be of interest to publish also pre-trade information with regard to crossing systems. Such information is maybe not relevant as regards the pricing of the instruments, but it would clearly indicate the volumes at which trades could be executed at a given price and consequently the interest for trading in such instruments.

Q12.6: It should first be pointed out that we do not fully grasp in which situations deferred publication with regard to pre-trade information relating to block trades may be applied. In theory, the only situation which we can think of is where a RM or MTF facilitates some form of Upstairs Trading, i.e. a block trading facility for its members. The practical consequence of that would be that transparency would apply between the members which have access to such a sub-market, but not to members or investors outside that restricted circle. Even if such a facility were in place, it can be questioned whether there is a need for pre-trade information to such block trading, instead the requirements for post trading disclosure, perhaps in a deferred form, would suffice.

As to the thresholds, we are of the opinion that the thresholds with regard to pre-trade transparency and post-trade transparency should not be the same. Clearly different considerations are to be made in relation to the two forms of transparency. Further, to our understanding, the issue is by far more important to resolve with regard to post-trade transparency than in relation to pre-trade transparency.

Having said that, we advise CESR to further contemplate its position that one common threshold for the waiver should be set for all trading venues within the EU. Even though such an approach makes sense in the context of achieving one single market for trading in equities, it could in fact have implications from a competitive point of view. The driver for establishing such threshold should be that trades which could have the potential of moving the market substantially should be eligible for a waiver. In a perfect European market, one common threshold would be rational, since the party having the risk position would be able to unwind it at any trading venue. However, the process of consolidation trading information and accessibility across all trading venues in Europe will take quite some time. Participants that disclose their post-trade information at a certain trading venue would most probably be expected to unwind the position by trading at the same venue. This assumption will be even more accurate until the time when there is a common clearing & settlement infrastructure in place in Europe. There is clearly a risk that, if the thresholds are set to high and based on the trading at the most liquid market (or, even worse, all markets), that may in the short run result in that the rules with regard to deferred publication becomes void in relation to smaller markets, which would put such markets in a competitive disadvantage in relation to the market

where the share in question is mostly traded. Consequently, in the short run, common threshold would run counter to one of the main objectives behind MiFID, namely to foster competition between trading venues.

Q12.7: No. However, in our opinion, it is imperative that the method chosen gives clear signals as to the fact that only a limited number of trades should be eligible for deferred publication. We also do think this is an area where it would be in the best interest of the European financial markets and to its stake holders, being investors or intermediaries, to adopt a principle based approach rather that fixed methods for calculation. To mention one argument for this, the regime to be applied will be applicable to all current and future market models, and to adopt a to rigid approach, like a mathematic formula for the calculation, might rule out alternatives which would be optimal viewed from the perspective of a particular market model. CESR could for example in its advice propose something in line with the following;

"deferred publication with regard to orders shall only be allowed where such orders based on their size would have a negative impact on the price formation process, with due consideration to the market model applied by the trading venue. The operator of the Regulated Market or MTF shall justify to its regulatory authority the acceptance of deferred publication of orders or recently concluded trades".

2.1.2 Post-Trade Transparency

2.1.2.1 Post-Trade Transparency requirements for Regulated Markets (Article 45) and MTFs (Article 30) and for Investment Firms (Article 28)

Firstly, it should be pointed out that there is an intrinsic conflict in MiFID with regard to the objectives of, on the one hand, promoting efficient price formation and, on the other hand, creating a Pan-European level playing fields between different trading venues. We think it is fair to say that the consolidation today is of good quality both on a Pan-European basis (notably with regard to major European Blue Chip companies) and regionally (notably with regard to small cap and mid cap companies). MiFID will probably not have any major impact on the consolidation with regard to the first category, however there is a risk that the competition with regard to reporting channels on the regional level will be negatively affected with regard to consolidation. Today, either concentration rules or firm reporting requirement in the rules of regulated markets guarantee a sufficient degree of consolidation, whereas this might not be the case in the post-MiFID phase.

One aspect of the above is the legal framework with regard to deferred publication of recently concluded trades. To set the thresholds for deferred publication on a Pan-European level is clearly adequate in relation to Pan-European Blue Ship companies, whereas such thresholds would be counterproductive for the trading on equites which are mainly of interest to local investors. We would therefore strongly propose that the level 2 advice recognizes this distinction, and one way in handling this could be to relate the rules to the market cap of the companies. For example, if the market cap of a company would exceed a pre-determined level, defining it as a European Blue Ship Company, then the Pan-European regime would apply. Where the market cap would be below such

a limit, then the rules should facilitate for the threshold for deferred publication to be set at the local level.

In order to promote consolidation, in particular on a regional level, it is imperative that the reporting channel used by the investment firms have implemented well functioning arrangements for quality checks with regard to post-trade information.

In addition to what FESE puts forward in this respect, we endorse that investment firms be able to make public their post-trade information through the facilities of e.g. a RM. However, the requirement to make such information available when the market is closed may result in excessive costs without adding any real value to investors. The requirement means that an investment firm carrying out trades in the evening (maybe when trading takes place in a distant time zone) may have to implement dual arrangements (through the RM during open hours, proprietary arrangements when the market is closed). Another alternative would be to force RM's to make their systems available for such purposes also when the markets are closed. Our opinion is that it could not be rational to require investment firms to instantly (or "as close to real time as possible") publish recently concluded trades entered into outside market opening hours. In such situations, we conclude that it should be sufficient if the information is published prior to the opening of the market the next following trading day.

Questions

***Q13.1**: Do consultees support the method of post-trade transparency (trade by trade information), should some other method be chosen (which)?*

***Q13.2**: Do consultees support the inclusion of "aggregated information" in paragraph 22 or should it be left for market forces to provide on the basis of the information disclosed under paragraph 21. If it is included what should the content be?*

***Q13.3**: Do consultees support the two week period for which the post-trade information should be available?*

***Q13.4**: Should some minor trades be excluded from publication (and if so, what should be the determining factor)?*

***Q13.5**: Do consultees agree on the method of defining the time limit in paragraph 24 and is the one minute limit capable of meeting the needs of occasional off-market trades?*

***Q13.6**: Do consultees support the view that only intermediaries who have created a risk position to facilitate the trade of a third party should benefit from deferred publication or should all trades which are above the block size be eligible for deferred publication?*

***Q13.7**: Should the identifier of a security be harmonised and if so to what extent? What should be the applicable standard (ISIN code, other)?*

***Q13.8**: Should more information be available on stock lending? If so, which should be the content? Are there other similar types of activities which should be covered?*

***Q13.9**: Should CESR initiate work, in collaboration with the industry and data publishers, to determine how best to ensure that post-trade transparency data be disseminated on a pan-European basis?*

Q13.1: Yes. However, it should be made clear what this will mean in practise. For example, if a client wants to sell shares, and part of the transaction is executed on a RM and part of it by negotiation with another investment firm, only the part which have been executed outside the RM should be subject to the post-trading disclosure obligation (the part which has been executed in the trading system is already displayed). It could be even more complicated, where a client turns to a broker, which uses another broker to execute all or part of the transaction. In these kinds of chains, it should be made clear that there is only one genuine transaction which should be disclosed, otherwise there would be a risk that one and the same trade would be subject to dual or maybe triple disclosure. One could always argue that this should not be a problem, but from a RM point of view it is as problematic to disclose to much as it is to disclose to less. In our experience the problem is not that members firm does not want to report recently concluded trades, rather the problem has been that too many transactions have been reported (due to the interest for members firms to score high in the public figures with regard to their market share of the trading).

Q13.2: No, in this respect, market driven solutions should be preferred.

Q13.3: We have no objections to the proposal.

Q13.4: We can see no reason why minor trades should be excluded from the transparency requirements.

Q13.5: The proposed one minute time limit is to rigid and we question whether it is feasible to apply such a “One Size Fits All”- approach in this respect. There are different forms of post-trade disclosure, as we see it. Firstly, for trades which takes place in an electronic trading system (being on a RM, and MTF or through the facilities of a Systematic Internaliser), such trades would normally be disclosed instantly. Secondly, investment firms would normally not have a problem to meet the one minute deadline with regard to uncomplicated trades concluded over e.g. the telephone. Thirdly, however, there are situations where trades are negotiated directly between two parties, where the terms are not of a plain vanilla type and where the trade may also involve other parties. It is important that the investment firms involved are given sufficient time to reassure that the information provided to the market is adequate. In that respect, one minute seems to be too narrow.

In light of the above, we propose that the main rule should be that trades should be published to the market immediately, but that an ultimate time limit be set at five minutes (which in our view reflects current market practice in Europe).

Q13.6: We do not question the proposal.

Q13.7: We support that the identifier be harmonized, and that the ISIN-code be used as such identifier. Potentially, it could be worthwhile to consider using the market code together with the ISIN and the currency code.

Q13.8: In our opinion, the reporting of stock lending is important information to the market, since it gives an indication with regard to the amount of short selling. However, such information is not without problems, another reason for stock lending is to promote settlement in case the seller can not deliver shares when due. This may also differ from market to market, depending on which mechanisms for stock lending which are in place in order to diminish the risk for failed settlement. We therefore consider this issue to fall outside the scope of MIFID.

Q13.9: We do not oppose to CESR initiating such a work. However, CESR should participate in an advisory and, possibly, coordinative role only.

2.2 Admission of financial instruments to trading

Questions

***Q14.1**: Do consultees agree on the requirements for admission to trading? Should more (qualitative and/or quantitative) criteria for admission to regulated markets be specified in the level 2 measures? If yes, which?*

***Q14.2**: Do consultees agree on the role proposed for RMs in order to ensure that the issuers fulfil their disclosure requirements?*

Q1: Yes, we agree on the requirements for admission to trading. There should not be more criteria for admission to regulated markets specified in the level 2 measures. This would decrease the possibilities for RMs to compete with different offers.

Q2: Yes

3. Section IV – cooperation and enforcement

3.1 Transaction Reporting

3.1.1 General comments

A general tendency within Europe is the consolidation between trading venues, notably regulated markets, being in the form of mergers or as co-operations. One common feature for such consolidation is that the markets to a large extent offer trading on the same technical platform. As an example, all the RMs in the Nordic countries and, shortly, Baltic countries will use the same trading system for trading in equities. To a large extent, members can use one single point of technical connection to access the system, and thereby get access to a number of markets.

With regard to transaction reporting requirements, it is imperative that such reporting can take place as cost efficiently as possible for those falling under such requirements. It is as imperative that the arrangements used for such purposes is as simple as possible, and we would argue that CESR should commit to exploring any possibility of using the infrastructure used by the vast majority of the European investment firms today also for transaction reporting purposes. The issue is very much about connectivity and cost efficiency in order not to raise the compliance costs for investments firms to an unacceptable level.

Having said the above, we would argue that European regulated markets today are in a good position for offering channeling of transaction reporting from investment firms to the European regulators. It is of utmost importance that CESR recognizes this fact, and does not impose requirements which would be detrimental to the possibilities for RMs to offer this particular service to their respective members.

In order to facilitate for a development as envisaged above, CESR must first adopt a position which makes it possible for RMs and MTFs to, on behalf of investment firms, forward transaction reporting to one single point of entry only, notably to the home country regulator of the RM or the MTF, as the case may be. In our opinion, MiFID does not raise any obstacles for adopting such an approach. The next step would be to develop modalities for sharing transaction reports amongst the relevant regulators as envisaged in MiFID. If CESR were to propose reports to be submitted to the home country regulator of each and all investment firm, that would in effect make it hard for using the systems of RMs or MTFs for transaction reporting purposes.

In order to sort out any potential question mark with regard to confidentiality, the above does not rule out the possibility of RMs or MTFs forwarding transaction reporting to the relevant regulator without being able to make use of or even get access to such information for its own commercial or other purposes.

3.1.2 Specific comments

3.1.2.1 The methods and arrangements for reporting financial transactions

Questions

Q15.1: Should competent authorities be able to waive the requirement for investment firms to report transactions in electronic format? Should such an exemption be limited to exceptional cases, and what cases would those be in your view?

Q15.2:In respect of bond markets and commodity derivatives markets, new systems for reporting financial transactions will probably have to be put in place in many Member States, in order for investment firms to be able to meet the requirements of the Directive and Level 2 advice. (Note that Article 20(1)(b)) of ISD1 already requires investment firms to report all the transactions covering bonds and other forms of securitised debt to competent authorities, though Member States have the right to provide that this obligation only applies to aggregated transactions in these instruments.) To what extent should the implementing measures allow market participants more time to implement these proposals ("transitional regime")? What could be legitimate reasons for such a possibility?

Q15.3: To what extent should CESR investigate the possibility for future convergence between national reporting systems? What are the advantages and disadvantages of harmonising at EU level the conditions (including format and standards) with which all the reporting methods and arrangements have to comply in order to be approved, instead of, as proposed by CESR, harmonising the conditions at a national level? What impact might harmonisation have on existing national reporting channels, national monitoring systems and on the industry?

Q15.4: Do you agree with the set of the general minimum conditions suggested? If you do not agree, what other general conditions would be more appropriate in your view? In particular, taking into consideration the responsibilities of investment firms on the one hand and third parties and other reporting channels, on the other, do you think that CESR should include the requirement of a standard-level agreement between an investment firm and a reporting channel in the list of general minimum conditions, or would this be better addressed at Level 3? What is your view on the border line as to the responsibilities for reporting if done by a third party acting on behalf of an investment firm or by a reporting channel?

Q15.5:What other issues, if any, should CESR take into account when responding to the Mandate concerning the "methods and arrangements for reporting financial transactions"?

Q15.1: No comments.

Q15.2: No comments.

Q15.3: It should be left to the market forces to decide the structures for reporting. A too detailed and rigid regulation on level 2 would run the risk of being an obstacle to more cost efficient an innovative solutions which may be contemplated due to discussions between regulators and service providers and based on commercially viable considerations.

As an example, there are a number of infrastructures in place due to consolidation or co-operations between RMs across Europe. The trading platforms, which to a large extent are available to investment firms on a cross border basis, will presumably have available a lot of the information which is to be gathered under the TRS-regime. To our understanding, it would be cost efficient to explore the opportunities to use current trading platforms also for the purposes of TRS, instead of inventing new systems for such purposes. However, it is not evident that system adaptions can take place without increased costs, and the possibility of using different trading platforms for these purposes should therefore be assessed on a case by case basis.

Q15.4: We are of the opinion that any requirement with regard to SLA's should be dealt with on level 3. It should also be made clear that an SLA is not required where reporting is made by a RM according to Article 25.5, since the investment firm obligation to report is waived in such a situation.

Q15.5: No comments.

3.1.2.2 Criteria for assessing liquidity in order to determine the most relevant market in terms of liquidity for financial instruments

Questions

Q16.1: Do you agree with the approach to use proxies as suggested above? If you do not agree, what other approach would be more appropriate in your view?

Q16.2: Do you agree with the suggested proxies? If you do not agree, what other proxies would be more appropriate in your view?

Q16.3: Do you agree with the suggested revision procedures? If you do not agree, what other revision procedures would be more appropriate in your view? In particular, do you agree that the launch of the review procedure should be at the discretion of competent authorities? If not, what other factors should trigger the launch of the review procedure? Do you agree that the time period to be taken into account when applying the criteria "turnover" and/or "volume" and the definitions of such criteria can vary according to the financial instrument under consideration? Do you agree, therefore, that the time-period cannot be determined in a Level 2 legal text and should be defined under Level 3 arrangements for cooperation between competent authorities? If not, please provide suggestions regarding the time period that should be taken into account.

Q16.4: There are specific cases, such as a simultaneous IPO in more than one Member State, where the proxy approach does not work. Should such cases be addressed at Level 2, and if so, in more general terms leaving the details to Level 3, or in a more detailed way already at Level 2? Are there other cases similar to the one mentioned?

Q16.5: What other issues, if any, should CESR take into account when responding to the Mandate concerning the "criteria for assessing liquidity in order to define the most relevant market in terms of liquidity for financial instruments"?

Q16.1: We fully support the use of proxies.

Q16.2: The proxies proposed should in our view be sufficient in the majority of cases. However, with regard to derivatives, and given the ongoing consolidation between market, the proposed proxies may lead to strange results. As example, Nokia shares are most traded in Finland and Sweden, but it is rather obvious that the majority of the liquidity with regard to some derivatives based on Nokia would be Eurex, i.e Germany. It seems like situations like this may be solved by using the alternative method proposed by CESR, i.e. assessing the actual liquidity (either in terms of volume or in terms of turnover). Another example is the consolidation between the Swedish and Finnish markets, i.e. OMX Exchanges (notably Stockholmsbörsen and Helsinki Exchanges). In case of derivatives based on finnish indexes, the index is calculated by the RM based in Finland, whereas al trading in derivatives based on such indexes takes place on the RM in Sweden. It could be

questioned whether the Finnish FSA have any interest in getting regulatory reports with regard to trading in such derivatives, given that such derivatives by definition are not traded in Finland at all. The situation becomes even more complex if it is taken into account that the majority of the trading in such derivatives is carried out by finnish securities firms being distant members of Stockholmsbörsen. In fact, the result would be the same in relation to all derivatives which is based on a finnish share, where such derivative is not traded on Eurex. From another standpoint, the question could be raised as to which FSA in such a situation has the biggest interest in getting the information for regulatory purposes. The examples above lead us to the conclusion that proxies with regard to derivatives, in general, and derivatives based on indexes, in particular, should be contemplated further. One might argue that proxies should not be applied on derivatives at all.

Q16.3: We have not objections to the suggested revision procedure.

Q16.4: We have no opinion in this respect

Q16.5: CESR should also address how cross border mergers should be handled. If, for example, two companies are traded on two different RMs, and they merge, then there would not be any market at which the share was first admitted to trading. It could be argued that the market were the company absorbing the other company should be the most liquid one under the proxy method. However, in these situations, the presumably high trading activity may be substantial at both RMs for quite some time, following the merger.

Additional comment: The proposal under 10 that the RM be kept confidential might make sense on a major market with more than one competing trading venues, but in practical terms it would be of no use. As is indicated in the proposal, in most cases it is evident which market is the most liquid, and therefore the confidentiality would not add any value.

3.1.2.3 The minimum content and common standard/format of transaction reports

Questions

Q17.1: Do you agree with the approach to standardise/harmonise the list in Annex A to this draft advice only at a national level in order to be able to keep reporting systems that are already in place? If you do not agree, what approach do you think would be more appropriate?

Q17.2: What are advantages/disadvantages of moving towards harmonisation at EU level as regards the standards or format of the list in Annex A to this draft advice? To what extent would harmonisation at EU level of the standards or format of the list in Annex A to this draft advice impact the existing national data collection mechanisms and national transaction databases? Do you see merits in having an EU harmonised regime for the content and format of transaction reports, taking into consideration whether future and immediate long-term benefits could compensate the initial costs of harmonising the transaction reports?

Q17.3: Do you agree with the proposed fields in Annex A and B to this draft advice? If you do not agree, what other fields would be more appropriate in your view?

Q17.4: How would you define the field "agent/propriety"?

Q17.5: What are the advantages/disadvantages of requiring the field "client identification code" in transaction reports, bearing in mind the objectives of transaction reporting? What are your views on making the client/customer identification field mandatory in transaction reports? What are your views on the idea to promote a pan-European code for client/customer identification? Do you see any legal impediment to the introduction of such a code in your Member State?

Q17.6: What other issues, if any, should CESR take into account when responding to the Mandate concerning the "minimum content and the common standard or format of the reports to facilitate its exchange between competent authorities"? Will this approach serve the objectives pursued?

Q17.1: We agree.

Q17.2: In our opinion, general guidance as to the standard and format may well be issued at level 3, but not level 2, in order facilitate flexibility and cost efficiency. Firm rules in this respect is not recommended. It is important that investment firms reporting arrangements can be adjusted in a pace which does not impose unwarranted regulatory costs for such firms.

Q17.3: We have no comments to Annex B, but support most of the proposed content in Annex A (cf. the answer under Q17.5 below).

Q17.4: The distinction should be based on whether the investment firm deals on a riskless basis or not. This would mean that agent trades as well as trades executed on a riskless principal basis should be labelled as “agent”, and trading that takes place against the investment firms trading book at risk should be labelled as “propriety”.

Q17.5: We are generally hesitant to the requirement to provide information about the end customer. That may not only be a problem due to national legislation, but may also restrict the possibilities to use external reporting channels. As an example, such a requirement might require an investment firm to report directly to the relevant regulator, even though reporting through the facilities of a RM would be more cost efficient (reason being, that it might be a problem to provide end customer information, also from a technical point of view, to a RM and there may also be controversial for a investment firm to provide such information to a RM where such firm and RM to some extent run competing business. However, the provision of nd customer information should not be a “show stopper” with regard to the possibilities to make transaction reporting through the systems of a RM or an MTF. It would be possible to require such information to be ring fenced, and thereby to require a RM or an MTF not to get access to such information.

Q17.6: No comments