



Date: 29 July 2010  
Ref. CESR/10-926

## **PRESS RELEASE**

### **CESR proposes changes to MiFID to improve securities markets' functioning, transparency and investor protection**

CESR publishes today the first set of technical advice to the European Commission (Commission) in the context of reviewing MiFID, the Markets in Financial Instruments Directive, which entered into force in November 2007. This covers CESR's advice on equity markets (Ref. CESR/10-802), non-equity markets transparency (Ref. CESR/10-799), transaction reporting (Ref. CESR/10-808) and investor protection and intermediaries (Ref. CESR/10-859) as well as part of the responses (Ref. CESR/10-860) to the request for additional information in relation to the review of MiFID that the Commission presented to CESR in March 2010.

The advice that CESR puts forward is both extensive and highly significant, tackling the key issues that CESR and market participants have identified as needing action. They aim at improving pre- and post-trade transparency and the orderly functioning of the markets, strengthening investor protection and ensuring securities regulators are equipped with tools which enable them to effectively monitor trading. CESR's recommendations take into account market developments since MiFID was originally drafted. Importantly, if taken forward by the Commission, they would impact many elements of securities market regulation and constitute a major change in the EU regulatory landscape.

The development of the advice has benefited from a number of public consultations, open hearings and other types of exchange of views in a range of meetings and workshops organised with market participants as well as with representatives of retail investors. These contacts have been pivotal in shaping CESR's advice.

**Eddy Wymeersch**, Chair of CESR and Chair of the Supervisory Board of the Belgian Commission Bancaire, Financière et des Assurances (CBFA), stated:

*"The MiFID Directive is a cornerstone in the regulation of Europe's financial markets; since its entry into force in November 2007, Europe's single market has developed significantly. This very timely review of MiFID now provides an important opportunity to review the availability of pre- and post trade data in equity markets, which has become more complex with the development of multiple trading venues. It also enables us to expand transparency to non-equity markets, which the financial crisis highlighted as being of critical importance. The introduction of minimum harmonised rules on tape recording and the obligatory collection of client IDs when orders are transmitted will also greatly strengthen the tools supervisors have at their disposal to investigate misselling and market abuse. The creation of a consolidated tape however, remains an area where it will be key to see concrete steps being taken in the very short-term as we remain convinced of its necessity. The opportunity to review the MiFID at this juncture has also provided an important step forward towards convergence amongst supervisory practices and brings a single rulebook a step closer, which will be of benefit both to market participants and retail investors alike, strengthening certainty and greater confidence for all."*

The technical advice that CESR publishes today is four-fold and includes policy proposals on equity markets (I.), non-equity markets transparency (II.), transaction reporting (III.) and investor protection and intermediaries (IV.). CESR also provides its responses to some of the questions



presented by the Commission in its request for additional information (V).<sup>1</sup> In addition, the next steps in CESR's work in relation to the MiFID review are highlighted in section VI.

## **I. Technical advice on equity markets**

The technical advice on equity markets (Ref. CESR/10-802) follows the consultation paper published in April 2010 (Ref. CESR/10-394), to which 76 responses were received. The advice also takes into account the information received in response to CESR's Call for Evidence on micro-structural issues that was also published in April (Ref. CESR/10-142). The advice includes data on dark trading taking place on regulated markets (RMs), Multilateral Trading Facilities (MTFs) and investment firms' crossing systems for 2008, 2009 and Q1/2010.

The main recommendations put forward are:

### ***Improving the pre-trade transparency regime for RMs/MTFs***

Data from CESR's fact-finding shows that more than 90 percent of trading on organised markets in Europe is pre-trade transparent. CESR recommends retaining the general requirement for pre-trade transparency on organised markets (RMs/MTFs). However, exceptions to pre-trade transparency should continue to be allowed under certain circumstances.

In order to provide greater clarity for regulators and market participants and facilitate continuous supervisory convergence, CESR seeks to move from a 'principle-based approach' to waivers from pre-trade transparency to an approach that is more 'rule-based'. In addition, CESR recommends the Commission provide ESMA with specific powers to monitor and review the pre-trade transparency waivers and to develop binding technical standards in this regard.

Regarding particular waivers, CESR recommends the Commission undertakes or commissions further analytical work based on empirical data to determine whether the existing large-in-scale (LIS) waiver thresholds should be revised. CESR stands ready to provide the Commission with further assistance in this work. CESR also recognises the need for a harmonisation of the treatment of 'stubs' under the LIS waiver and recommends to clarify that venues using the reference price waiver should not embed a fee in the price of trades. With respect to the existing wording of the waivers, CESR continues to work on appropriate clarifications which may, as appropriate, be included in binding technical standards at a later stage.

In addition, CESR recommends that MiFID be amended to clarify that actionable indications of interest (IOIs) are considered to be orders and as such, subject to pre-trade transparency requirements.

### ***Reviewing the definition of and obligations for systematic internalisers***

CESR recommends the Commission clarify the objective of the systematic internaliser (SI)-regime and consider a broader review of this regime within the MiFID review, including further consideration of whether to establish appropriate thresholds for the material commercial relevance of the activity to the market and whether to retain/remove the price improvement restriction. CESR stands ready to provide the Commission with further assistance in this work in the coming months, as appropriate.

Notwithstanding the recommendation for a broader review, CESR sees value in some clarifications to ensure consistent understanding and implementation of the regime, as well as some specific amendments to the regime to improve the value of information provided to the market. CESR therefore recommends clarifying the criterion 'according to non-discretionary rules and procedures'

---

<sup>1</sup> See <http://www.cesr.eu/popup2.php?id=6547> .



in the definition of an SI and to revise the SI-obligations to require two-sided quotes and minimum quote sizes.

### ***Enhancing the quality of post-trade transparency information***

CESR recommends retaining the current framework for post-trade transparency but introducing formal measures to improve the quality of post-trade data, shorten delays for regular and deferred publication and to reduce the complexity of the regime. Detailed proposals for binding post-trade transparency standards and guidelines on the obligations for post-trade transparency are being worked on with the industry and further recommendations will be provided at a later stage.

As a supplement to the introduction of new standards on data quality and guidelines on trade publication, CESR recommends requiring investment firms to publish their trades through Approved Publication Arrangements (APAs). All APAs would be required to operate data publication arrangements to prescribed standards as set out in Annex I of the advice, including for example appropriate systems and controls to identify incomplete or erroneous information received from investment firms and regulatory reporting requirements.

### ***Extending the transparency obligations to equity-like instruments***

CESR recommends to extend the scope of the MiFID transparency regime by applying transparency obligations to equity-like instruments admitted to trading on an RM, including depository receipts, exchange-traded funds and 'certificates' as defined in CESR's advice. These instruments are considered to be equity-like, since they are traded like shares and, from an economic point of view, equivalent to shares. CESR believes that there are benefits for investors stemming from a harmonised pan-European pre-and post-trade transparency regime for these instruments.

### ***Improving the regulatory framework for consolidation and addressing cost of market data***

CESR recognises that significant barriers to the consolidation of post-trade data remain and that, without further regulatory intervention, market forces are unlikely to deliver an adequate and affordable consolidation of transparency information on a pan-European basis. CESR therefore recommends that the establishment of a European consolidated tape be mandated and its main features outlined in MiFID. Regarding the technical implementation, CESR recommends a solution involving the industry within a clear scope and tight timeframe set by the Commission and ESMA. The process for the development of the European consolidated tape by the industry should be launched and progress and implementation monitored by ESMA. In case of default at any stage of the process, MiFID should identify a clear course of action and require the establishment of a mandatory single European consolidated tape run as a not-for-profit entity on the basis of terms of reference and governance to be set out by ESMA.

To reduce the cost of market data for all kinds of users, CESR also recommends that the Commission require the unbundling of pre-and post-trade transparency information. The data should be made available free of charge after a delay of no more than 15 minutes.

### ***Establishing a new regulatory regime for broker crossing systems***

With regard to broker crossing systems (BCSs), CESR recommends that a new regulatory regime with tailored additional obligations be introduced for investment firms operating such systems. This would include:

- notification by investment firms that they operate a BCS;
- publication of a list of BCSs by CESR/ESMA;
- a requirement for a generic BCS identifier in post-trade transparency information;
- publication of aggregate trade information at the level of each BCS at the end of the day; and identification of BCSs in transaction reports.



CESR also acknowledges concerns expressed by some market participants and regulators about the speed of growth of BCSs and the potential impact of these OTC markets on price formation in the future. It is therefore recommended to impose a limit on the amount of business that can be executed by BCSs before they are required to become an MTF.

### ***Addressing certain options and discretions of MiFID***

CESR has identified certain options and discretions within MiFID's markets provisions and consulted on the desirability of eliminating them or turning them into rules. CESR recommends retaining the discretion regarding the use of pre-trade transparency waivers and maintaining the role of CESR/ESMA in considering the use of the waivers to ensure their consistent and reasonable use. Taking the feedback from the consultation into account, CESR proposes that the discretion of Member States to choose some of the criteria to define liquid shares and the existing discretion regarding requirements for admission of units in collective investment undertakings to trading on an RM is retained. However, CESR sees merit in converting the discretion of Member States under Article 22(2) of MiFID into a rule by prescribing that investment firms comply with their obligation to make an unexecuted client limit order immediately public by transmitting it to a pre-trade transparent RM/MTF.

### ***Tackling market micro-structural issues***

CESR sets out the key themes emerging from its Call for Evidence on micro-structural issues of the European equity markets (Ref. CESR/10-142) and proposes an action plan for further work in this area. CESR also recommends the Commission amend MiFID to include specific references to ESMA competencies to develop binding technical standards on RMs/MTFs' organisational requirements regarding sponsored access, co-location, fee structures and tick sizes, as appropriate. Pending the revision of MiFID, CESR will consider dealing with some of these issues under CESR guidelines. CESR will also work further on high frequency trading to better understand any risks that it may pose to the orderly functioning of markets.

CESR's technical advice to the Commission on equity markets has been prepared by the Secondary Markets Standing Committee chaired by Sally Dewar, Managing Director (Risk Business Unit) of the UK FSA, who stated:

*“CESR proposes important changes to the European regulatory landscape and future ESMA powers aimed at keeping pace with new technological advances, increasingly fragmented equity markets and shortcomings in the quality and consolidation of post-trade information in the European equity markets. The efficient development of a European consolidated tape for shares on the basis of clear rules and a viable economic model involving the industry is amongst one of a number of key proposals which should deliver major transparency benefits.”*

## **II. Technical advice on non-equity markets transparency**

The technical advice on non-equity markets transparency (Ref. CESR/10-799) follows the consultation paper published in April 2010 (Ref. CESR/10-510), to which 48 responses were received. In its advice, CESR makes detailed proposals on the calibration of the MiFID post-trade transparency regime for non-equity financial instruments following its earlier report on transparency of corporate bond, structured finance product and credit derivatives markets of July 2009 (Ref. CESR/09-348), in which CESR recommended a mandatory post-trade transparency regime for these financial instruments.

The current advice goes beyond CESR's previous report in several aspects. Firstly, it includes within its scope sovereign Credit Default Swaps (CDSs) and 'public bonds'. Since other derivatives than CDS were not analysed in the past, CESR also explored the possibility of a post-trade transparency regime for the most significant subset of these financial instruments: interest rate derivatives, equity derivatives, foreign exchange (FOREX) derivatives and commodity derivatives. At the request



of the Commission, CESR also reconsidered whether there is a need for pre-trade transparency for corporate bonds, Asset Backed Securities (ABS), Collateralised Debt Obligations (CDOs), CDS and the other derivatives mentioned above.

The main recommendations include:

### ***Re-defining the scope of a post-trade transparency regime for bonds***

CESR proposes that the MiFID post-trade transparency regime should cover the majority of the bond universe which would include not only corporate bonds, but also public bonds (i.e. bonds issued by public entities such as sovereign bonds, government bonds and regional bonds) for which a prospectus has been published and/or which are admitted to trading either on an EEA RM or on an EEA MTF. It is proposed that under the corporate bond regime covered bonds, exchangeable bonds, convertible bonds and Spanish “participaciones preferentes” should also be included.

The recommendation for the thresholds and delays for publishing the trade information on corporate and public bonds is based on three bands depending on trade size with its corresponding delays. As an example of its proposals, CESR recommends real time reporting of price and volume for transactions in public bonds for trade sizes below €1 million, whereas for transactions between €1 million and €5 million, the price and volume of the transaction should be made public at the end of the trading day. For transactions above €5 million, information on the price, but not the volume of the transaction, should be disclosed at the end of the trading day (with an indication that the transaction has exceeded the €5 million threshold).

A similar proposal has been made for corporate bonds where real-time reporting should take place for transactions of a size between €500,000 and €1 million.

### ***Defining a phased approach for the introduction of a post-trade transparency regime for structured finance products***

CESR recommends that the transparency regime for structured finance products (SFPs) should cover all ABS and CDOs for which a prospectus has been published (i.e. including all ABS and CDOs admitted to trading on EEA RMs) or which are admitted to trading on an MTF. Due to the perceived illiquidity of these markets, CESR recommends that the transparency requirements should be introduced in a two step approach:

In the first phase, all the instruments rated as AAA, AA or A (or any equivalent terminology used by other credit rating agencies) should be covered. For the instruments covered in the first phase, price and volume of transactions below €5 million should be publicly disclosed at the end of the trading day, whilst for transactions above that size information on the price but not the volume (with an indication that the transaction has exceeded the €5 million threshold) should be disclosed at the end of the trading day.

In the second phase, the rest of the SFP universe as outlined above should be covered.

### ***Extending the scope to clearing eligible sovereign CDS***

In its July 2009 report, CESR proposed to include within the scope of a mandatory post-trade transparency regime all CDS contracts which are eligible for clearing by a Central Counterparty (CCP) due to their level of standardisation. Following the positive response of market participants to the public consultation, CESR proposes to extend the regime also to sovereign CDS once they become clearing eligible.

Basing again the different reporting bands on the transaction size, CESR proposes a different regime for single name and sovereign CDS (for which, as an example, real time reporting of price and volume is set out for transactions of a size below €5 million) and for index CDS (for which their





larger average trade size has been considered and the thresholds have been raised; accordingly, real time reporting of price and volume is set out for transactions of a size below €10 million).

### ***Enhancing post-trade transparency of derivatives markets***

Despite the difficulties in providing technical advice in these markets, given the heterogeneity of all the OTC derivative segments included in the analysis, CESR is strongly of the view that enhancing post-trade transparency for these assets will assist market participants in making investment decisions as well as in supporting more resilient and transparent markets in general. As a result, CESR recommends to the Commission that a harmonised post-trade transparency regime for these assets should be developed in the near future. CESR stands ready to assist the Commission in calibrating a regime for these assets which takes into consideration the different features of the markets in question.

### ***Conducting a post-implementation review***

As a general standpoint, CESR is of the view that the calibration of publication thresholds and related time delays for the instruments covered in this technical advice should ideally be based on the liquidity of each asset in question. Unfortunately, due to the largely OTC nature of these markets there is currently an absence of trading data which can reliably be used to robustly calibrate a regime. As a consequence, CESR therefore recommends that, at this stage, calibration should be based on the average trading size of each of the markets in question and makes a proposal for each asset class.

However, once the regime has been implemented, this information will quickly become available. Therefore at the core of CESR's recommendations to the Commission, is the need to undertake a post-implementation review (for all asset classes) with a view to reaching conclusions one year after introducing the new transparency obligations. CESR stands ready to assist the Commission with this work.

### ***Introducing pre-trade transparency requirements for non-equity financial instruments traded on RMs and MTFs***

CESR is of the view that there is currently an un-even playing field in the EEA in respect to the provision of pre-trade transparency information for financial instruments other than shares. CESR therefore recommends that given their growing importance current voluntary arrangements are put on a formal footing and that a compulsory harmonised pre-trade transparency regime be introduced. The regime should apply to organised trading platforms (RMs and MTFs) with respect to the non-equity instruments traded on these platforms. Similar to the pre-trade transparency regime for equity markets, this regime needs to be refined to provide appropriate pre-trade transparency standards for various market structures and trading models, taking into account the various instruments and asset classes traded. As for equity markets, this may also involve the provision of appropriate waivers.

Given the different characteristics of the wide range of products concerned, each with its respective market microstructure and the varying degree of liquidity exhibited in these markets, CESR does not, at this stage, propose to introduce mandatory pre-trade transparency requirements to the OTC space. Nevertheless, CESR would welcome that any future regime allows Member States to introduce local requirements if they deem them to be necessary given the specificities of their markets.

CESR's technical advice to the Commission on non-equity markets transparency has been prepared by the Secondary Markets Standing Committee chaired by Sally Dewar, Managing Director (Risk Business Unit) of the UK FSA, who stated:

*“Through the introduction of mandatory pre and post-trade transparency requirements for bond, structured finance product and derivatives markets, CESR proposes a fundamental change in the*



*functioning of these markets, for the benefit of both wholesale and retail investors. At the same time, the regimes have been carefully designed in order to avoid harming the liquidity of these markets, many of which are still recovering from the financial crisis.”*

### **III. Technical advice on transaction reporting**

The technical advice on transaction reporting (Ref. CESR/10-808) follows the consultation paper published in April 2010 (Ref. CESR/10-292), to which 48 responses were received. The advice is published together with a feedback statement on the responses given (Ref. CESR/10-796).

The key purpose behind the suggested amendments is to improve market supervision and ensure greater market integrity. The main recommendations made in the technical advice are the following:

#### ***Introducing a third trading capacity (client facilitation)***

CESR suggests amending the MiFID Implementing Regulation by introducing a third trading capacity – client facilitation. CESR initially considered the introduction of a third trading capacity (riskless principal) to be the best and most robust way to differentiate principal transactions made by a firm on its own account and on behalf of the client from other types of principal and agency transactions. However, on the basis of the feedback given in the consultation, CESR decided to modify and clarify its proposal by introducing a “client facilitation” capacity.

#### ***Requiring the collection of and defining standards for client and counterparty identifiers***

CESR suggests that the Commission amends MiFID and its Implementing Regulation in order to make the collection of client ID mandatory to all competent authorities. This will provide a significant contribution in improving the ability to investigate cases of market abuse.

In terms of standards for transaction reporting, CESR considers that the ideal solution would be a unique pan-European code for each person (natural or legal). However, due to the inherent technical difficulties arising from the creation of such a code and the lack of harmonised national codes in all Member States, CESR is of the opinion that each Member State should be free to decide which codes should be used for these purposes, taking into account national regulations and practices. Nonetheless, for the purpose of exchanging transaction reports between CESR Members, CESR relies on the use of BIC codes for counterparties and clients (whenever such codes exist) and strongly encourages their use at national level.

#### ***Requiring the collection of client ID when orders are transmitted for execution***

CESR suggests amending MiFID to enable competent authorities to require the reporting of client ID when orders are transmitted for execution with the transmitting firm, either providing the client ID to the receiving firm or reporting the transaction, including full client ID, to the competent authority.

#### ***Extending transaction reporting obligations to market members not authorised as investment firms***

CESR suggests amending MiFID by introducing a transaction reporting obligation applicable to regulated markets and MTFs that admit as members, undertakings currently falling under the Article 2(1)(d) exemption for all the transactions carried out by those members on the respective regulated market or MTF. This exemption would mean that transactions made on their own account by non-authorized firms would now fall within the scope of transaction reporting obligations.

CESR’s technical advice to the Commission on transaction reporting has been prepared by CESR-Pol chaired by Anastassios Gabrielides, Chairman of the Hellenic Capital Market Commission, who stated:



*“Investment firms have been calling for greater consistency in the interpretation and implementation of MiFID transaction reporting obligations, e.g. in relation to the harmonisation of the standards for the use of client and counterparty identifiers in transaction reporting. In order to respond to these requests and, at the same time, improve the regulators’ ability to investigate market abuse, CESR proposes several changes to the transaction reporting requirements, the most significant being the requirement to always report the client ID.”*

#### **IV. Technical advice on investor protection and intermediaries**

The technical advice on investor protection and intermediaries (Ref. CESR/10-859) follows a consultation paper published in April 2010 (Ref. CESR/10-417), to which 80 responses were received.

The main recommendations addressed in the technical advice propose the following changes:

##### ***Introducing minimum harmonised mandatory recording requirements for telephone conversations and electronic communications***

CESR believes that there should be a common EEA regime for the recording of orders received or transmitted by telephone or through electronic communications. CESR proposes that the discretion for Member States to set rules on recording at a national level should be replaced by a minimum harmonisation EEA recording obligation. The obligation should apply, in relation to all financial instruments covered by MiFID, to investment firms that provide the investment services of reception and transmission of orders, execution of orders on behalf of a client or (in certain circumstances) portfolio management or perform the investment activity of dealing on own account. Investment firms would be required to hold such records for a period of 5 years.

CESR considers that such a regime would be an important step forward in terms of certainty, consumer protection, and surveillance of markets.

##### ***Requiring trading venues to produce reports demonstrating execution quality***

CESR proposes the introduction of a general obligation in MiFID for execution venues to produce regular reports on the quality of execution in shares. This would be supported by clarification of the existing obligations on investment firms executing orders in shares to collect information to enable them to assess which execution venues should be included in their execution policies, in particular in regard to investment firms executing client orders on behalf of retail clients.

##### ***Clarifying the distinction between MiFID complex and non-complex financial instruments***

CESR proposes to deliver a more graduated risk-based approach to the distinction between complex and non-complex financial instruments for the purposes of the Directive’s appropriateness requirements. This will involve updating the list of financial instruments in Article 19(6) of MiFID in relation to which investment firms (providing the other conditions in the article are met) can provide the services of the reception and transmission of orders and execution of client orders without the need to assess whether the product or service offered is appropriate for the client. These changes would need to be elaborated through subordinate legislation and/or guidance to provide greater clarity about their application.

##### ***Clarifying the scope of the definition of investment advice***

CESR is concerned that the current wording of Article 52 of the MiFID Implementing Directive, could be misunderstood as excluding from the definition of investment advice, personal recommendations which are issued exclusively through distribution channels. CESR proposes clarifying that investment advice can be provided through distribution channels. This is suggested in





order to protect clients against the growing number of intermediaries that now use distribution channels such as the internet and other similar means to provide personal recommendations. As such CESR proposes a revised definition of investment advice to address this.

### ***Harmonising the rules for the supervision of tied agents and related issues***

CESR recommends further harmonisation of the rules on the use of tied agents and the reduction of differences resulting from the discretions in Article 23 of MiFID. This includes allowing investment firms in all Member States to appoint tied agents and prohibiting the tied agents of all investment firms from handling client money and/or financial instruments. It also proposes (through amendments to Articles 31 and 32 of MiFID) enhancing transparency by obliging the home competent authority to transmit the identity of any tied agents acting cross border to the host authority, who should then disclose this information to the public.

### ***Addressing certain MiFID options and discretions***

In addition to the above specific changes, CESR has identified further options and discretions that fall within the investor protection and intermediaries area and has consulted on amending, eliminating or turning them into rules with a view to having the same level of investor protection throughout all Member States. These include preventing competent authorities from delegating certain tasks related to authorisation and supervision, and requiring all Member States to allow competent authorities to have the power to require certain information from all investment firms with branches in their territories (for statistical and supervisory purposes).

CESR's technical advice to the Commission on investor protection and intermediaries issues has been prepared by the Investor Protection and Intermediaries Standing Committee chaired by Jean-Paul Servais, Chairman of the Belgian CBFA, who stated:

*“Since the implementation of MiFID, financial markets have undergone a number of changes and currently operate within the challenging environment that the global financial crisis has created. It is all the more important, therefore, not only to facilitate pan-European competition, but also to harmonise the protection of investors throughout Europe as well as to take into account the lessons learned from the financial crisis. In this regard, the proposal made by CESR regarding a mandatory recording requirement for telephone conversations and electronic communications is an important step forward in terms of certainty, consumer protection, and surveillance of markets. It ensures that there is evidence to resolve disputes between investment firms and their clients, assists with supervisory work in relation to conduct of business rules and facilitates the prevention and detection of market abuse.”*

## **V. Commission's request for additional information in relation to the MiFID review**

In March 2010, the Commission requested that CESR provide it with some additional information in relation to the MiFID review, in particular asking for information on CESR Members' supervisory experience. It is important to note that the responses published today are almost entirely the result of fact-finding exercises amongst supervisors and generally not part of the broader consultation process, due to the nature of the information requested and the fact that the request for this information was received in March.

The questions presented by the Commission related to secondary markets, transaction and position reporting as well as investor protection and intermediaries issues. As such, CESR publishes today its responses on almost all the questions that relate to the investor protection and intermediaries area of the MiFID review (Ref. CESR/10-860). Responses to the questions on the client categorisation regime (question 19) will be provided at a later stage (see next steps below) on the basis of the ongoing consultation on the topic (see the consultation paper on client categorisation Ref. CESR/10-831 that CESR published on 12 July 2010).



In addition to providing responses to the questions presented by the Commission, CESR makes in the introduction of the document (Ref. CESR/10-860) some additional important recommendations and statements on the basis of its Members' supervisory experience. Important general points developed are, inter alia, the disclosure measures for Over-the-Counter (OTC) derivatives and other complex or tailor-made products and the specific organisational requirements related to the launch of new services or products.

Regarding the answers to the Commission's questions, CESR highlights the following:

### ***UCITS as complex/non-complex financial instruments***

CESR believes that there is a case for considering structured UCITS, and UCITS which employ complex portfolio management techniques, to be complex financial instruments for the purposes of the MiFID appropriateness requirements. This is a concept that would need to be elaborated - possibly through ESMA binding technical standards.

### ***Inducements***

CESR refers the Commission to the conclusions of its report on good and poor practices concerning inducements (Ref. CESR/09-958) and refers, in particular, to the following supervisory experience:

- CESR Members wonder whether inducements should not be forbidden when portfolio management services are being provided.
- Regarding the transparency of inducements, CESR Members think that ex-post disclosure (of the actual amount of the inducement where this cannot be provided prior to the provision of the service) is good practice, as this enhances the quality of the information received by the client and, therefore strengthens investor protection.

### ***Underwriting and 'placing'***

Underwriting and 'placing', raise a number of important issues about the application of the framework of EU securities legislation. After the relevant legislation (e.g. Prospectus Directive) was brought in under the Financial Services Action Plan, these issues have not been specifically addressed. Previous CESR guidance on this has not been updated. CESR has noted to the Commission that it will look again at these issues in order to consider providing Level 3 guidance. There might also be a case for including some specific provisions in MiFID on underwriting and 'placing' in the same way that specific conflict of interest provisions are set out for investment research.

### ***Appropriateness/suitability***

CESR provides comments on its Members' experiences of the application of the existing rules. CESR Members generally consider that the current requirements are comprehensive, yet sufficiently flexible, to apply to different types of clients, instruments and advised services and therefore do not need modifying. However, CESR Members also suggest clarifying in the MiFID Implementing Directive that advice about hedging of risks is investment advice.

## **VI. Next steps**

The documents published today form the most extensive part of CESR's advice to the European Commission in the context of the review of MiFID. However, some work streams still remain to be finalised in the course of the next few months.

- In the first instance, CESR will publish the feedback statements on the consultations conducted on equity markets, non-equity markets transparency and investor protection and intermediaries. These feedback statements will be published by mid-September.



- Shortly afterwards, CESR will deliver to the Commission the technical advice to be given on the basis of three ongoing consultations:
  - Client categorisation (Ref. CESR/10-831), which is open for consultation until 9 August 2010.
  - Standardisation and exchange trading of OTC derivatives (Ref. CESR/10-610), which is open for consultation until 16 August 2010; and
  - Transaction reporting on OTC Derivatives and extension of the scope of transaction reporting obligations (Ref. CESR/10-809), which is open for consultation until 16 August 2010.
- The technical advice on binding post-trade transparency standards and obligations which CESR is currently working on with the industry will also be delivered to the Commission in the second set of submissions.
- Finally, at the same time as providing the rest of its technical advice, CESR will also respond to questions 1-14 of the Commission request for additional information in relation to the review of MiFID.



## Notes for editors:

1. CESR has been working on assessing the functioning of the MiFID regime since 2008, when it provided its advice to the Commission on the review of the MiFID provisions relating to commodity derivatives business (Ref. CESR/08-752). This work was followed by the publication of the report on the impact of MiFID on equity secondary markets functioning in June 2009 (Ref. CESR/09-355) and the submission of CESR's report on the transparency of corporate bond, structured finance product and credit derivatives markets (Ref. CESR/09-348) to the European Institutions in July 2009.
2. In preparation of the technical advice on the MiFID review, CESR published the following four consultation papers: consultation paper on equity markets published in April 2010 (Ref. CESR/10-394); consultation paper on non-equity markets transparency published in May 2010 (Ref. CESR/10-510); consultation paper on transaction reporting published in April 2010 (Ref. CESR/10-292); and consultation paper on investor protection and intermediaries (Ref. CESR/10-417). The non-confidential responses to these consultations have been published on the CESR website under:  
<http://www.cesr-eu.org/index.php?page=consultation&mac=0&id=> .
3. In developing proposals for the Commission's MiFID review, CESR also acknowledged relevant changes in the operation of trading and market structure. Technological advance has continued to facilitate new developments in markets and has led to for example a strong growth in algorithmic and high frequency trading. CESR published a Call for Evidence on micro-structural issues of the European equity markets (Ref. CESR/10-142) on 1 April 2010 for a one month call for comments.
4. CESR is an independent Committee of European Securities Regulators. The role of the Committee is to improve co-ordination among securities regulators and act as an advisory group to assist the European Commission, in particular in its preparation of:
  - Draft implementing measures in the field of securities;
  - Work to ensure more consistent and timely day to day implementation of community legislation in the Member States.

The Committee was initially established under the terms of the European Commission's decision of 6 June 2001 (2001/527/EC) which was repealed and replaced by the Commission Decision of 23 January 2009 (2009/77/EC). CESR was one of the two Committees first envisaged in the Final Report of the Group of Wise Men on the regulation of European securities markets chaired by Baron Alexandre Lamfalussy. The report itself was endorsed by the European Council and the European Parliament. The relevant documents are available on the CESR website.

5. Each Member State of the European Union has one Member in the Committee. The members are nominated by the Member States and are the heads of the national public authorities competent in the field of securities. The European Commission has nominated as its representative the Director General of the DG MARKT. Furthermore, the securities authorities of Norway and Iceland are also represented at a senior level as observers.



**Further information:**

**Carlo Comporti**  
Secretary General of CESR

**Victoria Powell**  
Director of Communications

Tel: +33 (0) 158 36 43 21  
Fax: +33 (0) 158 36 43 30  
Email: [communications@cesr.eu](mailto:communications@cesr.eu)  
Website: [www.cesr.eu](http://www.cesr.eu)