



THE COMMITTEE OF EUROPEAN SECURITIES REGULATORS

Ref: CESR/07-047

## CESR Level 3 Guidelines on MiFID Transaction reporting

### Consultation Paper

February 2007



## Introduction

1. Article 25 of MiFID establishes a transaction reporting regime where investment firms shall submit reports of executed transaction to their competent authorities regarding financial instruments admitted to trading on regulated markets. The reports can be made either by investment firm itself, a third party acting on its behalf or by a regulated market or MTF through whose systems the transaction was completed. Competent authorities shall further exchange the reports between themselves.
2. The purpose of transaction reporting is to enable competent authorities to monitor the activities of investment firms and to ensure that they act honestly, fairly and professionally and in a manner which promotes the integrity of the market.
3. CESR-Tech and TREM project are preparing the technical system for exchanging the data between CESR members. In addition the technical work some issues have been identified where there is a need for harmonised approach by CESR members. This document provides guidance to three aspects of transaction reporting: practical solutions for the reporting obligations for branches; an answer to what constitutes “execution of a transaction” for transaction reporting purposes; and operational solutions for some aspects on reporting channels.
4. The outcome of CESR’s work is reflected in the common guidelines set out in this paper which do not constitute European Union legislation and will not require national legislative action.
5. CESR members will apply the guidelines in their day-to-day regulatory practices on a voluntary basis. Even if they do not directly apply to market participants, there is a general commitment by all CESR members to consider that these entities would fulfil their requirements when following the recommendations set out in this paper.
6. The manner in which the guidelines will be applied will be reviewed regularly by CESR. These guidelines will not prejudice, in any case, the role of the Commission as guardian of the Treaties.

### Public Consultation and Timetable

7. CESR invites responses to this consultation paper. Respondents can post their comments directly on CESR’s website ([www.cesr.eu](http://www.cesr.eu)) under the section “Consultations”. The consultation closes on **2 March 2007**.



## Reporting by branches

8. CESR has considered the issue of the transaction reporting obligations of branches of investment firms under the MiFID framework. A CESR paper on passporting issues is currently under consultation (Ref. CESR/06-669). However, given the technical impact it would have on investment firm's systems, the specific question of reporting by branches is also handled in this paper.
9. Article 32(7) of MiFID provides that the competent authority of the Member State in which the branch is located shall assume responsibility for ensuring that the services provided by the branch within its territory comply with the obligations laid down, among others, in article 25. However, in respect of services provided by the branch outside the territory of the host Member State, the branch would have to report transactions to its home regulator under the home Member State reporting requirements.
10. CESR has asked clarification from the Commission on the legal interpretation of providing services "within the territory of the branch". Depending on the response by the Commission, the issues discussed in this paper may become less relevant. In any case, there may still be situations where the MiFID transaction reporting requirements would request the branch to send transaction reporting to two authorities.
11. While it should be highlighted that MiFID provides for clear split of responsibilities in this respect, CESR notes that in practice it may cause unnecessary difficulties for branches to split their reporting between two authorities. Therefore CESR members are committed to seeking for flexible practical solutions to the extent permitted by MiFID.
12. In order to determine whether the branch or its head office (or which branch where two branches are involved) should report a given transaction, an investment firm will need to apply one or more criteria, and in the absence of commonly agreed criteria there will be a risk of multiple reporting. CESR therefore wishes to ask stakeholders whether the adoption of such criteria by CESR would be useful, and whether the place of booking of a transaction might be used as a simple criterion for this purpose. This "place of booking" test is intended only to designate which unit of the investment firm- the head office or the branch, or which branch-must report the transaction. It is not intended to have any effect on the timing of the transaction reports. It is also without prejudice to work in progress on the legal interpretation of "services provided by the branch within its territory" in Article 32(7) of MiFID <sup>1</sup>.
13. CESR notes that according to Article 25(6) of MiFID the competent authorities of the home Member States will be forwarded, should they so choose, all transaction reports received from branches by the competent authorities of the host Member States. Hence, home state authorities will have access to all information about transactions carried out by branches of entities under their supervision.
14. Taking into account the rules of MiFID, CESR notes that practical solutions aiming at reducing the potential splitting of transaction reports by branches should be based on co-operation between members. It should also be noted that according to Articles 25(6) and 32(7), a solution where reports by branches would only be channelled to the "home" authority of the firm is not possible.

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<sup>1</sup> See paragraph 11 of the CESR consultation paper "The passport under MiFID" (CESR 06-669) published in December 2006.



15. Against this background, and without prejudice to the requirements of MiFID and the national laws implementing it, CESR members have agreed that they should adopt a concrete and practical solution in respect of the transaction reporting obligations of branches of investment firms, which would allow the branch to send reports of any transactions carried out by the branch to the "host authority" according to the format in use in that jurisdiction. That would require a choice by the branch in question as well as an agreement by both competent authorities. The agreement between competent authorities could take place in a general format or on a case-by-case basis.

Level 3 Guidelines:

**CESR acknowledges that all transactions executed by branches where the service is provided within the territory of the Member State where the branch is located, shall be reported to the host Member State competent authority, whereas other transactions executed by branches shall be reported to the home Member State competent authority.**

However, CESR recognizes that, from a practical point of view, it would be burdensome for branches of investment firms to be obliged to report their transactions to two competent authorities.

Therefore, all transactions could be reported to the host Member State competent authority, if the investment firm elects to do so and in agreement with the home Member State competent authority. In these cases transaction reports may follow the rules of the competent authority to which the report is made. Agreements may be given either in general or on a case-by-case basis.

*Question 1: Do respondents agree with the proposed guidelines?*

*Question 2: Do respondents consider that guidance is needed on which transaction is executed by a branch or by its head office for the purpose of reporting it to the relevant competent authority? If yes, do respondents consider that transactions executed by a branch should be understood as those transactions booked by the branch?*



### What constitutes execution of a transaction (to be reported)

16. According to Article 25(3) of MiFID investment firms shall report executed transactions to their competent authorities. Article 5 of the implementing Regulation specifies that for these purposes "transaction" means the purchase and sale of a financial instrument and excludes specifically securities financing transactions; exercise of options or of covered warrants as well as primary market transactions.
17. The goal of Article 25 is to facilitate the supervision by competent authorities. Transaction reporting data is needed to enable supervisors detecting and pursuing suspected instances of market abuse, client abuse or other breaches of relevant MiFID provisions.
18. CESR notes that there will be many different circumstances in which transactions take place. In some cases a client will go to an investment firm who then executes a transaction with market counterparty. However, there may also be more complicated situations where more than one investment firm is involved in the transaction chain (e.g. the client goes to Firm A who then goes to Firm B who in turn deals with market counterparty). Such a chain may involve several transactions between intermediaries or it may include passing of an order by an investment firm to another investment firm for execution.
19. MiFID transaction reporting regime is based on reporting of executed transactions and not directly information on individual orders. It is therefore necessary to separate execution of a transaction from reception and transmission of orders.
20. Within the overall MiFID framework and with regard, in particular, to their obligation to monitor the activities of investment firms to ensure that they act honestly, fairly and professionally and in a manner which promotes the integrity of the market (Art. 25(1) of MiFID), CESR members recognize that competent authorities have a justifiable need to specify under which circumstance transactions are executed and hence need to be reported.
21. CESR members have considered the conditions under which, in such a transaction chain, the investment firms involved may be said to be executing transactions as opposed to simply receiving and transmitting orders. CESR members note that based on differences in market structures (and civil law) the treatment of such a chain may, to some extent, differ from Member State to another.
22. In order to enhance convergence on transaction reporting obligations for firms, CESR members have agreed a common treatment of transaction chains. CESR members commit themselves to including in transaction reports those transactions which are conducted by the immediate market facing investment firms and those transactions where the investment firm is undertaking the transaction on its own accounts (either on market or off-market).
23. Taking the national differences as described above, it is also necessary to allow certain margin of difference between members. Therefore, to the extent permitted by MiFID, individual Members States may widen the scope of the national transaction reporting regime to include also "client-facing" investment firms in addition to the "market-facing" firms. In these Member States the transaction reporting includes transactions where the investment firm, while not the immediate market-facing investment firm, is intervening in the execution process by dealing as agent on behalf of a client with the result that the terms of the financial instruments ultimately settled on its client are determined by its actions (either because the firm receives the stock and then allocates it to its clients or because the firm gives instructions



to the market-facing investment firm as to how the financial instrument should be allocated and at what price).

Level 3 Guidelines:

**CESR members have agreed to commit themselves to collecting and, where required, exchanging information about at least the following set of transactions:**

- (a) those conducted by the immediate market facing investment firm; and
- (b) transactions not covered by (a) above but where the investment firm is undertaking the transaction on its own accounts (either on RM, MTF or OTC).

**Question 3:** *Do respondents agree with the proposed guidelines?*



### Approval of reporting channels

24. According to the Article 25(5) of MiFID, transaction reports can be made by different means: by the investment firm itself, by a third party acting on its behalf, or by a trade matching or reporting system approved by the competent authority or by the regulated market or MTF through whose systems the transaction was completed.
25. Article 12 of the implementing Regulation further specifies what requirements reporting channels shall meet and the conditions for approval of the systems (where relevant) by competent authorities.
26. Although these provisions require that some of these reporting systems are approved by a competent authority, the process of approval is not specified in details, nor does the reporting systems benefit from a European Passport. A reporting system willing to operate in several CESR members need to obtain the necessary approval individually in these jurisdictions and relevant local procedures apply.
27. CESR members however recognise that the market would benefit if the approval processes could be streamlined so that national process in one CESR member would recognise if a prior approval in another CESR members has been granted. This is especially relevant for requirements (a) – (d) of Article 12 of the implementation Regulation. Issues which relate to the ability of the reporting channel to submit the reports according to the relevant national requirements, like point (e) of Article 12 need to be evaluated nationally in each case.

#### Level 3 Guidelines:

**CESR members agree to take account of any prior approval by another CESR member (home competent authority of the reporting channel) for reporting channels when conducting their work under Article 25 of MiFID and Article 12 of the implementation Regulation. To the extent permitted by national law, they will adapt their internal processes to rely on the evaluation of other members and to avoid unnecessary duplication documents.**

**Question 4:** *Do respondents agree with the proposed guidelines?*