



EUROPEAN COMMISSION

Internal Market and Services DG

Director-General

Brussels,
MARKT G3/SH/cr Ares (2009)

Mr Eddy Wymeersch
Chairman
CESR – Committee of European
Securities Regulators
11-13 Avenue de Friedland
F - 75008 Paris
France

Subject: Request for additional information from CESR in relation to the review of MiFID

Dear Eddy,

As already expressed at various occasions, the very substantial work already undertaken by CESR, and planned as part of CESR's Work Programme for 2010 in preparation of the Markets in Financial Instruments Directive (MiFID)¹ review, is highly appreciated. We will continue following the work closely to achieve the best possible coordination of our efforts. At this stage, I write to request additional information from CESR regarding the MiFID review.

The requested information mainly relates to issues that CESR is already considering. Although some issues discussed in the CESR documents may not have raised major concerns, these will need to be addressed nonetheless in the MiFID review. We would also seek CESR's assistance on a limited number of new issues (e.g. post-trade transparency for derivatives other than CDS, pre-trade transparency for non-equity markets, oversight of commodity derivatives markets, classification of clients, underwriting).

In addition to asking CESR's general assistance in these areas, the Commission services would benefit from selected technical information in the context of further testing and analysing the impact of relevant policy options through independent studies or work carried out by the Commission services. Some extra fine-tuning as well as additional data

¹ Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments; Commission Directive 2006/73/EC of 10 August 2006 implementing Directive 2004/39/EC of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive; 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 purposes of that Directive

gathering is necessary in our view for us to elaborate policy proposals as well as carry out a full impact assessment.

In addition, as you may know, the Commission is in the process of engaging external consultants, partly to assist in collecting factual information and partly, at a later stage, to assist in evaluating the economic impact of possible policy options. To avoid duplication of work, the consultants will be asked to work also on the basis of information provided by CESR, in particular in the cases where CESR members are considered best placed to retrieve the relevant information or where CESR has already carried out work.

As a consequence, given the time pressure for delivering the review and taking into account that CESR has already produced technical advice and carried out consultations on a number of key issues, the Commission does not intend seeking assistance in the form of technical advice as it had done at numerous occasions in the past.

I would be grateful for receiving your response on the issues that require or where we seek CESR's assistance by 10 July 2010.

In relation to technical information that has already been collected by CESR, or which CESR members are considered best placed to collect, I would appreciate that the information is made available to the European Commission (Maria Velentza, Head of Securities Markets, DG MARKT, Phone: +32 229 51723, maria.velentza@ec.europa.eu) as soon as possible, taking into consideration that external consultants are likely to use this information. Due to the less formal requirements and the absence of policy advice in this context it would be more useful for the Commission services work if you allow, for instance, the Standing Committee on Secondary Markets or the Investor Protection and Intermediaries Standing Committee to communicate this information directly to the Commission on an ad-hoc basis.

In order to ensure good functioning of the Lamfalussy arrangements in this very important exercise I would like recall the value we place on cooperation and input from CESR.

Yours sincerely,

Jörgen HOLMQUIST

**Request for additional information from CESR in relation to the review of MiFID
Transparency, level playing field between trading venues in equity markets,
Transparency and oversight of non-equities markets,
Conduct of business rules**

First it is appropriate to recall the issues currently under consideration by CESR as part of the CESR's Work Programme for 2010 in relation to equity markets, non-equity markets as well as conduct of business rules:

- Pre-trade transparency waivers, specifically large in scale waivers, reference price waivers, negotiated trade waivers and order management facility waivers as well as possible issues in the context of Indication of Interests (IOIs)
- Regime for systematic internalisers
- Post trade transparency regime including the quality, delay and deferral of post trade information
- Application of transparency obligations for equity-like instruments
- Cost and consolidation of trade transparency data
- Regulatory boundaries for requirements for investment firms operating crossing systems and possible level playing field issues between trading venues
- Transparency for non-equity markets
- Transaction reporting for OTC derivatives
- "Best execution": Availability, comparability and consolidation of information concerning the quality of execution of various execution venues.
- Complex/non-complex financial instruments
- MiFID discretions including recording of telephone conversations and electronic communications involving client orders, and tied agents

In addition, we would like CESR to respond to a series of concrete questions on some further issues:

- Client classification
- Underwriting
- Suitability
- Inducements

The additional information requested should generally be considered in the context of the above mentioned issues, the majority of which are already under consideration by CESR. In most cases it is not the intention to expand the work streams within CESR considerably. The purpose is to highlight issues possibly not considered under the current work streams, or to make available to the Commission specific technical information,

mostly collected in the course of the work of CESR, so that it can be used for assessing the economic impact of these measures.

1. EQUITY MARKETS

1.1. General assessment

Q1: Please share your supervisory experience as regards any problems with the definition of a transaction for the purpose of Regulation 1287/2006.

Q2: Please share your supervisory experience as regards any problems in relation to Table 1 of Annex II of regulation 1287/2006, defining the information to be made public by MTFs and regulated markets according to Article 17 of the same regulation.

Q3: In the context of the work on systematic internalisers currently carried out by CESR, please share your supervisory experience as regards any problems in relation to Table 3 of Annex II of regulation 1287/2006, defining the standard market size.

Q4: In the context of the work on systematic internalisers currently carried out by CESR, please share your supervisory experience as regards any problems in relation to the definition of a liquid share, as set out in Article 22 of Regulation 1287/2006.

1.2. Technical information

Q5: In the context of the work currently undertaken by CESR on transparency for instruments similar to shares, please provide information about the number of trades as well as the turnover per Member State for depository receipts, exchange traded funds, preference shares and certificates.

Q6: In relation to CESR work to identify possible differences in organisational requirements between regulated markets and MTFs, please provide details of any differences that are identified.

Q7: In the context of the work currently carried out by CESR to review systematic internaliser requirements, please provide figures for the total trading activity currently involving systematic internalisers. If any changes to the definition of a systematic internaliser are proposed, please provide estimates of the additional trading that would be covered as a result of the changes.

2. NON EQUITY MARKETS

2.1. General assessment

Trade transparency

Q8: How does CESR envisage achieving further transparency in line with its recommendations in the CESR report on Transparency of Corporate Bond, Structured Finance Products and Credit Derivative Markets²? For example:

² Ref.: CESR/09-348

Q8(a): Should the requirements apply by financial instrument regardless of where the trade is executed (regulated market, MTF, systematic internaliser, or OTC) based on qualitative and/or on quantitative grounds? Qualitative criteria could include, for example, whether a bond has been issued with a prospectus, or whether a derivative is clearable. Quantitative criteria could include, for example, bonds with a certain issue size, or instruments with an average daily turnover above a certain threshold.

Q8(b): Should the requirements apply by trading venue (regulated market, MTF, systematic internaliser) to any financial instruments traded on these venues or only to those financial instruments fulfilling certain qualitative or quantitative criteria as specified under (a) above? If so, should separate requirements apply to OTC trades as well?

Q9: Pre-trade transparency not being considered in CESR's report on Transparency of Corporate Bond, Structured Finance Products and Credit Derivative Markets, please assess whether there is any evidence of a failure in the level of pre-trade transparency available in these markets? Do all potential participants have access to pre-trade information on even grounds, for example in the case of retail investors in relation to non-equity products made available to them?

Q10: Considering recommendations from the G20, and the Commission Communication on Ensuring efficient, safe and sound derivatives markets³, and notwithstanding CESR's advice regarding energy derivatives⁴, please assess whether similar or other shortcomings in the level of post-trade and/or pre-trade transparency arise for derivatives not covered by CESR's report on Transparency of Corporate Bond, Structured Finance Products and Credit Derivative Markets (interest rate derivatives, FX derivatives, equity derivatives, commodity derivatives).

Oversight and transaction reporting to regulators

Q11: In view of its work on transaction reporting of OTC derivatives and on trade repositories, please assess:

Q11(a): How best to arrange the flow of information to be provided by investment firms to regulators for transaction and position reporting purposes? Please consider the objective of minimising any double reporting for investment firms;

Q11(b): Apart from detecting and pursuing cases of market abuse, what other purpose does transaction reporting have? What purpose does position reporting have?

Q11(c): What are the experiences of CESR with transaction reporting by regulated markets, MTFs or trade-matching or reporting systems by pursuant to Article 25(5) MiFID?

³ COM 2009(563)

⁴ CESR and ERGEG advice to the European Commission in the context of the Third Energy Package (CESR/08-998)

Q12: In light of the G20 endorsement of the IOSCO recommendations regarding commodity derivative markets, the increased participation of financial participants as an alleged possible factor influencing the price of physical commodity markets via the respective derivative markets, and the recent volatility in these markets:

Q12(a): Please provide us with an overview of existing position reporting arrangements in the different Member States. Do these arrangements arise from national legislation or are these initiatives undertaken together with derivative exchanges?

Q12(b): In your view what are the benefits in terms of regulatory oversight?

Q12(c): Would data by type of trader (e.g. commercials, investment firms, fund managers etc.) be of further use? How?

Q12(d): What regulatory purposes could a system of position limits best serve?

Q13: Against this backdrop, and its earlier advice concerning Articles 2(1)(i) and (k) of MiFID notwithstanding,⁵ please assess whether market oversight could be impaired if exempted firms do not fall under the scope of possible future reporting requirements to trade repositories and/or regulators?

2.2. Technical information

Q14: In the context of the CESR work on post-trade transparency in corporate bonds, structured finance products and credit derivative markets, could CESR provide us with any relevant information collected on the level of the de facto existing trade transparency including any description of existing sources of pre- and post-trade information, mostly through electronic systems?

3. CONDUCT OF BUSINESS RULES

3.1. General assessment

Complex/non-complex financial instruments and appropriateness test.

Q15: In the feedback statement to the CESR consultation paper "MiFID complex and non-complex financial instruments for the purposes of the Directive's appropriateness requirements", CESR raised some concerns about the classification of UCITS, which are always classified as non-complex instruments under Article 19(6) of MiFID and referred to the European Commission initiative on this topic. In addition to the work already carried out, please consider technical criteria to possibly distinguish UCITS between complex and non complex financial instruments for the purposes of the execution-only regime.

Q16: Please assess possible additional criteria to further refine the scope of financial instruments under Article 19(6) MiFID, such as:

⁵ CESR 08-752

Q16(a): Extending the element of the admission to trading on regulated markets - currently only required in the case of shares - to other financial instruments,

Q16(b): Taking into account the element of the risk of the financial instruments (e.g. high quality rating of the financial instruments involved).

Q17: Please assess the possibility, in addition to or as an alternative to the assessment under Q16, to require a general consideration of the ability of the client to understand the implications of execution-only services in terms of reduction of applicable protections.

Inducements requirements

Q18: In a "level 3" context, CESR already focused on inducements in 2007⁶ and in 2009⁷ and is currently finalising a report on good and poor practices. The different aspects of Article 26 of the Implementing directive have been considered, such as the different categories of inducements, the conditions provided in order to allow firms to provide or receive commissions and other benefits (e.g. the requirement to disclose certain inducements or the design to enhance the quality of the service to clients and the ability not to impair compliance with duty to act in the best interest of the client), and the classification of "proper fees" (Article 26(c)).

We ask CESR to share its supervisory experience and to consider whether, in the different national contexts, the existing regime is able to deliver an appropriate level of investor protection or whether further action may be needed. This may include focusing on the following areas: 1) classification of different categories of inducements; 2) disclosure regime under Article 26(b)(i); 3) conditions under Article 26(b)(ii).

Client categorisation

Q19: "Professional clients per se" (Annex II.I of MiFID) and eligible counterparties (Article 24 MiFID) include a number of entities presenting differences in their nature, their size and the complexity of their business (for instance, small and big financial entities providing different types of activities; different categories of "institutional investors", municipalities and other public bodies). In the perspective of further calibrating the treatment of clients:

Q19(a): Please share your supervisory experience and data related to problems encountered in the provision of investment services to professional clients or eligible counterparties. This includes any alleged miss-selling which may have involved public local authorities (e.g. municipalities), small and medium undertakings, institutional investors (e.g. pension funds), or small credit institutions. We ask CESR to provide details about the kind of entities and products concerned;

Q19(b) Please consider possible technical criteria to further distinguish within the current broad categories of clients ("other authorised or regulated financial institutions", "locals", "other institutional investors" (Annex II.I(1)(c), (h), (i) of MiFID), public bodies managing public debt (see Article 24(2) and Annex II.I(3) of MiFID).

⁶ CESR/07-228b

⁷ CESR/09-958

Tied agents

Q20: Please share your experience regarding any widespread supervisory problems involving tied agents notably concerning any organisational or conduct of business matters related to tied agents and to firms appointing tied agents.

Underwriting

Q21: Corporate finance business is covered in MiFID under different investment and ancillary services: underwriting and placing, advice to undertakings, including services relating to mergers, services related to underwriting (Annex I, Section A(6) and (7) – Section B(3) and (6)). Investment firms providing the investment services of underwriting and placing should be authorised and are subject to the MiFID requirements. However, further aspects concerning these services are not regulated under the Directive. This includes the relationship between intermediaries and issuers, the process of issuing and allocating the financial instruments, the organisation of underwriting syndicates, the pricing of financial instruments.

Please provide a general description concerning the following aspects:

Q21(a): The process followed by investment firms and credit institutions in providing the services of underwriting and placing in equity and bond markets;

Q21(b): Your experience in supervising entities providing the above mentioned services;

Q21(c): Concrete cases which, over the last years, may have attracted substantial level of criticisms from investors, issuers or intermediaries.

Ancillary services

Q22: The granting of credits or loans to clients in connection with the provision of investment services is currently classified as an ancillary service under MiFID (Annex I, section B(2) of MiFID). The provision of this service increases significantly the exposure of clients to risk. Please consider whether the granting of credits or loans is commonly associated to the provision of investment services and whether, based on supervisory experience, it may raise regulatory or supervisory concerns.

3.2. Technical information

Services under Article 19

Q23: Please provide any available data about the following areas:

Q23(a): The break-down of retail client transactions involving (i) the provision of investment advice, (ii) services covered under Article 19(5) of MiFID and (iii) services only consisting of execution and/or reception and transmission of orders under Article 19(6),

Q23(b) In the case of the provision of services under Article 19(5) of MiFID:

- The frequency of clients' refusal to provide information regarding their knowledge and experience,

- The frequency of warnings to clients concerning the inappropriateness of proposed financial instruments;

Q24: In the case of warnings concerning the inappropriateness of investments, please consider whether, based on supervisory experience, retail clients may better understand warnings mentioning the specific reasons why the transaction is not appropriate instead of receiving warnings in a standardised format.

Suitability requirements

Q25: Please provide information on your experience in the application of the suitability requirements (Article 19(4) MiFID). Directive 2006/73/EC further specifies these requirements (so called suitability requirements – Articles 35 and 37 of Directive 2006/73/EC). For example:

Q25(a): How do you monitor that intermediaries are adequately organised (internal arrangements and procedures, internal controls) and comply with the suitability requirements?

Q25(b): Do you have evidence of any evolution of complaints for unsuitable advice before and after MiFID (provided that a suitability regime was applicable in the jurisdiction concerned)?

Q25(c): Based on supervisory experience do you think that modifications are needed in the suitability requirements?