Waivers from Pre-trade Transparency

CESR positions and ESMA opinions
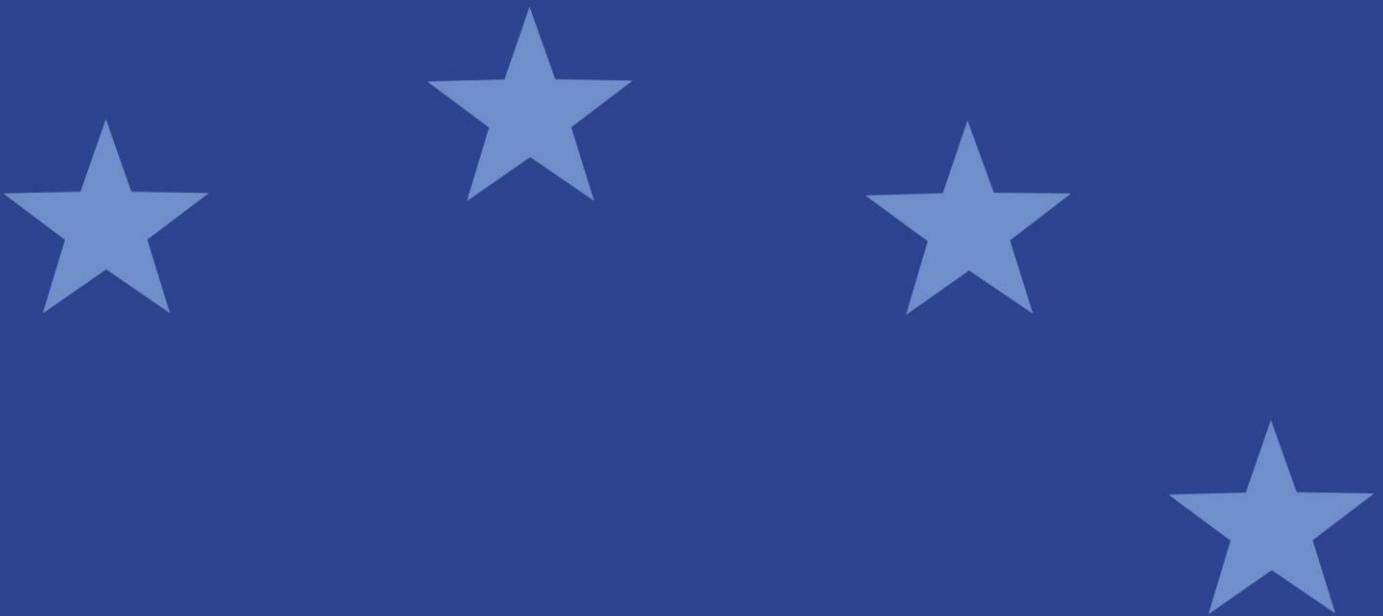
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I. Background

1. Under the Markets in Financial Instruments Directive (MiFID), operators of Regulated Markets (RMs) and Multilateral Trading Facilities (MTFs) must make public the current bid and offer prices and the depth of trading interests in respect of shares admitted to trading on a regulated market unless exemptions apply. However, MiFID allows competent authorities to waive the obligation for operators of RMs and MTFs regarding pre-trade transparency requirements for shares based on the market model or the type and size of orders.

2. MiFID is made up of the following European legislation:

   a. Directive 2004/39/EC, which was adopted in April 2004. It is a 'framework' Level 1 Directive which has been supplemented by technical implementing measures.

   b. Implementing Directive 2006/73/EC[1] and Implementing Regulation 1287/2006[2].

3. MiFID allows competent authorities to grant four types of waivers which are contained in Articles 18 and 20 of MiFID Implementing Regulation. Possible waivers apply to:

   - **Reference price systems**: Systems where the price is determined by reference to a price generated by another system and the reference price is widely published and regarded generally by market participants as a reliable reference price.

   - **Negotiated trade systems:** Systems that formalise negotiated transactions, provided the transaction:
     - takes place at or within the current volume-weighted spread reflected on the order book or the quotes of market makers in that share or, where the share is not traded continuously, within a percentage of a suitable reference price set in advance by the operator of the RM or MTF or
     - is subject to conditions other than the current market price of the share (e.g. a volume weighted average price transaction).

   - **Order management facilities**: Orders that are held in an order management facility maintained by a RM or MTF pending those orders being disclosed to the market.

   - **Large-in-scale transactions**: 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 of the MiFID Implementing Regulation.

4. In May 2009, ESMA's predecessor (CESR) developed an internal process according to which the arrangements for pre-trade transparency waivers sought by operators of RMs or MTFs were considered at CESR level at the initiative of the relevant national competent authority. This process was one

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[1] Commission Directive 2006/73/EC of 10 August 2006 implementing Directive 2004/39/EC of the European Parliament and of the Council regarding organisational requirements and operating conditions for investment firms and defined terms for the purpose of that Directive, 2.9.2006, OJ L 241/1.

[2] Commission Regulation (EC) No 1287/2006 of 10 August 2006 implementing Directive 2004/39/EC of the European Parliament and of the Council as regards record-keeping obligations for investment firms, transaction reporting, market transparency, admission of financial instruments to trading, and defined terms for the purpose of that Directive, 2.9.2006, OJ L 241/1.

of the tools used by CESR to exchange views on the practical application of the waiver provisions in the MiFID Implementing Regulation and to foster supervisory convergence.

5. Similarly, ESMA is required to play an active role in building a common supervisory culture by promoting common supervisory approaches and practices. In this regard, ESMA will continue to develop opinions under Article 29(1)(a) of the ESMA Regulation[3] about the MiFID compliance of specific systems or functionalities in accordance with its internal waiver process.

II. Purpose

6. The content of this document is aimed at competent authorities under MiFID to ensure that in their supervisory activities their actions are converging in accordance with the opinions provided by ESMA. However, the examples are also intended to help firms by providing clarity as to the content of the MiFID requirements without creating an extra layer of requirements and to assist them when they intend to develop new trading functionalities.

III. Status

7. The ESMA waiver process leads to an ESMA opinion to the notifying competent authority under Article 29(1)(a) of the ESMA Regulation on the MiFID compliance of a specific proposal for a pre-trade transparency waiver. The information published on the examples of pre-trade transparency waivers is a practical convergence tool used to promote common supervisory approaches and practices under Article 29(2) of the ESMA Regulation. Additionally, it aims at providing information on the application of the relevant provisions of MiFID in specific cases and at assisting market participants when they create new functionalities.

8. Due to the nature of the information provided, formal consultation is considered unnecessary.

9. The consideration of the waiver proposals covered in this document is based solely on the information provided by the relevant national competent authority. According to the existing legal framework in MiFID, the responsibility for the final decision on the waivers lies with the national competent authorities.

10. The specification of a system or an order type as being MiFID compliant/non-compliant does not imply that only a system/order type having exactly the same characteristics is considered to be MiFID compliant/non-compliant. However, ESMA's consideration would naturally have the same outcome if other arrangements have exactly the same characteristics as the ones already considered. In any case, reference to a specific product, process or service does not constitute or imply that it is recommended or favoured by ESMA or any of the national competent authorities.

11. CESR published its first positions on MiFID pre-transparency waivers on 20 May 2009 and last updated them on 22 December 2010. This document endorses the decisions previously adopted by CESR[4]. The information in the table will be updated on a continuous basis as and when ESMA forms new opin-

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[3] Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC Regulation, OJ L 331, 15.12.2010, p. 84.

[4] On the basis of Article 8(4) of the Rules of Procedure of the ESMA Board of Supervisors (ESMA/2011/BS/1), guidelines, recommendations, standards and any other Level 3 material issued by CESR continue in force until such time as they are re-adopted, replaced or revoked, having the status provided for under the Charter of the Committee of European Securities Regulators.

ions on waivers. The date CESR decisions were made or ESMA opinions were given is included after each example.

12. The table does include all waivers granted by national competent authorities. The information is published without prejudice to any new considerations that ESMA might want to make following new information and/or new developments having an impact on its content.

IV. Table: CESR positions and ESMA opinions on functionalities subject to the waiver process

Article 18(1)(a) of the MiFID Implementing Regulation

'Reference Price Waiver'

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 the following criteria:

They must be based on a trading methodology by which the price is determined in accordance with a reference price generated by another system, where that reference price is widely published and is regarded generally by market participants as a reliable reference price.

In the case of systems having functionality other than described above, the waiver shall not apply to that other functionality.

Functionalities that satisfy the criteria contained in MiFID	_Example 1[5] (May 2009):_
	All orders will be submitted to the system for execution/crossing at the midpoint of the European Best Bid and Offer (EBBO). The European Best Bid price is the highest binding bid (or buy) price available in the central limit order books of the regulated markets and MTFs contributing to the determination of the EBBO. The European Best Offer price is the respective binding lowest offer (or sell) price. Thus the EBBO will always deliver the tightest spread available in the contributing trading platforms.
	In order to ensure the integrity of the price formation process, the EBBO is calculated using data from the primary

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[5] The decision regarding this example has been adopted by CESR at qualified majority, according to Article 6 of the Charter, with the dissenting opinion expressed by the French AMF, the Italian Consob and the Greek CMC. These three competent authorities have a dissenting opinion on the compliance of the described system with the criteria set out in Article 18(1)(a) of the MiFID Implementing Regulation. These three competent authorities consider that by selecting the two sides of its quotes from different and multiple systems, any such platform undermines the principle of fair competition between trading venues and may ultimately damage the quality of the price formation process taking place on displayed markets and overall market efficiency.

exchange and other sufficiently liquid (e.g. in terms of market share for a particular share) European regulated markets and MTFs where the share is traded. The EBBO is distributed by market data providers.

All orders will be matched (or crossed) at the midpoint of the EBBO. Midpoint orders will only interact with other midpoint orders.

The system will allow trading participants to submit immediate-or-cancel (IOC) orders (which will be immediately matched at the midpoint of the EBBO or cancelled).

The relevant competent authority granting the waiver will monitor that the system continues to fulfil the criteria set out above and will report its findings as necessary as part of future consideration by ESMA of the application of the waivers.

Example 2[6] (May 2009):

All orders will be submitted for execution/crossing at one of the following European Best Bid or Offer (EBBO) reference prices:

– the midpoint of EBBO;

– the European Best Bid; or

– the European Best Offer.

The European Best Bid price is the highest binding bid (or buy) price available in the central limit order books of the regulated markets and MTFs contributing to the determination of the EBBO. The European Best Offer price is the respective lowest offer (or sell) price. Thus the EBBO will always deliver the tightest spread available in the contributing trading platforms.

In order to ensure the integrity of the price formation process, the EBBO is calculated using data from the primary

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[6] The decision regarding this example has been adopted by CESR at qualified majority, according to Article 6 of the Charter, with the dissenting opinion expressed by the French AMF, the Italian Consob and the Greek CMC. These three competent authorities have a dissenting opinion on the compliance of the described system with the criteria set out in Article 18(1)(a) of the MiFID Implementing Regulation. These three competent authorities consider that by selecting the two sides of its quotes from different and multiple systems, any such platform undermines the principle of fair competition between trading venues and may ultimately damage the quality of the price formation process taking place on displayed markets and overall market efficiency.

exchange and other sufficiently liquid (e.g. in terms of market share for a particular share) European regulated markets and MTFs where the share is traded. The EBBO is distributed by market data providers.

The system will allow crossing as follows:

− EBBO midpoint orders will only interact with other orders entered for crossing at the EBBO midpoint reference price;

− European Best Bid orders will only interact with other orders entered for crossing at the European Best Bid reference price; and

− European Best Offer orders will only interact with other orders entered for crossing at the European Best Offer reference price.

All executions will occur at one of these three EBBO reference prices.

The system will allow trading participants to submit immediate-or-cancel (IOC) orders pegged to bid, mid or offer of the EBBO (which will be immediately matched at the relevant pegged point or cancelled).

The relevant competent authority granting the waiver will monitor that the system continues to fulfil the criteria set out above and will report its findings as necessary as part of future consideration by ESMA of the application of the waivers.

Example 2a (December 2011)

A *platform operator* intends to set up a system with the same key characteristics as example 2.

The European best bid/offer ("EBBO") providing the reference prices at which orders may be executed is calculated and published by the trading platform. Under the trading platform's EBBO policy, eligible MTFs which are candidates for inclusion in the EBBO are assessed for reliability and viability. In making this assessment, the market operator applies the following criteria:

- Whether the eligible MTF meets a minimum liquidity threshold based on a pan-European market share evaluated over a quarterly cycle;

- Whether transactions on the eligible MTF obtain a price which is consistent with the prices available on other

liquid venues; and

- The relevant venue's technology platform for resilience and latency, ownership and membership structures and clearing arrangements.

The market operator provides a market data service through a proprietary system, which is made available (on a non-discriminatory basis at a reasonable cost) to both users of the platform and non-users wishing to subscribe to the service. The prevailing EBBO in each security offered is widely published in real time via the market data service.

Example 3[7] (June 2009):

Orders for a particular share will be submitted for crossing at one of the following reference prices derived from the central limit order book of the primary regulated market where the share is admitted to trading. Such a regulated market has to be sufficiently liquid.[8]

- The best bid on the primary market – the highest binding bid price of the primary regulated market

- The best offer on the primary market – the lowest binding offer price of the primary regulated market

- The midpoint between the best bid and best offer of the primary regulated market.

The system will allow crossing as follows:

- Midpoint orders will only interact with other orders entered for crossing at the midpoint reference price;

- Best Bid orders will only interact with sell orders entered for crossing at the Best Bid reference price; and

- Best Offer orders will only interact with buy orders entered for crossing at the Best Offer reference price.

All un-priced orders will enter the system with instructions to execute at one of three points - mid, best bid or best offer on the primary regulated market, i.e. these orders are to be crossed at the reference price explicitly nominated

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[7] The decision regarding this example has been adopted by CESR at qualified majority, according to Article 6 of the Charter, with the dissenting opinion expressed by the French AMF, the Italian Consob and the Greek CMC. These three competent authorities have a dissenting opinion on the compliance of the described system with Article 18(1)(a) of the MiFID Implementing Regulation. They consider that the price limits set by participants willing to trade on that system do contain some substantial price information. As such, such orders should not be eligible to Article 18(1)(a) waiver and should be publicly displayed to contribute to the overall price discovery process.

[8] The reference price will be taken from the primary regulated market where the share is admitted to trading in each case. The only exception is for German primary listed stocks where Xetra (Deutsche Borse) will be used as the reference market.

when the order is entered. All orders can cross only at these points.

The crossing system will allow trading participants to protect themselves by limiting the absolute price level at which they are willing to buy or sell shares. This feature allows participants to withdraw their order from crossing in the event that the reference price moves above (or below) the price at which they are willing to trade. Participants can place a price cap (for a buy order) or a price floor (for a sell order) on the order submitted for crossing. Participants do not have to specify a limit price.

During continuous crossing each reference price will change as the market changes. The effect of an order limit will be to prevent the order from executing above or below the specified limit price. The limit does not allow an order to execute at a price which is different to the specified reference price.

The relevant competent authority granting the waiver will monitor that the system continues to fulfil the criteria set out above and will report its findings as necessary as part of future consideration by ESMA of the application of the waivers.

Example 3a[9] (December 2010):

Orders for a particular share will be submitted for crossing at the midpoint between the best bid and the best offer of the order book of an MTF where the share is admitted to trading. In this context, the best bid on the reference market is the highest binding bid price of the MTF and the best offer on the reference market is the lowest binding offer price of the MTF. The MTF is not a market of listing of the shares concerned and possesses the following characteristics in relation to those shares:

- Bid and offer prices are consistent with those available on other transparent, liquid markets which also offer trading in the shares concerned;

- Bid and offer prices are supported by a sufficient level of trading interests at or close to those prices;

- Bid and offer prices are widely published via a broad range of market data vendors; and

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[9] Note that the description of example 3a only includes the elements of the pre-trade transparency waiver that differ from example 3. For a full description of the functionality (and in particular the feature that facilitates trading participants protecting themselves against strong price movements by introducing limit orders), please refer to example 3. The decision regarding this example has been adopted by CESR at qualified majority, according to Article 6 of the Charter, with the dissenting opinion expressed by the French AMF, the Italian Consob, the Hungarian FSA, the Greek CMC and the Cyprus SEC. These five competent authorities have a dissenting opinion on the compliance of the described system with Article 18(1)(a) of the MiFID Implementing Regulation on the basis of the arguments expressed in relation to example 3 (see footnote 4).

- Market participants deem the bid and offer prices to be reliable based on the reasonable amount of enquiries made by the platform concerned.

The system will only allow crossing midpoint orders with other orders entered for crossing at the midpoint reference price. All unpriced orders will enter the system with instructions to execute at the midpoint of the order book of the MTF.

Example 3b[10] (July 2011):

The trading venue proposes to set up a system with the same key characteristics as example 3 above.

Additionally, the system would allow a participant to attach a routing instruction to an order that would permit a pegged[11] order to seek liquidity at each of the reference prices in a non-discretionary and pre-determined sequence, but would only allow full or partial execution at a single reference price. Orders would interact as follows (using a buy order for the purpose of illustration):

- A buy order pegged to bid would only interact with orders entered for crossing at the best bid reference price;

- A buy order pegged to mid would interact with orders entered for crossing at the best bid, and if no execution is possible, would then interact with orders entered for crossing at the midpoint reference price;

- A buy order pegged to offer would interact with orders entered for crossing at the best bid, and if no execution is possible, would interact with orders entered for crossing at the midpoint, and if no execution is possible, would interact with orders entered for crossing at the best offer.

Where an order would achieve partial execution while being routed to the order book representing the nominated reference price, it would reside in the order book where that partial execution is achieved (i.e. where a buy order pegged to offer would receive a partial execution in the midpoint order book, the remainder of the order would reside on the midpoint book and it would not be routed to the best offer order book).

Example 3c (March 2012):

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[10] Note that the description of example 3b only includes the elements of the pre-trade transparency waiver that differ from example 3.

[11] The references to orders "pegged" to bid, mid or offer mean that the orders would be crossed at the best bid, best offer or the midpoint between the best bid and the best offer. The different labelling does not represent any difference in functionality in comparison to "best bid/midpoint/best offer" orders.

Orders for a particular share will be submitted for crossing at the midpoint of the bid/ask spread visible in the order book of the reference venue/s in continuous trading. To that end, there is a separate order book where only midpoint orders are held and executed in real time during continuous trading. The matching will be done by participant-time priority. During auctions, no execution of midpoint orders can take place.

As a general principle, midpoint orders are only executed if the potential execution price would not trigger a volatility interruption (if executed in the open order book). Execution of midpoint orders does not lead to a new reference price and does not trigger stop orders either.

In certain trading venues, the actual midpoint is always used, determining execution prices being at half tick size levels. There is no rounding of order price to a less aggressive price.

Prices on the functionality are published with a respective flag for transparency reasons.

The best bid/ask offers are published in real-time via several data vendors. Additionally, they can be seen by participants in the system.

Example 4[12] (August 2009):

All orders will be matched and executed at the official closing price published by the primary market. These orders will not be able to interact with the transparent order book and will be governed by a separate matching logic.

- During continuous trading on the primary market, participants can submit orders to the system. All orders are unpriced and will rest hidden. No matching of orders will take place until after the primary market closing auction begins.

- At the start of the closing auction on the primary market, all orders held in the system will be matched and 'locked' in time priority against other orders. A locked order is one which has been matched with an opposing order of equal size but is yet to be allocated the reference price (because the closing price on the primary market has not been finalised). Once an order is locked it cannot be cancelled. Participants can continue to submit unpriced orders for matching during the closing auction. When new orders are entered, they will either

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[12] The decision regarding this example has been adopted by CESR at qualified majority, according to Article 6 of the Charter, with the dissenting opinion expressed by the French AMF and the Greek CMC on the compliance of one of the functionalities offered by the system with Article 18(1)(a) of the MiFID Implementing Regulation. They consider that the price limits - above (or below) the official closing price - participants may place on their orders for a ten minute period after the publication of the closing price on the primary market contain substantial information for the overall price discovery process. As such, such orders should not be eligible for Article 18(1)(a) waiver and should be publicly displayed.

be matched or rest in the system.

- At the end of the closing auction on the primary market, any residual orders that have not been matched will rest in the system or be cancelled (depending on the preference of the participant).

The system will continue to allow unpriced orders to be matched and executed for ten minutes after the closing price on the primary market has been published. When new orders are entered, they will either be immediately matched at the closing price or rest.

During this ten minute period, participants can also place a limit price on their order. The limit will only be used to determine whether an order is accepted or rejected by the system and all orders submitted will execute at the specified reference price. The benefit to the participant is that a limit can be specified when the official closing price may not yet be known to it. These order limits are an additional feature, and are not essential to the functionality of the system. The limit does not allow an order to execute at a price that is different to the primary market closing price (reference price) and it does not influence the priority at which orders are matched.

At the end of the ten minute period after the closing price has been published, any orders that have not been matched in the system will be cancelled.

All orders entered into the system will:

- be matched at the closing price published by the primary market

- be price taking (closing price on the primary market)

- not be able to interact with other price forming orders.

Example 5 (December 2009):

The trading platform will offer trading based on the volume weighted average price (VWAP) on the relevant primary market. The system will match sell orders with matching buy orders on a continuous basis. It is a separate system and does not allow interaction with any other system or order book of the trading platform.

Orders submitted to the trading system must specify the volume and time period (based on units of 15 minutes) over which the order is to be matched. Trading participants can specify any period, from the minimum 15 minute interval to the whole of the trading day.

The system will match all orders seeking execution for the same time period. Where there are multiple orders for the same time period, orders will be matched on the basis of time priority of orders received. Orders will be matched on a non-discretionary basis. The trading system will notify trading participants of successful matches every 15 minutes. At the end of the period over which two orders are matched, the trade will be finalised at the VWAP for that period. The trade would be published immediately at the end of the VWAP period with an indication that the exchange of shares was determined by factors other than the current market valuation of the share (under Article 27 of the Commission Regulation).

The system will operate without pre-trade transparency as orders will execute only at the VWAP – a price which cannot be determined until the relevant trading period has been completed. The VWAP for any specified period is based on a formula which divides the total value of trading in the period by the total number of shares traded. The system will not match or execute any orders where there is an absence of continuous trading on the relevant primary market.

The executions that occur on the primary market (and which make up the VWAP) are widely published and distributed by market data vendors via real-time data feeds.

Example 5b (March 2012):

A trading platform allows trading based on the volume weighted average price (VWAP) of the relevant primary market. Orders submitted to the trading platform's VWAP match are entered into a pre-matching session. Clients are issued with particulars of their successfully pre-matched orders. After the close of trading on the primary exchange, trades pre-matched during the pre-matching session will be matched and attributed a price determined by the VWAP of that security on the primary exchange for the trading day provided that at least one trade was reported by the primary exchange in that security during the trading day. Pre-matched orders in securities that do not trade on the primary exchange during the trading day shall be cancelled.

If a security is listed on more than one market, then the VWAP order must specify which market should be used for calculation of the VWAP.

The reference prices used to calculate the VWAP are widely published by market data vendors and by the exchanges themselves and are regarded generally by market participants as reliable reference prices.

Example 6 (March 2012):

	'At The Close' orders are entered at any time during the trading session without a price limit for execution at the applicable closing price. These orders can only be executed during the closing (part of the) trading session, after the determination of the closing price for the day. These orders do not participate in the determination of the closing price. Outstanding limit orders executable at the closing price entered into the system prior to the start of the closing (part of the) trading session, will be executed along with "At The Close" orders at the 'closing price'. During the closing (part of the) trading session, the aggregate number of orders and the shares they represent at each price level, for at least the best five bid and offer price levels, are disseminated to the public.
Functionalities that do not satisfy the criteria contained in MiFID	_Example 1 (June 2009):_ All orders will be subject to dual mode matching by reference to the midpoint of the Best Bid and Offer (BBO) on the primary market. The best bid is the highest bid price and the best offer is the lowest offer price. The dual mode matching of orders will operate as follows: • Periodic auction – matches passive orders at the BBO midprice of the relevant primary market (i.e. 50% of the spread). Periodic auctions will take place approximately every 30 seconds in each instrument. Passive/resting orders that do not require immediate execution will be matched as part of the periodic auction. Randomised periodic auctions will be completed in less than a millisecond and will only engage resident passive orders. Aggressive orders will be queued while the randomised periodic auction is ongoing. • Continuous execution – matches new/unexecuted orders with aggressive orders (requiring immediate execution). Continuous executions will take place at the mid-point of the primary market midprice and the market price (the Best Bid for a sell order, and the Best Offer for a buy order). In other words, a passive order will pay/give up 25% of the spread and an aggressive order will pay/give up 75% of the spread. There is only continuous execution for aggressive orders; the execution price is the midpoint of the primary market midprice and the market price when an aggressive order enters the system, not the midpoint of the previous periodic auction. There is no interaction between the system and the transparent order book of the primary markets used as a reference. Only the timing of the periodic auctions is randomised, not orders which form part of the continuous execution. Continuous matching will be available whenever a periodic auction unwind is not underway.

The table below sets out an example of the execution prices for passive executions (midpoint) and aggressive executions.

Best Bid	Aggressive sell	Midpoint (passive)	Aggressive buy	Best Offer
149.00	149.25	149.50	149.75	150.00
	An aggressive sell order will be matched with a resting buy order at this price	The periodic auction will match passive orders at the midpoint price	An aggressive buy order will be matched with a resting sell order at this price	

The possibility of executing transactions at prices determined in accordance with a reference price but at the same time adjusted for incentives or fees should not be considered as trading without price discovery, which is the rationale behind the pre-trade transparency waiver of article 18(1)(a) of the MiFID Implementing Regulation. In order to benefit from the waiver of Article 18(1)(a), one should be able to determine at which price an order would be executed. As there are multiple prices possible, this requirement is not fulfilled by this proposal (i.e. a passive order does not know when (periodic auction or continuous) or at what price (midprice or at 25%/75% of the reference price) it will be executed. Therefore this example is not compliant with the criteria for waivers set out in MiFID.[13]

Example 2 (August 2009):

Participants may submit into the open order book either displayed limit orders or hidden EBBO reference price orders. All EBBO reference price orders can interact with any other type of order entered into the open order book.

EBBO orders will be submitted for execution at one of the following European Best Bid and Offer (EBBO) reference

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[13] The Czech National Bank (CNB) does not agree with these justifications and therefore considers that this waiver would fulfil the criteria set out in MiFID for a reference price waiver under Article 18(1)(a). The platform publishes information about the price at which it is possible to trade and that is where CNB sees the rationale behind the pre-trade transparency obligation imposed by MIFID. The option to accept less favourable price than the published one falls within the investor's decision. In case of periodic auction systems, even those with full pre-trade transparency, one does not know the exact execution price beforehand. So there is no reason to make system using the pre-trade transparency waiver subject to stricter conditions.

prices:

- The midpoint of EBBO

- The European Best Bid

- The European Best Offer

The European Best Bid price is the highest binding bid (or buy) price available in the central limit order books of the regulated markets and MTFs contributing to the determination of the EBBO. The European Best Offer price is the respective lowest offer (or sell) price. Thus, in principle, the EBBO will deliver the tightest spread available in the contributing trading platforms.

All EBBO reference price orders will enter into the system with instructions to execute at a reference price explicitly nominated - midpoint, best bid or best offer of the European markets. All EBBO reference price orders can match only at these points (i.e. the dark EBBO orders will only execute at the midpoint/EBB/EBO, according to the conditions set out when entering the order). Even though a dark EBBO order sitting in the order book hits an incoming displayed limit order that improves price conditions, the EBBO order will not benefit from price improvement.

Whereas hidden EBBO orders can only interact with displayed limit orders at a price generated by another system [the aforementioned EBBO price (midpoint, best bid, best offer)], for displayed limit orders (non EBBO) entered into the system - in the case of interaction between other displayed limit orders - the matching price will not be generated by another system.

The EBBO will be provided by a market data provider already offering this service to investment firms, regulated markets and MTFs on the basis of the trading data of regulated markets and MTFs that trade the shares. The trading platform itself will not calculate the EBBO figures and will not have the discretion to select among trading platforms contributing to the EBBO.

This example falls outside of the scope of Article 18(1)(a) of the MiFID Implementing Regulation. Therefore it does not satisfy the criteria contained in this article.

Example 3 (March 2012):

A trading platform proposes a functionality sharing the key elements of example 3 of MiFID compliant reference waivers (June 2009) with an additional limited visibility feature. By using this additional feature, anonymised information about potential matches in relation to orders exceeding the large in scale criteria would be available to some

	but not all members.
	Those members would enhance the likelihood of execution of their eligible clients by providing that information about available large in scale orders coming from their clients and also from other trading venue's members. Eligible clients for such anonymous information should have submitted in advance a bona fide indication of liquidity on that particular share exceeding the large in scale criteria as defined in Regulation (EC) No 1287/2006. According to MiFID, a system should comply with the transparency requirements either by making information available to the public on a non-discriminatory basis (Article 44(1) of MiFID and Article 32 of the MiFID Implementing Regulation) or by complying with the terms of a waiver (Article 44(2) of MiFID and Articles 18 and 20 of the MiFID Implementing Regulation). A proposal involving such selective disclosure of information does not seem to be consistent with MiFID. In addition to that, the suggested additional feature would imply a discriminatory information disparity that would conflict "fair and orderly trading" according to Article 39 (d) of MiFID (regardless that these conditions might be fully transparent for all market participants) and the aforementioned articles.
Functionalities in relation to which there is no common CESR position	*Example 1 (June 2010):* The trading platform will offer trading based on a consolidated volume weighted average price (CVWAP) based on executions from multiple European trading platforms. The system will match sell orders with matching buy orders on a continuous basis. The trading system is a separate system and does not allow interaction with any other system or order book of the trading platform. Orders submitted to the trading system must specify the volume and time period (based on units of 15 minutes) over which the order is to be matched. Trading participants can specify any period, from the minimum 15 minute interval to the whole of the trading day. The system will match all orders seeking execution for the same time period. Where there are multiple orders for the same time period, orders will be matched on the basis of time priority of orders received. Orders will be matched on a non-discretionary basis. The trading system will notify trading participants of successful matches every 15 minutes. At the end of the period over which two orders are matched, the trade will be finalised at the CVWAP for that period. The trade will be published immediately at the end of the CVWAP period with an indication that the exchange of shares was determined by factors other than the current market valuation of the share (under Article 27 of the Com-

mission Regulation).

The system will operate without pre-trade transparency as orders will execute only at the CVWAP – a price which cannot be determined until the relevant trading period has been completed. The CVWAP for any specified period is based on a VWAP formula which divides the total value of trading in the period (across all relevant venues) by the total number of shares traded.

The calculation of the CVWAP will only include order book executions from specific publicly displayed trading platforms. The executions that occur on the relevant European markets (and which make up the CVWAP) are widely published and distributed by market data vendors via real-time data feeds.

The CVWAP is calculated using the prices of all executions on the relevant European markets for a particular share, weighted according to the volume.

The case was submitted to the decision making process of CESR where, because consensus could not be reached, a vote by CESR Members took place. In the vote, qualified majority was not reached. As a consequence, there is no common CESR position for this functionality and the relevant competent authority to whom an application for this waiver is submitted has to decide on the MiFID compliance of this waiver without further guidance by CESR.

Article 18(1)(b) of the MiFID Implementing Regulation

'Negotiated Trade Waiver'

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 formalise negotiated transactions, each of which meets one of the following criteria:

(i) it is made at or within the current volume weighted spread reflected on the order book or the quotes of the market makers of the regulated market or MTF operating that system or, where the share is not traded continuously, within a percentage of a suitable reference price, being a percentage and a reference price set in advance by the system operator.

(ii) it is subject to conditions other than the current market price of the share.

Other conditions specified in the rules of the regulated market or MTF for a transaction of this kind must also have been fulfilled.

In the case of systems having functionality other than described above, the waiver shall not apply to that other functionality.

Functionalities that satisfy the criteria contained in MiFID	*Example 1[14] (March 2010):* The trading system will formalise negotiated transactions at or within the volume weighted spread whereby trading participants will individually agree on the price and volume of the trade before transmitting it to the trading platform. The system will ensure that all negotiated transactions are at or within the volume weighted spread on the public order book of the trading platform. The volume weighted spread is defined as the volume weighted bid and offer prices of orders on the trading platform's public order book aggregated to the size of the negotiated transaction, i.e. the spread between:

[14] The decision regarding this example has been adopted by CESR at qualified majority, according to Article 6 of the Charter, with the dissenting opinion expressed by the French AMF, the Greek HCMC and the Portuguese CMVM on the compliance of one of the functionalities offered by the trading platform with Article 18(1)(b) of the MiFID Implementing Regulation. The three competent authorities do not agree with CESR's assessment as they consider that the way of determining the reference price and the percentage within that reference price to be used in cases where the share is not traded continuously should be clearly defined in advance by the relevant trading platform and be taken into account by CESR Members when examining a request for granting a waiver under Article 18 (1)(b). Furthermore, the CMVM considers that the MiFID Implementing Regulation does not allow for the use of a reference price when it is not possible to calculate a volume weighted spread for a share that is traded continuously.

- the average price of the transaction assuming that a sell order executed against buy orders on the trading platform's public order book up to the transaction size. If the transaction size is larger than the volume of buy orders on the order book it will be the average price of the transaction assuming that a sell order executed against all buy orders on the order book; and

- the average price of the transaction assuming that a buy order executed against sell orders on the trading platform's public order book up to the transaction size. If the transaction size is larger than the volume of sell orders on the order book it will be the average price of the transaction assuming that a buy order executed against all sell orders on the order book.

Where there is no volume weighted spread on the trading platform's order book at the relevant time, the transaction will be subject to the following price constraints:

- within a percentage of the high or low price for trading in that share on the trading platform on that day; or, if not available,

- within a percentage of the trading platform's closing price on the previous day.

In the event that there were no transactions on the trading platform's public order book on the previous day, the trading platform would not accept negotiated transactions in the particular share(s).

Trading participants are provided with these reference prices (i.e. the trading platform's closing price and its high and low price) through data feeds provided by the trading platform and through market data vendors.

All trades executed using the system will be made public with a flag, indicating that the transaction was a negotiated trade in accordance with Article 27(1)(c) of the Commission Regulation. These trades will be made public as close to real time as possible.

Example 1a (November 2012):

A market operator proposes to set up a system under Article 18, paragraph 1, of the Regulation (CE) n. 1287/2006 sharing the key characteristics of Example 1 of MiFID compliant waivers with one additional element: for cases where there is no volume weighted spread on the platform's order book on a trading date (n), the transaction would only be accepted if it is within a percentage of the average price of the immediately preceding day (n-1). If there was no available average price at the immediately preceding trading day, n-2 average price would be used and so forth till n-5. If no valid reference price is available from the immediately preceding 5 trading days, the system will not

accept the negotiated transactions in that particular share(s).

Art. 18 (1)(b)(i) of MiFID Implementing Regulation demands "a suitable reference price" in cases where a share is not traded continuously to ensure fair treatment of market participants. Based on that, for very illiquid markets (as opposed to individual shares) where prices are adjusted to existing trading conditions at a slower pace, a scalable extension in the determination of the reference price might be acceptable.

Example 1b (December 2013):

A market operator proposes to set up a system sharing the key characteristics of examples 1, 2 and 3 of MiFID compliant negotiated trade waivers with the following additional element under the first limb of Article 18(1)(b) of the Commission Regulation 1287/2006:

Where the given share is not traded continuously due to the nature of the trading model (i.e. auction trading model):

- The negotiated transaction may not deviate more than a percentage from the price of the last transaction executed on the previous trading day (base price).

- Where there is no transaction on the platform's order book on the previous trading date (n-1), n-2 price would be used and so forth till n-5. If no base price (i.e. no transaction) is available from the immediately preceding 5 trading days, the system will not accept the negotiated transactions in that particular share(s).

Example 2 (March 2012):

The rules of the platform allow a trade negotiated privately between participants of the platform to be reported as a negotiated trade where it meets one of the two limbs of Article 18(1)(b) of the MiFID Implementing Regulation.

A negotiated trade reported in accordance with the first limb will take place within the volume-weighted average spread at the time of the trade on the platform order book for the given share.

A negotiated trade reported in accordance with the second limb will be subject to a special condition, other than the current market price of the share. Such trades include portfolio, VWAP, non-standard settlement, give-up and special ex/cum dividend trades.

A negotiated trade conducted under the second limb is required to be reported with a 'special price' (SP) flag, to provide transparency to the market that the terms of the trade reflect a special condition other than the current

market price.

Example 3 (March 2012):

Manual trades are entered into the Order Book for its formalisation and which the Member and the client, prior to execution, agree shall be done in accordance with the rules of the RM/MTF.

Manual trades have to be made at or within the current volume weighted spread reflected on the order book. This is not a condition for manual trades to be large in scale, as defined in the Commission Regulation 1287/2006 Annex II Table 2.

In the absence of a spread in the order book at the time of the trade, the trade shall be entered into at a price that takes into account the market situation at the time of the trade. Members must be able to provide reasons for their assessment. Outside of the trading hours, the price for a manual trade must be on or within the volume weighted average spread in the order book at the close of trading hours.

Trades may be entered into as manual trades and outside the above price limits in situations covered and marked by the following trade types: Derivative related transaction; Portfolio trade; VWAP trade, Exchange granted trade, Pre-opening trade.

Example 4 (March 2012):

Settlement (Pre-agreed) Block Trades are negotiated transactions executed in the pre-agreed trading board which is used exclusively for conducting pre-agreed trades, outside of the central order book. The buyer of a Settlement (Pre-agreed) Block Trade is a member acting to fulfill its delivery obligations towards the settlement system arising from previously executed transactions (either on behalf of clients or on its own behalf).

There is no restriction on the value of such trades.

Settlement (pre-agreed) block trades are considered as negotiated transactions submitted for formalisation under Article 18. 1 (b)(ii) of the MiFID Implementing Regulation, i.e. subject to conditions other than the current market price of the share.

Example 4b (March 2012):

Restitution (Pre-Agreed) Block Trades are negotiated transactions executed in the pre-agreed trading board which

	is used exclusively for conducting pre-agreed trades, outside of the central order book.
	Restitution (pre-agreed) block trades are subject to the following conditions:
	- One leg of the trade should be either a member which has settled a failed buy trade (previously executed on behalf of a client) with its own funds or a member, which has settled a failed sell trade (previously executed on behalf of a client) with lending arrangements (repurchase agreement).
	- The other leg of the trade should be the client on behalf of which the initial failed buy or sell trade was executed. With this trade the member sells to (buys from) its client the securities of the failed buy (sell) trade.
	This type of trades aims to address settlement problems arising from lack or late notification of settlement instructions leading to failed trades and can be executed until the fifth business day (T+5) following the day of the initial trade(T).
	There is no restriction on the value of such trades.
	Restitution (Pre-Agreed) Block Trades are considered as negotiated transactions submitted for formalisation under Article 18. 1 (b)(ii) of the MiFID Implementing Regulation, i.e. subject to conditions other than the current market price of the share.
	Example 5 (March 2012):
	The trading system formalises Market value weighted average price ("Market VWAP") transactions where a member agrees with his client or with another member to effect a transaction at a price within a 1% range (boundaries included) around the average price, as weighted by volumes, traded in the central order book of a security during a future period of time.
	Example 6 (March 2012):
	The trading system formalises negotiated transactions subject to conditions other than the current price of the share under Article 18. 1 (b)(ii) of MiFID Implementing Regulation, in application of the hedge component of "stock contingent trades" in derivatives.
	The waiver applies to transactions on a security admitted to trading on an equities market resulting from a trade on

a derivatives market operated by the same market operator, combining an option contract and its underlying security as a "stock contingent trade". In these cases, the transactions are automatically registered on the equities market provided that the price of the underlying security is set within an interval and the terms and conditions of the calculation are pre-defined by the market operator. Both the option contract and the underlying equities component of a "stock contingent trade" are executed on behalf of the same client or account.

Example 7 (March 2012):

The rules of the system allow a trade negotiated bilaterally between participants of the trading venue to be reported as a negotiated trade in accordance with Article 18(1)(b)(i) of the MiFID Implementing Regulation.

The participants agree upfront in a bilateral contract on the parameters of the trades which shall be conducted via the system in the future. Both participants agree on the list of eligible financial instruments and the price improvement with regard to the volume weighted spread. With regard to volume they might agree on a maximum order size (for the order flow provider) and a minimum execution rate (which obliges the liquidity provider).

The system does compute the price at which a trade will be conducted. This price has two components: (1) the volume weighted spread as derived from the lot order book of the trading venue, (2) the price improvement as agreed between the two trading participants.

The following criteria have to be met to conduct a trade via the system:

(1) Using the system is only possible during continuous trading (not during auctions);

(2) The orders need to have immediately executable limits;

(3) The volume of the orders must not exceed the trading interest of the liquidity provider (i.e. no partial fill); and

(4) The price of each transaction must not exceed the barriers of the volatility interruption mechanism.

If one of these requirements is not met the order will be forwarded immediately to the lit order book of the trading venue. The system maintains strict price-time-priority of the lit order book of the trading venue through a "clean-up" rule.

All trades executed via the system will be made public with a flag in real time.

Functionalities that do not satisfy the criteria contained in MiFID	*Example 1[15] (December 2009):* The trading system will formalise negotiated transactions at or within the volume weighted spread whereby trading participants will individually agree on the price and volume of the trade before transmitting it to the trading platform. The system will ensure that all negotiated transactions are at or within the volume weighted spread on the public order book of the trading platform. The volume weighted spread is defined as the volume weighted bid and offer prices of orders on the trading platform's public order book aggregated to the size of the negotiated transaction, i.e. the spread between: • the average price of the transaction assuming that a sell order executed against buy orders on the trading platform's public order book up to the transaction size. If the transaction size is larger than the volume of buy orders on the order book it will be the average price of the transaction assuming that a sell order executed against all buy orders on the order book; and • the average price of the transaction assuming that a buy order executed against sell orders on the trading platform's public order book up to the transaction size. If the transaction size is larger than the volume of sell orders on the order book it will be the average price of the transaction assuming that a buy order executed against all sell orders on the order book. Where there is no volume weighted spread on the trading platform's order book at the relevant time, the transaction will be subject to the following price constraints: • within a percentage of the high or low price for trading in that share on the trading platform on that day; or, if not available, • within a percentage of the trading platform's closing price on the previous day. In the event that there were no transactions on the trading platform's public order book on the previous day, the

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[15] The decision regarding this example has been adopted with the dissenting opinion expressed by the Danish Finanstilsynet, Estonian Finantsinspektsioon, Hungarian FSA, Irish Financial Regulator, National Bank of Slovakia, Finnish Finanssivalvonta, Swedish Finansinspektionen and UK FSA, that consider that in the absence of continuous trading on one platform, a suitable reference price can be taken from an alternative platform where there is continuous trading in that particular share, provided that the alternative reference price is specified in advance by the system operator.
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trading platform's closing price would be the closing price for that share published by the relevant primary market.

Trading participants are provided with these reference prices (i.e. the trading platform's closing price and its high and low price) through data feeds provided by the trading platform and through market data vendors.

All trades executed using the system will be made public with a flag, indicating that the transaction was a negotiated trade in accordance with Article 27(1)(c) of the Commission Regulation. These trades will be made public as close to real time as possible.

The calculation of both the volume weighted spread and, in case of shares not traded continuously, the reference price used should always be based on the trading data of the trading system operated by the same regulated market or MTF that seeks to develop a functionality of negotiated transactions. Therefore the suggested use of reference prices from the primary market is not in compliance with Article 18(1)(b)(i) of the Commission Regulation.

Example 2 (July 2011):

The trading venue proposes to set up a system ("Facility") which offers the possibility to trading participants to enter into bilateral agreements on a transaction before routing it to the central order book where it would be published and flagged as a negotiated transaction in accordance with Article 27(1)(c) of the MiFID Implementing Regulation. The trading conditions provided by the operator of the trading venue would ensure that all transactions agreed between "Order Flow Providers" (OFPs) and "Matching Partners" (MPs) through the Facility would be at least within the best bid and offer (BBO) on the central order book of the trading venue or better.

The order flow could be paired with the MP's quotes under the following conditions:

- A bilateral contract would need to be agreed between the OFP and the MP setting out the terms of the executions in advance (i.e. price improvement conditions, presence time and size);

- OFPs could enter into these bilateral agreements with multiple MPs with the conditions for pairing to be agreed with each MP separately;

- The same member could assume the role of OFP and MP simultaneously.

Trading participants would be provided with the reference prices (i.e. the trading venue's BBO on the central order book) through data feeds provided by the trading venue and market data vendors. If there were no bids or offers for a particular share on the central order book, the trading venue would not accept the execution of transactions

through the Facility in the particular share.

The pairing process provided by the Facility would have the following features:

- During the continuous trading session, the order flow provided by the OFPs would be paired with quotes of MPs if the latter meet the bid/ask from the OFP;

- Price/time priority rules would be used to determine which MP quote should be paired with the incoming OFP order;

- The pairing process would connect on behalf of the MP and its OFP an executable quote with an executable order using a Bilateral Parameter Table and the price restrictions set out in the trading conditions. To that end, the intention to buy (sell) of the OFP (as expressed in symbol, bid/ask, price, size) would be paired with the parameters (as expressed in terms of bid/ask, price improvement and size) to sell (buy) of the MP, as outlined in their general bilateral agreement;

- The pairing process would select from a Bilateral Parameter Table the possible set of executable MP Quotes, using price/time priority rules to determine which MP quote should be paired with the incoming OFP order. The incoming OFP orders would not rest in the MP's Quote Table but would be rather filtered through its conditions.

In relation to the interaction of orders, the pairing would take place under the following conditions:

- Orders would have to be immediately executable against the current BBO in the central order book (i.e. aggressive limit orders or market orders);

- Orders coming from OFPs could only be paired with MPs' quotes in case of a pre-existing and identified relationship (i.e. a bilateral agreement) between them;

- Quotes from one MP could not interact with the quotes of another MP;

- If a pairing were not possible, e.g. in the absence of a quote from a MP at or better than the BBO of the central order book, the order of the OFP would be sent directly to the displayed central order book of the trading venue where it would either execute immediately or remain in the book until its execution, cancellation or amendment. The time stamp would be that of the order when it hits the matching engine's

gateway (as for any incoming order);

- If an OFP order could only be partially executed in the Facility against MP quotes, the remaining part of the order would be sent to the central order book. It would never go through the Facility again.

The opinion of ESMA on this waiver takes into account the following main concerns:

- A transaction resulting from the process described under this proposal cannot be considered as privately negotiated since at least the volume of the transaction, as well as the counterparty to the transaction in some cases, are not agreed upfront by the buyer and seller outside the Facility but result from the matching process organised by the Facility between the incoming orders of an OFP and resting 'dark quotes' of one or several MP(s). The concern about the not previously negotiated volume is particularly relevant in the case of partial execution of an order of the OFP against a MP quote within the facility.

- The Facility would de-incentivise submitting orders to the lit order book. A previous buy/sell order sitting at the best limit in the displayed order book would remain unexecuted while matching orders entered through the Facility would be executed at the same limit against the 'dark quotes' of the MP. The concern is that MPs' quotes would not be publicly displayed and would not contribute to the overall price discovery process.

- The Facility would provide its participants a means of providing systematic internalisation (SI) activity under an RM/MTF umbrella while circumventing the SI regime and the related pre-trade transparency obligations, since it would allow the same firm, or two entities of the same group to be both OFP and MP.

Example 3 (March 2012):

A trading system permits market participants to formalise pre-agreed transactions made outside of the order book. The trades that qualify for this system must qualify the following requirements:

- Minimum size which would be, in any case, below the standards sizes set out by Table 2 of Annex II of MiFID Implementing Regulation; and

- The maximum difference between the trade price and the closing price at the previous session would not exceed a certain percentage, e.g. 10%.

The use of this system would not meet the requirements of Article 18(1)(b) of MiFID Implementing Regulation because:

- Allowing price differences of a certain amount (e.g. 10%) with respect to the closing price of the previous session would determine that many transactions would not be made at or within the

current volume weighted spread reflected in the order book. As a consequence, they cannot be considered as negotiated transactions under Article 18.1 (b)(i) of MiFID Implementing Regulation; and

- Transaction size cannot be considered as the sole element to qualify a transaction as "subject to conditions other than the current market price of the share", according to Article 18.1 (b)(ii) of MiFID Implementing Regulation.

Example 4 (March 2012):

This facility permits members of a trading venue with very low liquidity to formalise pre-agreed transactions made outside of the order book. Trading participants agree on the price (without any sort of restriction), volume and other details of the trade stipulated in the Rules before transmitting it to the trading platform.

The use of this system would not meet the requirements of Article 18(1)(b) of MiFID Implementing Regulation due to the lack of price restrictions and/or special conditions other than the current market price of the share. The low liquidity of a market in this context does not imply that trades are "subject to conditions other than the current market price of the share".

Example 5 (September 2013):

A market operator proposes to set up a system under the first limb of Article 18(1)(b) of the Commission Regulation 1287/2006 sharing the key characteristics of examples 2 and 3 of MiFID compliant negotiated trade waivers with the following additional elements: for liquid shares, where the financial instrument is not traded continuously, the price of the negotiated trade should fall within a percentage of the "base price", which serves as a reference price. The base price is the price of the last transaction executed before the given trading day. Where there is no transaction on the order book on the previous trading date (T-1), the T-2 price would be used and so forth till T-5. If no valid reference price is available from the immediately preceding 5 trading days, the system will not accept the negotiated transactions in that particular share(s).

The use of a scalable extension of the reference price should not be considered in compliance with the requirement of art. 18(1)(b)(i) of MiFID Implementing Regulation for a suitable reference price, save in exceptional cases of very illiquid markets (and not individual, illiquid shares) as explained in example 1a of MiFID compliant Negotiated Trades Waivers.

Article 18(2) of the MiFID Implementing Regulation

'Order Management Facility Waiver'

Waivers in accordance with Articles 29(2) and 44(2) of Directive 2004/39/EC based on the type of orders may be granted only in relation to orders held in an order management facility maintained by the Regulated Market or the MTF pending their being disclosed to the market.

Functionalities that satisfy the criteria contained in MiFID	*Example 1 (December 2009):*
	In the Reserve order system, a part of the order (a peak) is introduced in the order book whereas the rest of the total volume of that order is not displayed, resting in the order management facility. After the displayed portion of the order has been executed, a new peak is sent to the order book (with a new time stamp), and the non-displayed portion of the order is decreased accordingly (retaining time priority against other Reserve orders at the same price level).
	As a particular feature, the displayed and non-displayed portions of a Reserve order are available for potential execution against incoming aggressive orders, i.e. once all the visible orders at a certain price level (including visible peaks of reserve orders) have been executed, the non-displayed part of a Reserve order has priority for execution against the non-displayed part of other Reserve orders at the same price level which have been entered to the system at a later time.
	As a consequence, if the outstanding volume of the incoming aggressive order equals or exceeds the remaining part of the Reserve order with the highest time priority, no new peaks of any Reserve orders will be executed in the order book before the Reserve order with the highest time priority (on the basis of the entering time of the original Reserve order) will have first gotten full execution.
	This is because newly introduced peaks, despite having the same time stamp, will be executed according to its reserve order's original time priority in the order management facility. Only after the full execution of the Reserve order with the highest time priority new peaks will be executed in the order book according to their price level and time priority.
	Example 1b (March 2012):
	The trading system provides for an iceberg order functionality sharing the key elements of Example 1 above, where

the non-displayed portion of the order is not available for potential execution against incoming aggressive orders. Therefore, peaks are introduced to the order book and executed according to their timestamp. Apart from that, the non-displayed portion of the iceberg order does not retain any priority against other iceberg orders at the same price level.

Example 1c (March 2012):

The trading system provides an iceberg order functionality which shares the key elements of Example 1 (December 2009) with a particular feature according to which the system requires the order to specify at entry its total volume and the quantity to be disclosed (peak) which must be at least ten times bigger than the trading unit.

Example 1d (March 2012):

The trading system provides an iceberg order functionality which shares the key elements of Example 1 (December 2009) with the following additional features:

a. The minimum non-displayed volume must be at least 5 times larger than the standard lot;

b. The peak must not exceed 20% of the order's total volume; and

c. Both the visible volume and the total volume must be multiples of the standard lot.

The total volume is taken into account every time the opening price is calculated.

After the displayed portion of the order has been executed, a new peak is sent to the order book (with a new time stamp), and the non-displayed portion of the order is decreased accordingly (retaining time priority against other iceberg orders at the same price level). However, an order will receive a new execution priority, as a result of the following adjustments:

a. Increasing the initial visible volume of the hidden order;

b. Increasing the total volume of the hidden order.

The current visible volume is visualized by all exchange agents and is associated to an indicator of the hidden order (letter 'h') in the order book.

A market operator proposes to set up a system under the order management facility waiver under Article 18, paragraph 2, of the Regulation (CE) n. 1287/2006 sharing the key characteristics of Example 1 with one additional element, for cases where the peaks of several iceberg orders at the same price are executed by an incoming aggressive order exceeding the sum of all of the peaks.

In that case, the execution of the rest of the incoming aggressive order will be done against these iceberg orders in proportion to their outstanding not displayed quantity, disregarding time priority.

Example 2 (March 2012):

The trading system provides for iceberg order functionality in auction trading, where the complete quantity of the iceberg order is considered for the (indicative) auction price calculation**.** The remaining order quantity is used to calculate the surplus during the call phase (if the market imbalance indicator is switched on) the complete order quantity and during the order book balancing phase.

Example 3 (March 2012):

A stop order is an order to buy or sell a quantity at the prevailing market price once a security's trading price or the value of an index has reached a "stop limit" specified in the order. The order rests in the order management facility till the "stop limit" is reached (or exceeded or falls below the price specified), when the stop order is automatically placed in the order book as a market order. The system allows placing stop limit orders (an order to buy or sell a financial instrument at a specific price or better) in the order book as well. The order gets a timestamp corresponding to the time of introduction in the order book.

A buy stop order is triggered when the last traded price or the auction price is equal or higher than the specified stop limit. A sell stop order is triggered when the last traded price is equal or lower than the specified stop limit. The specified price for a buy/sell order must be higher/lower than the last traded price. In cases where the "stop limit" is related to the value of an index, the buy or sell stop order is triggered by a transgression of a specified value of the index. Each modification of a stop order leads to the allocation of a new timestamp.In certain markets, the system allows using the volume weighted average price in the central order book as "stop limit".

Example 3a (August 2012)

"Trailing Stop Orders" are stop orders with an additional feature: an absolute or percentage distance between the

	stop limit and the current reference price is entered. The stop limit adjusts automatically to the development of the reference price.
	The transfer of a "trailing stop order" to the order book is triggered by (depending on the market model):
	- A price determination: when the last execution has reached, exceeded (buy orders) or fallen below (sell orders) the reference price; or
	- Update of a Specialist/Market Maker Quote.
	Example 3b (August 2012)
	"One-cancels-other orders" operate by the simultaneous placement of a stop order and a limit order within one order. The limit order is entered in the order book. The stop order is entered in the order management facility. Depending on which limit is hit first (the limit of the limit order or the stop limit) the respective order will be executed and the other order will be cancelled.
	The transfer of an "One-cancels-other order" to the order book is triggered by (depending on the market model):
	- A price determination: when the last execution has reached, exceeded (buy orders) or fallen below (sell orders) the reference price; or
	- Update of a Specialist/Market Maker Quote.
Functionalities that do not satisfy the criteria contained in MiFID	_Example 1 (May 2009)_:
	A discretionary order is an order to buy or sell a stated amount of a security at a specified price ("displayed price") which would be visible in the order book, where in addition to the "displayed price", there is a hidden instruction that allows the order to be executed at a more competitive undisplayed price ("discretionary price") when there is no current opportunity for execution at the displayed price. Discretionary orders therefore execute at the displayed price when there is a matching order available to them at that price. As long as there is no match, the discretionary element enables the order to execute at a "better" price for the counterparty (i.e. higher than the displayed price for a buy order, lower for a sell order) against incoming orders priced within the limit that has been set for the undisplayed price.
	The limit order at the un-displayed price is held in the order management facility run by the trading venue. When,

under the algorithm set out for this type of order, the discretionary order can be matched with an incoming limit order (either passive or aggressive[16]) priced within its un-displayed limit, the transaction takes place at the price of the incoming order. Discretionary orders may be "triggered" by either passive incoming limit orders which if not "hit" would rest on the book, or aggressive orders, such as "fill or kill" orders, which would be cancelled instantaneously if there was no immediately available match. In cases where the discretionary order is only partly executed at its undisplayed limit, the non-executed amount may remain in the order book at the displayed limit price.

Such orders are considered not to meet Article 18(2) criteria as they contain an un-displayed element that, by construction, does not have the potential to rest in the order book, as required by the waiver.

Example 2 (October 2009):

A trading platform is proposing to offer a functionality with the following types of orders that were described by the trading platform as 'iceberg' orders:

- They are always limit orders.

- They have:

  o a displayed quantity in the order book ('visible tip'); and

  o a non-displayed quantity held in the order management facility at the same price limit.

- The 'visible tip' is disclosed in the order book, while the non-displayed quantity of the order is held in the order management facility pending its disclosure to the market. Only once the displayed quantity has been completely filled, a new quantity is released from the order management facility and displayed in the order book.

- The size of the 'iceberg' orders cannot be increased after a partial execution. In that case, there would be a

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[16] "Aggressive limit orders" require immediate execution, otherwise the order will be cancelled (or 'killed'). No aggressive order, or part of an aggressive order, will ever rest on the order book. Aggressive limit orders can be understood as immediate-or-cancel (IOC) or fill-or-kill. The difference between IOC and fill-or-kill order is that IOC can partially execute, whereas a fill-or-kill will only execute if the entire volume of the order can be filled. These orders can be used by investment firms to 'ping' trading platforms to discover trading interest.

	second 'iceberg' order with a different timestamp.
	• Whilst in the examples of 'iceberg' orders in place across Europe a new time priority (and timestamp) is assigned each time a new quantity (tranche) is introduced to the order book, in the suggested functionality the new tranche displayed would retain the original timestamp of the 'iceberg' order. Therefore, each new tranche would have time priority against other orders sitting in the order book at the same price level.
	CESR considers that the feature of this functionality where the new tranche displayed would retain the original timestamp of the original 'iceberg' order is not compliant with MiFID.[17]

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[17] The decision regarding this example has been adopted by CESR at qualified majority, according to Article 6 of the Charter, with the dissenting opinion expressed by the Czech National Bank, Hungarian FSA, Icelandic FSA and Swedish Finansinspektionen that consider that there is no support in MiFID for not allowing the use of this kind of time priority for an order type.

Article 20 of the MiFID Implementing Regulation ‘Large in Scale Waiver’ 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 of the Commission Regulation 1287/2006. 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 of the Commission Regulation 1287/2006.	
Functionalities that satisfy the criteria contained in MiFID	*Example 1 (May 2009):* A trading platform has a system with the following characteristics: • For shares admitted to trading on an EEA Regulated Market, orders must be equal to or exceed the relevant minimum size set out in Table 2 of the MiFID Implementing Regulation. • Checks will be carried out upon initial order entry, on the residual portion of the order following a partial fill, and when the order size is amended. • Any order or residual portion of an order below the relevant minimum size set out in Table 2 of the Commission Regulation will be rejected/cancelled. Accordingly, all orders or residual portions of orders in shares admitted to trading on an EEA Regulated Market in the trading system will meet or exceed the MiFID large in scale size thresholds. *Example 1b (March 2012):* A trading platform shares the same key characteristics of the previous example with one differing feature, that the order remains hidden after any partial fill regardless of the size of its remaining unexecuted quantity. During the original process of assessing the MiFID compliance of the functionality described above (*July 2009*), the Commission services were asked for their view on the interpretation of Article 20 of the MiFID Implementing Regulation, more specifically when an order has to be large in scale in order to qualify for a waiver from pre-trade trans-

	parency, i.e. when first introduced into the order book or all the time.
	In their answer, the Commission services noted that there appear to be two different models that have been adopted in relation to this waiver provision. The first model assumes that to qualify for the waiver an order is assessed at the time it is entered into the system and it can remain undisclosed even if, after partial execution, the remainder of the order is reduced below the relevant threshold. The second model assumes that to qualify for the waiver the order must be above the large in scale threshold when it is first entered into the system and then must continue to remain above the threshold if it is partially filled by subsequent orders. The Commission services concluded by noting that, having regard to the underlying intention of the directive, they think that both models are permissible under the directive.
	Additionally, this system permits that a hidden order can be executed against disclosed or non-disclosed orders in the order book. The hidden order can only be introduced into the order book as a limit-order. If there are disclosed and undisclosed orders in the order book with the same limit price, the visible order has priority.
	In certain markets, the system permits entering large in scale orders with All or None (AoN) execution condition. These large orders with AoN condition have the lowest priority. Large in scale orders without AoN condition are displayed in the order book's aggregate volumes during *call interaction*.
	Example 2 (March 2012):
	Block trades are negotiated transactions that are executed outside the central order book. The orders for block trades are submitted to the Pre-Agreed Trading Board, which is different from the Main Board (central order book) and there is no possibility of interaction with other orders in the order book. The orders for block trades should be limit orders and cannot be partially executed.
	The minimum order size for block trades is determined in accordance with the thresholds set forth by EU Regulation 1287/2006 art. 20.
Functionalities that do not satisfy the criteria contained in MiFID	

Combination of waivers
Functionalities that combine elements of different waivers contained in Articles 18 and 20 of MiFID Implementing Regulation

Functionalities that satisfy the criteria contained in MiFID	*Example 1 (August 2015):* A market operator proposes a system for orders that are Large in Scale, with elements of Iceberg Order systems. These Large-in-Scale orders are submitted to the functionality with two different price limits: a visible price limit for the visible peaks submitted to the order book, and a second price limit (invisible) which is only relevant for matching the hidden size. Peaks are introduced in the order book at the visible price limit. After matching the peak, a new peak will be transferred from the hidden size to the order book with a new time stamp. The time stamp of the resting portion (i.e. the hidden size) will remain the same. The hidden part of the order rests in an order management facility and can be executed directly against the hidden size of other orders of the same type at the current bid/ask-midpoint price derived from the lit order book of the trading venue proposing this functionality, unless it does not meet the invisible price limit. The invisible price limit only serves as a protection from disadvantageous execution prices if the market moves in a certain direction. In case the peak of the order can be matched with other orders in the lit order book, these executions have priority over any hidden execution. If the execution in the order book with the peak limit is not possible but the matching of the hidden LIS part with another one of these orders is possible, the execution will be done in a separate book which is exclusively for the hidden LIS parts of these orders. There is no interaction between the lit order book and the order book for the hidden LIS parts, except the deletion of the respective order volume from the order book for the hidden LIS parts and the order management facility in case of matching or of submission of a subsequent peak. Additionally, the hidden size can only be matched with other hidden sizes of the same type of orders when each of the sides is equal to or larger than the minimum size specified for a Large in Scale Order in accordance with Table 2 of Annex II of the MiFID Implementing Regulation. Partial executions of the hidden size do not result in a cancellation of the stub. If the minimum size requirement is not met by the hidden size after partial execution, further executions are only possible by submitting peaks to the visible order book at the visible price limit like any regular iceberg order. *Example 2 (June 2016):* A trading venue which currently operates an order book based on the reference price waiver in accordance with Article 18(1)(a) of the MiFID Implementing Regulation 1287/2006 intends to modify the algorithm used to match

	orders so as to allow the matching of orders following a size-time priority logic. Within the facility, all orders will be under the following matching logics:
	- Orders with a size below the LIS threshold would be matched on the basis of the reference price derived from another system using time priority;
	- Orders with a size above the LIS threshold would be matched on the basis of the reference price derived from another system using the following size-time priority:
	    o Orders with a size above the LIS threshold have execution priority against other orders with a size above the LIS threshold. In case there are several of these orders eligible for execution at the relevant reference price, strict time priority applies. If there is only one resting order with a size above the LIS threshold, it is matched on the basis of the time priority against the resting orders with a size below the LIS threshold.
	    o Members may decide that their orders with a size above the LIS threshold will only be matched against other similar orders, either with the same restriction or resting orders that only meet the LIS threshold.

Functionalities that do not satisfy the criteria contained in MiFID	