



**Questions and answers on MiFID:
Common positions agreed by CESR Members in the area of the Secondary
Markets Standing Committee**

First version – May 2010

INTRODUCTION - The context and status of this ‘Q and A’:

MiFID overview:

MiFID is a major part of the European Union’s Financial Services Action Plan (FSAP), which is designed to help integrate Europe's financial markets and to establish a common regulatory framework for Europe’s securities markets. MiFID comprises two levels of European legislation:

- Level 1, the Directive itself (2004/39/EC), was adopted in April 2004. It is a ‘framework’ Directive and makes provision for its requirements to be supplemented by technical implementing measures, the so-called Level 2 legislation.
- The Level 2 legislation consists of a directive (2006/73/EC) and a regulation (1287/2006). The Level 2 measures were developed on the basis of technical advice provided by CESR and were the subject of negotiation at European level in the European Securities Committee (ESC). They were formally adopted by the Commission and published in the Official Journal of the European Union on 2 September 2006.

MiFID came into effect on 1 November 2007. Its predecessor is the Investment Services Directive (ISD). MiFID allows regulated markets, multilateral trading facilities (MTFs) and investment firms to operate throughout the EU on the basis of authorisation in their home Member State (the "single passport"). MiFID extended the coverage of the ISD and introduced new and more extensive requirements that firms have had to adapt to, in particular for their conduct of business and internal organisation. In general, MiFID covers most, if not all, firms that were subject to the ISD, plus some that were not. This includes investment banks, portfolio managers, stockbrokers and broker-dealers, corporate finance firms, many futures and options firms and some commodities firms. One of the main purposes of MiFID is to harmonise investor protection throughout Europe.

The Secondary Markets Standing Committee:

The Secondary Markets Standing Committee undertakes all CESR’s work related to the structure, transparency and efficiency of secondary markets for financial instruments, including trading platforms and OTC markets (regulated markets, MTFs, systematic internalisers and activity of intermediaries in trading platforms).

In particular, the Standing Committee assesses the impact of changes in the market structure to the transparency and efficiency of trading and develops CESR policy in relation to the issues identified. This applies not only to shares that are currently subject to the Markets in Financial Instruments Directive (MiFID) transparency requirements but also to other financial instruments. The Standing Committee also fosters supervisory convergence among CESR Members in its area of competence.

In terms of policy, the Standing Committee has responsibility for elaborating Level 2 advice and Level 3 measures on the MiFID provisions applicable to regulated markets, multilateral trading facilities (MTFs), systematic internalisers and pre- and post-trade transparency, with a view to ensuring harmonised implementation of the EU legislation. More generally, the Standing Committee



will identify and address other areas for further work in the field of secondary markets as appropriate. The Standing Committee also prepares CESR's technical advice to the European Commission on the need for possible changes to the Level 1 and 2 Directive when requested.

All work carried out on these issues, and in particular work carried out to develop convergence amongst supervisors (undertaken by CESR in a Level 3 capacity) is available at:

<http://www.cesr.eu/index.php?page=groups&mac=0&id=61>

The Secondary Markets Standing Committee MiFID Q and A publication:

This consolidated Q and A publication follows the model that is used by CESR for the Prospectus Directive. It is intended to provide market participants with responses in a quick and efficient manner to 'everyday' questions which are commonly posed to CESR by market participants, CESR Members, or the public generally. CESR responses do not constitute standards, guidelines or recommendations. The main purpose of the MiFID Q&A is to address issues of practical application, for which a formal consultation process is considered to be unnecessary. CESR intends to operate in a way that will enable its Members to react quickly and efficiently if any aspects of the common positions published need to be modified or the responses clarified further.

Answers to the questions submitted are closely coordinated with the European Commission.

If you have any questions to CESR on the practical application of any of the MiFID requirements, please send them to the following email address (mifid@cesr.eu).



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1. Articles 29(2) and 44(2) of Directive 2004/39/EC and Article 18(1) of Commission Regulation (EC) No 1287/2006 – Dark pools of liquidity *December 2008*

- Q) (a) Can all orders be submitted to a dark pool? If not, what restrictions apply?**
- (b) Must a dark pool order be completely filled or can a residual remain?**
- (c) If an order is routed to a dark pool, what is the time frame it can reside there before having to be routed onwards?**

A) (a) Although not a term defined in MIFID, in answering this question, a dark pool of liquidity (dark pool) is understood as a trading facility where there is no pre-trade transparency, i.e. where orders are not publicly displayed based on pre-trade transparency waivers provided by MIFID.

The type of orders that can be submitted to a dark pool depends on the pre-trade transparency waiver criteria being used by the dark pool.

Where the waiver is based on the market model, there are no specific provisions governing which orders can be submitted to such a dark pool. Where the waiver is based on the characteristics of the order (e.g. an order large in scale compared to normal market size), the waiver criteria place restrictions on the orders which can be accepted by a dark pool.

In addition, investment firms responsible for executing the order on behalf of a client will need to decide whether submission to a dark pool complies with the order-handling and best execution obligations to which they are subject under MIFID.

- (b)** There are no explicit provisions in MiFID requiring that orders submitted to a dark pool have to be completely filled. However, whether the residual part of an order ('stub') can continue to remain dark to the market depends on which pre-trade transparency waiver is being used (e.g. waiver for crossing systems, waiver for orders that are large in scale compared to normal market size) and on whether the conditions of the pre-trade transparency waiver granted to/used by the dark pool continue to be fulfilled. The fulfillment of the waiver conditions needs to be assessed by the operator of the dark pool, and if required on the basis of the national implementation of MiFID, also by the relevant competent authority.
- (c)** There are no specific provisions in MiFID governing how long an order may be left in a dark order-book before being routed elsewhere, as long as the waiver criteria from pre-trade transparency continue to be met. As in the first answer, an investment firm acting on behalf of a client will need to determine, in light of the order-handling and best execution obligations that it is subject to under MiFID, how long it is appropriate for an order to be held in one trading venue (whether light or dark) without being executed.

2. Article 33 of Directive 2004/39/EC – remote membership of a regulated market

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- Q) If a firm has obtained authorisation from its home Member State regulator in order to conduct activities which require authorisation (e.g. market making in securities on a regulated market or an MTF in that jurisdiction or transacting investment business on behalf of clients), does it need to exercise its passport rights in order to conduct dealing on own account on markets in other Member States or can it rely on the exemptions in Articles 2(d) and 2(l) and conduct own**



account dealing (excluding market making in securities or undertaking systematic internalisation in respect of client business) without the need for additional authorisation?

- A) Where a firm has obtained authorisation from its Member State competent authority to provide investment services and activities in the territory of that Member State and wishes to provide the same services on a cross-border basis, it should exercise its passport rights under MiFID.

Membership of a regulated market does not necessarily involve the provision of investment services or the performance of investment activities for the purposes of a cross-border services passport notification. Where an investment firm is admitted as a member of a regulated market established in another Member State, it will not need to make a cross-border services notification under MiFID, to the extent that its investment services and activities in that other Member State are limited to dealing on own account or executing client orders on that other regulated market, as a remote member.

3. Article 57 of Directive 2004/39/EC – scope of the direct requests for information to remote members of a regulated market	<i>July 2009</i>
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- Q) **According to Article 57 of MiFID, in the case of investment firms that are remote members of a regulated market the competent authority of the regulated market may choose to address them directly. Are there any specific limitations regarding the scope of these information requests?**

- A) MiFID increased the powers and ability of competent authorities to cooperate and exchange information with the view of increasing investor protection and of strengthening the integrity of financial markets. Among others, MiFID introduced in Article 57 a specific provision to provide the competent authority of a regulated market with the discretionary power to directly address investment firms that are remote members of that market.

The relevant paragraph of Article 57 on “Cooperation in supervisory activities, on-the-spot verifications or in investigations” states: “...A competent authority of one Member State may request the cooperation of the competent authority of another Member State in a supervisory activity or for an on-the-spot verification or in an investigation. In the case of investment firms that are remote members of a regulated market the competent authority of the regulated market may choose to address them directly, in which case it shall inform the competent authority of the home Member State of the remote member accordingly.”

The requests for information made to a remote member on the basis of Article 57 have to relate to its activities in its capacity as a remote member of a regulated market. However, these information requests do not need to be limited to MiFID purposes but can cover basic information that would assist the competent authority in obtaining information that could facilitate detecting behaviour that may eventually be considered as market abuse.