

**EUROPEAN COMMISSION CALL FOR EVIDENCE: TRANSPOSITION OF MiFID RESPONSE BY THE INTERNATIONAL CAPITAL MARKET ASSOCIATION<sup>1</sup>: SEPTEMBER 2008**

1. The Commission Call for Evidence on MiFID transposition reflects its role in the implementation of MiFID in accordance with Level 4 of the Lamfalussy process. Our response therefore relates primarily to evidence provided by our members on the legal implementation process involved in transposition of MiFID in national jurisdictions.
2. The implementation of MiFID was due on November 1, 2007. A number of countries were late in implementing the new rules. These delays make it hard for our members to assess in all the jurisdictions the transposition of MiFID at this stage. Some members are still in the process of meeting delayed national regulatory requirements.
3. In addition to questions about MiFID transposition in Member States, some of the questions presented in this Call for Evidence also relate to the extent to which firms and investors are complying with the provisions of MiFID. In our experience, our member firms have tried very hard to comply with the provisions of MiFID, despite the difficulties of doing so (e.g. lack of time).
4. Other questions in the Call for Evidence relate to the way in which MiFID is working in practice. In our view, more time is needed to allow the market to develop before it will be possible fully to evaluate the MiFID provisions themselves. However, we give our preliminary comments, where we can.

**MiFID Authorisation**

Authorisation procedure and requirements/maintenance of previous authorisation

- *Is your home member State requiring the fulfilment of additional requirements to those provided by MiFID in order to grant the relevant authorisation?*
5. We are not aware of additional requirements having been imposed to those provided by MiFID.
- *Have investment firms encountered any problem concerning the transition from the ISD to the MiFID regime?*
6. We are not aware of any problem encountered related to the transition from the ISD to the MiFID regime.
- *Have investment firms encountered other administrative, legislative, etc obstacles to the provision of investment services and activities and ancillary services for the financial instruments covered by MiFID?*
7. The catalogue of investment services as defined by MiFID does not completely correspond with the set of “financial services” and “banking business” as defined by the German Banking Act (KWG). In Germany, firm underwriting (“Emissionsgeschäft”) and financial commission business

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<sup>1</sup> In addition to evidence provided by ICMA members, we are very grateful for input from the BWF in Germany and ASSIOM in Italy. The BWF, ASSIOM and ICMA are all members of the European Financial Markets Federation.

(“Finanzkommissionsgeschäft”) were defined as “banking business” before MiFID while, according to the ISD/MiFID provisions, both types of business are regarded as “investment services”. Currently there is a legislative initiative on the way which attempts to replace the “Finanzkommissionsgeschäft” by the “Effektengeschäft” which would also be a “banking business” but very likely will have a broader scope than the “Finanzkommissionsgeschäft”. Consequently there are serious concerns that some business typologies which currently fall under the Banking Act’s definitions of “financial services”, such as certain agency business and proprietary trading (as a service for others) could be regarded as “banking business” in the future and consequently would require an extended licence with an accordingly higher regulatory burden. However, while the categorisation of firm underwriting and commission business as “banking business” was in place long before MiFID, the initiative regarding the “Effektengeschäft” is currently under consultation and has already attracted criticism from the banking and the securities industry alike. The Ministry of Finance argued that the new initiative to replace the Finanzkommissionsgeschäft by the wider Effektengeschäft might result in a “clarification” in the light of MiFID provisions.

8. Under Article 4 of the MiFID implementing Directive, the Italian policy makers have extended the scope of application of the MiFID provisions on conduct of business rules (including the provisions concerning inducements and conflicts of interest) also to:
  - i) Subscription and placement of financial products issued by banks and insurance undertakings;
  - ii) Collective management service and UCITS directly marketed by management companies.(See Libro IV and Libro VI of the CONSOB regulation on intermediaries adopted with CONSOB decision of 29 October 2007, n. 16190).
9. The absence of a European approach related to conduct of business rules maintains the current fragmented landscape and provides an unlevel playing field, which should be avoided in order to achieve truly integrated financial markets.
  - *Have transitional measures concerning information communicated for the purposes of ensuring cross-border activities been respected (Article 71(4) MiFID)*
10. We are not aware of any issues as regards transitional measures concerning information communicated for the purposes of ensuring cross-border activities.

Organisational requirements (initial and on-going)

- *Have investment firms encountered any specific concern with respect to compliance, internal audit, risk management and senior management requirements (Articles 6-9 Directive 2006/73/EC)?*
11. We have not encountered any specific concern as regards compliance, internal audit, risk management and senior management requirements
    - *Have investment firms encountered any specific concern with respect to other organisational requirements, e.g. outsourcing, conflicts of interest, record-keeping?*

12. We would like to draw to the Commission's attention the problems that Italian investment firms are facing in relation to the Italian translation of the provision concerning 'personal transactions' under the Level 2 Directive.
13. In the Italian translation of Art. 2 point 3 a) of the Level 2 Directive, with reference to a "relevant person", the word "partner or equivalent" is translated by "socio o equivalente". Please note that the word "socio" identifies a person who holds a stake into a company and therefore a "shareholder". Yet the English term for "partner or equivalent" means a partner in a partnership and/or a partner holding limited liability in a limited partnership (as a matter of fact, pursuant to common law, there's also a general (unlimited) partnership).
14. Pursuant to the Italian law, the term partner may also refer to both partnerships (that is to say partnerships formed by natural persons) and public/private companies, whose partners may also be legal persons filed with a stock exchange.
15. The impact of this translation is particularly evident in the case where investment firms are required to establish, implement and maintain arrangements aimed at preventing the relevant persons (among which "soci" – also legal persons) - who are involved in activities that may give rise to a conflict of interest or who have access to inside information – or carrying out personal transactions.
16. The Italian level 2 Regulation transposing the provision concerning the personal transactions (see Article 18 of the Joint Act of CONSOB and Banca d'Italia of 29 October 2007) has used exactly the same wording of the level 2 Directive, without improving or specifying the translation.
  - *Have investors encountered any problem concerning the handling of complaints (Article 10 Directive 2006/73/EC)?*
17. We are not aware of any problem concerning the handling of complaints.

Freedom to provide services and establishment of branches

- *Are additional requirements being applied in host Member States when making use of the "MIFID Passport"?*
18. The additional requirements are covered in the section on information requirements below.
    - *Concerning branches, have supervisory authorities of the host Member States exceeded their competences with regard to Article 32(7) MiFID?*
  19. It has been difficult to reach an agreed interpretation on the question of the allocation of competences between home and host authorities in the case of branches, notably in the case of transaction reporting (see below). Despite the difficulties, the CESR protocol offers a helpful framework for competent authorities to agree on the allocation of competences.

## Investor Protection

### Best execution

- *Have investment firms encountered any obstacle in a given Member State concerning the MiFID requirements related to best execution?*
20. This point is covered in the section on information requirements (para. 23 to 25).
- *Is best execution respected by all the market players? Are firms really looking for the best possible result? Are they taking all relevant venues into consideration?*
21. Market players have made best efforts in the run-up to implementation to ensure that systems are in place to comply with the best execution requirements in MiFID.
- *Have investment firms encountered problems in accessing data enabling them to compare relevant venues?*
22. We are not aware that firms have encountered any significant problems in accessing data so far. But it is important to note that the market in post-trade data is still adjusting to the more competitive post-MiFID environment.

### Information requirements

- *Have investment firms been hindered in their provision of investment services/activities by the application in a given Member State of additional information requirements to those set up in MiFID and its implementing measures?*
23. In Italy, CONSOB has formally pointed out that, in the case of negotiation of securities for which there is not a plurality of execution venues (e.g. bank bonds or OTC products), the Intermediary which has to "serve to the best interest of the clients" must implement adequate procedures for pricing and provide information to the client inherent in the modalities of the definition of the pricing itself. (In the Level 3 consultation, it emerged that there was a need to provide disclosure of the single components of the price, including the "mark up": i.e. the Intermediary's margin).
24. On May 26, 2008, CONSOB issued a consultation paper on new Level 3 rules, with a specific focus on the obligation of Intermediaries to act in a professional way when offering/trading illiquid financial instruments. CONSOB appears to have established a definition of "illiquid financial instruments" which is not envisaged by MiFID, and has added obligations to Italian intermediaries irrespective of the "level playing field" principle.
- *How are costs and associated charges disclosed to clients (Article 33 of Directive 2006/73/EC)?*
25. This question relates to compliance issues within firms rather than transposition by Member States.

Know your customer test

- *Have investment firms / investors observed in some Member States that no clear distinction is made between suitability and appropriateness? Are investment firms applying the suitability and appropriateness tests in accordance with MIFID requirements?*
26. See our comments in the case of Italy above. We are not aware of any other issues related to the implementation of the suitability and appropriateness test in Member States. As far as compliance issues are concerned, firms have been thorough in putting in place the systems to apply suitability and appropriateness tests in accordance with MiFID requirements.
- *Have investment firms / investors encountered any obstacle in a given Member State concerning MIFID requirements related to the suitability and appropriateness tests?*
27. We are not aware of any obstacles related to the implementation of suitability and appropriateness tests in Member States.
- *Have investment firms / investors encountered problems in the provision of “execution only” services with regard to non-complex instruments (Article 19(6) of Directive 2004/39/EC and Article 38 of Directive 2006/73/EC)?*
28. We are not aware of any problems as regards the provision of ‘execution only’ services with regard to non-complex instruments.

Inducements

- *Have you encountered any obstacle in a given Member State concerning the MIFID requirements related to inducements which hinder the provision of services?*
29. The interpretation of MIFID inducement provisions by the Commission and CESR applies to a broader range of services than previously understood. This has made the inducement provisions more complex than necessary. But the sensible interpretation of the “designed to enhance” test, and the facility to disclose the method of calculation of fees, has meant that the provision of services has not been hindered.
30. CONSOB has literally transposed the provisions on inducements of the L2 Directive into Articles 52 and 73 of regulation on intermediaries adopted with CONSOB decision of 29 October 2007, n. 16190. However, in the preliminary guidelines published on 30 October 2007, while providing for interpretative guidelines on incentives, CONSOB has stated that the retrocession of commissions paid by asset managers to investment firms in the case of individual portfolio management in UCITS cannot be considered as legitimate.
31. Following this strict interpretation, some of our members have ceased to offer this kind of product as from November 1<sup>st</sup> 2007. According to evidence gathered by ICMA members and other regulators (e.g. France and

Luxembourg) have not adopted the same stringent approach. There follows that the strict interpretation of CONSOB discriminates Italian investment firms against competitors based in Member states allowing for a more lenient interpretation of this provision.

### Competition between trading venues

- *Have investment firms encountered any legal or administrative problems or other obstacles in obtaining a licence to operate an MTF or in operating as a systematic internaliser?*
32. MTFs offering trading venue services for government bonds continue to face significant obstacles in a number of Member States.
  33. These barriers to the provision of services come in the form of restrictions placed on Primary Dealers in government bond markets regarding the trading platforms on which they conduct their secondary market activity.
  34. The Primary Dealer requirements are established by national Debt Management Offices (DMOs) and have the effect of preventing competition between competing MiFID-authorized trading venues.
  35. Typically these Primary Dealer restrictions come in the form of Member States' Debt Management Offices assigning access to the primary and secondary market making functions to one electronic platform.
  36. Participating Primary Dealers are obliged to fulfill specific trading behaviour on this platform to make sure they rank better than their competitors.
  37. Rival platforms cannot compete on a level playing field with the designated system(s) as traders are incentivised, as a result of these measures, to concentrate all activities on the electronic trading venue designated by the Member State Debt Management Office in order to qualify and obtain the highest possible ranking as Primary Dealer.

<b>Member State</b>	<b>Obstacles to provision of MTF services in government bonds</b>
<i>Spain</i>	<p>To be designated by the Spanish Treasury for primary dealer purposes, electronic trading systems need to have a physical residency in Spain and need to be designated as Sistema Organizado de Negociacion (SON). To date, only Senaf and MTS Spain have been designated electronic trading systems by the Spanish Treasury.</p> <p><a href="http://www.tesoro.es/en/deuda/valores/vls_letras.asp">http://www.tesoro.es/en/deuda/valores/vls_letras.asp</a></p> <p>To date there is no timetable to open the market.</p>
<i>Ireland</i>	<p>The Irish National Treasury Management Agency, in its report and accounts for the year ended 31st December 2007, recognises only one electronic trading platform being MTS Ireland.</p> <p>The DMO has given no indication that it will open the government bond market to multiple trading platforms in Ireland.</p>

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	<a href="http://www.ntma.ie">http://www.ntma.ie</a>
<i>Portugal</i>	<p>To date the Portuguese DMO only recognises MTS Portugal.</p> <p>This is a statute of law in Portugal that will need to be amended to open the government bond market to multiple trading platforms in Portugal.</p> <p>For additional information see <a href="http://www.igcp.pt/gca/?id=71">http://www.igcp.pt/gca/?id=71</a> [Regulation no 3/2002 Article 19 Duties 1.C.</p>
<i>Slovenia</i>	<p>MTS Slovenia is the only platform currently accepted by the Slovene DMO for primary dealer purposes.</p> <p><a href="http://www.mf.gov.si/angl/vredn_papirji/gov_sec.htm">http://www.mf.gov.si/angl/vredn_papirji/gov_sec.htm</a></p>
<i>Italy</i>	<p>In March 2008 the Italian Treasury launched a public consultation regarding the draft regulation identifying the characteristics of wholesale trading in financial instruments and regulating wholesale trading in government bonds.</p> <p>Link to consultation: <a href="http://www.dt.tesoro.it/Aree-Docum/Regolament/Consultazi6/index.htm">http://www.dt.tesoro.it/Aree-Docum/Regolament/Consultazi6/index.htm</a></p> <p>Currently the Italian Treasury only designates MTS for Primary Dealers' quoting obligations. These applicable rules for Primary Dealers quoting on the only designated platform can be found on the following website:</p> <p><a href="http://www.dt.tesoro.it/ENGLISH-VE/Public-Deb/Specialist/Evaluation/Changes-to-the-Specialists-Evalaution-Criteria---Year-2008---with-effect-from-1st-July.txt_cvt.htm">http://www.dt.tesoro.it/ENGLISH-VE/Public-Deb/Specialist/Evaluation/Changes-to-the-Specialists-Evalaution-Criteria---Year-2008---with-effect-from-1st-July.txt_cvt.htm</a></p> <p>There is currently no timetable to follow up the Treasury's consultation and therefore the market for competing trading venues in the Italian government bonds remains closed.</p>
<i>Denmark</i>	<p>MTS Denmark is the only platform currently recognised by the Danish DMO for primary dealer purposes.</p> <p>This position is due to be reviewed by the Danish DMO at the end of 2008.</p> <p>Link confirming current status (see P 47):  <a href="http://www.nationalbanken.dk/C1256BE9004F6416/side/641ECA8BEF727D57C12573F70044669C/\$file/SLOG_UK_2007_web.pdf">http://www.nationalbanken.dk/C1256BE9004F6416/side/641ECA8BEF727D57C12573F70044669C/\$file/SLOG_UK_2007_web.pdf</a></p>
<i>Greece</i>	<p>The Greek DMO currently restricts designated trading platforms to HDAT (the domestic system supported by the Bank of Greece ) and MTS Greece but recently two other trading platforms (BGC and ICAP) have been given permission to enter the country.</p> <p>Therefore, while the Greek market is gradually opening to competing trading platforms, the discriminatory market making obligations for primary dealer purposes on HDAT only continue to breach MiFID's regulatory level playing field</p>

	between trading venues.
<i>Poland</i>	MTS Poland is the only platform currently accepted by the Polish DMO for primary dealer purposes.  <a href="http://www.mofnet.gov.pl">http://www.mofnet.gov.pl</a>
<i>Finland</i>	MTS Finland is the only platform currently accepted by the Finnish DMO for primary dealer purposes. The Finnish DMO has indicated that it currently has no intention to open to other trading platforms.  <a href="http://www.statetresury.fi">http://www.statetresury.fi</a>

- *Have investment firms encountered problems in the application of pre-trade transparency requirements for MTFs and systematic internalisers?*

38. In Italy, according to the Level 3 rules issued on January 21, 2008, CONSOB has *de facto* imposed on some Italian banks the role of Systematic Internaliser in those securities, other than liquid shares, which they trade on a consistent basis, claiming that “branded issues” were playing an important commercial role for such banks. Systematic Internalisers for securities other than liquid shares have also had pre- and post-trade obligations imposed on them. CONSOB is maintaining/publishing a list of Italian Systematic Internalisers for securities other than liquid shares in its web site whereas CESR is only providing the list of Systematic Internalisers in liquid shares.

- *Have investment firms encountered problems in relation to the use of published pre-trade transparency information in terms of availability, accuracy and commercial terms on which the information is provided?*

39. The market in pre-trade information is still adjusting to the post-MiFID environment. But we are not aware at this point of any issues related to the use of published pre-trade transparency information.

- *Have investment firms encountered problems in the application of post-trade transparency requirements?*

40. In Italy, CONSOB has, among other things, extended the obligations of post trade transparency for “authorized subjects” to operations concluded out of a Regulated Market, MTF or Systematic Internaliser on financial instruments different than shares admitted to be traded on Italian Regulated Markets, with a counter value less or equal to 500,000 euros.

- *Could you identify any obstacles that due to an inaccurate transposition/application of MiFID hinder efficient price formation process or access to data related to price?*

41. Although the market is still adjusting, we are not at the moment aware of any obstacles due to inaccurate transposition/application of MiFID.



- *Are there any problems concerning the access to central counterparty clearing and settlement facilities and the right to designate settlement systems?*
42. Gaining access to central counterparty clearing and settlement facilities is not as smooth as it could be. However, we would like to draw the Commission's attention to the fact that the lack of interoperable links between post trading infrastructures is limiting users' choice of trading venues. In other words, the lively competition that MiFID has unleashed at the trading level cannot always be fully deployed because of the lack of a harmonized legal and supervisory framework: in fact, national regulators, when authorizing links, have to apply their non harmonized national rules.
43. For instance, currently, access by electronic trading systems to Eurex Clearing AG's central counterparty (Eurex CCP), in Germany, remains restricted by the Deutsche Börse group to Eurex repo (part of the same group). Preventing access to Eurex CCP *de facto* protects Eurex repo from competition by competing trading facilities.
44. In Spain, the Spanish primary dealer regulation requires banks to be a member of Iberclear (domestic and international participant): "*as long as Iberclear does not establish links and arrangements with any other system or facility as are necessary to ensure the efficient and economic settlement of the transactions, as judged by the Public Debt Market's supervisors in accordance with article 34.2 of MiFID, the platforms must clear and settle the trades carried out among PD's at Iberclear*"<sup>2</sup>.
45. In Greece, there continue to be issues with the right to designate settlement systems for Greek government bonds. The domestic central securities depository, being the Bank of Greece, requires domestic settlement through domestic agent banks (i.e. ICSDs need to connect to a local agent)<sup>3</sup>.

### Transaction reporting

- *Have investment firms encountered any problem in fulfilling their transaction reporting obligations arising from MiFID and its implementing measures in a given Member State?*
46. As a result of the wide range of additional information requirements that competent authorities are able to make under MiFID, obstacles remain in respect to a consistent approach being applied in respect to transaction reporting across the European Union. It was widely understood that MiFID was to provide a common approach to the requirement in this regard however this does not appear to have been achieved and therefore resulting in confusion, potential regulatory risk and significant cost to the industry in an attempt to meet differing requirements. Different examples are given below.
47. Significant industry concerns highlight the discrepancies with requirements in respect to transaction reporting.

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<sup>2</sup> [http://www.tesoro.es/en/home/index\\_creadores.asp](http://www.tesoro.es/en/home/index_creadores.asp)

<sup>3</sup> <http://www.mof-qlk.gr/en/home.htm>

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48. The UK regulatory authority the FSA for example, has implemented the concept of a Unique Client Identifier. The industry would question how the term 'unique' is in fact interpreted across the EU. The cost incurred by the industry as a result of diverging interpretations of this concept would be considerable, notably when the industry had already complied with one interpretation of identifying a client.
49. With regards to the client-side reporting requirement the industry is clearly concerned that there is still an inconsistent approach across the EU and there appears to be no cost benefit analysis regarding such a requirement.
50. The industry is similarly concerned in respect to the potential increase regarding the reporting requirement across the EU for OTC derivatives which the UK regulatory authority requires from a super-equivalent perspective. This again highlights the variance in reporting requirements. The industry again believes an appropriate cost benefit analysis should be conducted if this is being considered for implementation across the EU.
51. Firms have received requests from Member State regulators, other than the one to which they are obliged to report, regarding their transaction reports. According to the MiFID home/host arrangements, it is expected that transaction reports will be exchanged via TREM at CESR level. The industry is aware the regulators are sharing appropriate information via TREM. However it is apparent to the industry that Competent Authorities (CAs) are inconsistent with the approach being applied to the transaction reporting requirements for the implementation and this is again highlighted with the implementation of Alternative Instrument Identifier (AII). It has been identified already that 3 different CAs are requiring the provision of the AII code in 3 different formats. This again is clearly of concern to the industry as many regulators are still to define their requirement. Clearly reporting requirements should be consistent across the community. Again there are potentially significant costs implied and no cost benefit to support the variations.
52. It must be stressed that any request to a firm should come from the relevant CA (i.e. where the reporting obligation lies) otherwise the industry faces, potentially, 30 different reporting obligations. It would also appear that CA therefore need to adopt a consistent approach across the EU in this regard and approach the relevant regulator for the information required and therefore the information obtainable will meet the local requirements in line with the reporting obligation. The requests, and the handling of these requests, need to be consistent across the EU. Failure to ensure this will lead to multiple reporting requirements to different competent authorities which will go against the spirit of MiFID transaction reporting requirements. A clarification of home/host issues is needed in this area.
53. The UK has highlighted concerns from the general way that reporting is conducted from a clearing and executing broker perspective. Potentially the only resolve for this is that the executing broker assumes the responsibility. Again this was not considered pre-implementation as the clearers at present are often better placed to provide the information required for a transaction report for the majority of the reporting conducted as they have conducted checks such as Know Your Customer & Money Laundering. MiFID requires the executer to report and therefore the reporting by the executing broker appears consistent. This though is a change and again a consistent approach re the requirement must be considered to avoid different expectation across

the EU which would imply significant regulatory risk and cost concerns to the industry.

54. The above point highlights the need for a pan European definition on what 'execution' means. It is also relevant elsewhere (e.g. brokers passing on orders and for asset managers).
55. The industry has identified regulatory uncertainty as regards the required CESR approach concerning clients that utilise (DMA) Direct Market Access. In this instance it is extremely difficult to precisely identify where the trade is actually executed. Given the requirement to transaction report and the uncertainty as regards the location of the execution in a DMA scenario, the industry feels that at present it is exposed to regulatory risk. The Commission therefore needs to consider a consistent and appropriate approach from an EU perspective towards the execution requirement in this context. This point reinforces the need for clarity for a definition of 'execution'.
56. The industry has iterated its concern regarding the failure to provide a pan – European consolidated list of reportable securities. Given TREM is operational, and CAs now share relevant data to ensure consistency and efficiency, it must be in the interest of regulatory compliance that such a list is made available. Given the ultimate reporting requirement of firms and the sharing of information provided by CESR TREM, a pan-European database in line with pan-European requirements should be in the interest of both regulators and industry participants.
57. The industry is also of the view that the establishment of a primary contact group within CESR for cross-border issues would also be helpful. Given the access to data CESR has, the industry sees the legitimacy of such a group to be liaising platform on cross-border issues.

### **Efficient supervision / cooperation among authorities**

- *Have investment firms / regulated markets faced problems due to the fact that there is a lack of cooperation among competent authorities?*
58. We are not aware of any problems arising from a lack of cooperation among competent authorities, apart from the Czech Republic, where lack of cooperation between the competent authorities (the Ministry of Finance and the Czech National Bank, providers of respectively primary and secondary legislation) led to delays and cost overruns.
  59. All the examples set out in the responses to this consultation provide evidence that competent authorities need to strengthen their dialogue among each other, exchange information and cooperate in order to implement MiFID consistently across the EU.
  60. More cooperation and exchange of information will in the end create trust among them and will ensure that they do not impose investment firms with double reporting requirements. CESR is the appropriate place where this dialogue can take place and should be endowed with more coordination powers, in order to make sure that all competent authorities implement MiFID in a consistent manner.

