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## **CALL FOR EVIDENCE ON THE REVIEW OF THE SCOPE OF THE MiFID TRANSACTION REPORTING OBLIGATION**

### **Background:**

In May 2007, CESR published the CESR Level 3 Guidelines on MiFID transaction reporting (Ref. CESR/07-301). The guidelines covered non-technical issues where there was a need for a harmonised approach by CESR Members: transaction reporting by branches; scope of the transaction reporting obligation (i.e. what constitutes 'execution of a transaction' for transaction reporting purposes); and approval of reporting channels. Regarding the scope of the transaction reporting obligation, CESR committed to launch a review of the guidelines after there has been a year's experience of full operation of the MiFID transaction reporting regime with a view to producing definitive guidance in this area which aims at converging practices between CESR members.

The review will be conducted by the MiFID Level 3 Expert Group, chaired by Jean-Paul Servais, Chairman of the Management Committee of the Belgian CBFA.

### **Summary of the May 2007 CESR Guidelines**

According to Article 25(3) of MiFID, investment firms shall report details of transactions executed in financial instruments admitted to trading on a regulated market to their competent authorities. In the Guidelines, CESR noted that the MiFID transaction reporting regime is based on reporting of executed transactions and not directly on information on individual orders. It was therefore considered to be necessary to separate execution of a transaction from reception and transmission of orders.

Furthermore, CESR noted that there will be many different circumstances in which transactions take place. In some cases a client will go to an investment firm which then executes a transaction with a 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 which then goes to Firm B which in turn deals with a 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.

CESR Members 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. They noted that based on the differences in market structures (including the size of the market) the treatment of such a chain may, to some extent, differ from Member State to another.

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 recognised that competent authorities have a justifiable need to specify under which circumstances transactions are executed and hence need to be reported. It was noted that in addition to transaction reports, CESR Members need other information on the different steps of executing a transaction. In this regard practices differ between CESR Members. This information (including for example the identity of the originator of the order) may be collected as part of the transaction report or it may be acquired by other means (for example *ad hoc* requests that can take place ex-post).



These differences were noted to be due to different supervisory techniques, in relation to different structures and sizes of the markets. This was not considered to mean that certain supervisory methods are superior to others. It was also recognised that it remains to be seen what impact the possible changes in market structures post-MIFID will have on the supervisory methods.

Therefore it was considered inevitable that certain differences in the collection and exchange of supervisory information existed at the time of the implementation of MiFID.

However, in order to enhance convergence of transaction reporting obligations for firms, CESR Members agreed a common treatment of collecting transaction information. CESR Members committed themselves to collecting reports of those transactions which are conducted by the firms transacting directly with or as an execution venue (immediate market facing investment firms) and those transactions where the investment firm was undertaking the transaction on its own account (either on-market or off-market). Additionally CESR Members agreed that they should be able to exchange the information necessary to identify the ultimate client or the investment firm which is dealing with the ultimate client.

To sum up, in the interim guidance CESR Members agreed to commit themselves to collecting the following:

- (a) Information relating to transactions conducted by the investment firms transacting directly with an execution venue (immediate market facing firm);
- (b) information relating to transactions not covered by (a) above but where the investment firm is undertaking the transaction on its own accounts (regardless whether the transaction is executed on an RM or MTF or outside them); and
- (c) information which is necessary to identify the ultimate client on whose behalf the transaction is undertaken or information which is necessary to establish the identity of the investment firm which is dealing with the ultimate client where the competent authority is not already in possession of such information or where it could not obtain such information in a sufficiently timely manner.

In addition, CESR Members agreed to exchange the information in points (a) and (b) and, if requested and when available the information in point (c).

This was seen as an interim solution in order to avoid disruptions in the existing reporting and supervision systems of CESR Members. Following one year's experience of full operation of the MiFID transaction reporting regime (including the operation of the transaction reporting exchange mechanism, the effect of changing the reporting lines and the choices of requiring or not the client identification in the reports) CESR committed to review the reporting regime with a view to achieving further convergence.

#### **Call for Evidence:**

CESR invites all interested parties to submit their views as to what CESR should consider when conducting the review of the scope of the MiFID transaction reporting obligation (i.e what constitutes 'execution of a transaction'). Other elements relating to transaction reporting are outside the scope of this review. In particular, CESR invites views on the questions set out below.

1. Have the differences in the scope of the transaction reporting obligation between CESR Members caused problems for you? Please provide practical examples of any difficulties encountered.
2. Please provide information on your practical experiences in reporting transactions that fall under each of the items (a)-(c) above? Is the difference between these three categories sufficiently clear? Do the competent authorities interpret the scope of these categories in the same way? If not, where in particular have you encountered problems?
3. In your opinion, what are the advantages and disadvantages of competent authorities systematically receiving transaction reports covering the information referred to in item (c) above versus acquiring that information on an ad-hoc basis by other means?



4. On the basis of their pros and cons, what would be the preferred solution in relation to the possible convergence of the scope of the transaction reporting obligation (regarding what constitutes ‘execution of a transaction’)? Please provide justifications for your choice. When analysing the pros and cons, please consider also whether there is a danger of regulatory arbitrage if the scope of the transaction reporting obligation is not harmonised between Member States, as well as the implications for transparency calculations on shares considering that in the future these calculations will be conducted on the basis of the transaction reporting data?

All contributions can be submitted online via CESR’s website under the heading Consultations at [www.cesr.eu](http://www.cesr.eu) by **5 December 2008**.