xtrakter®
a Euroclear company

Carlo Comporti
Secretary General
CESR - Committee of European Securities Regulators
11-13 avenue de Friedland
75008 PARIS
France

2 June 2010

Xtrakter response - CESR/10-292

Dear Carlo,

Xtrakter, part of the Euroclear group of companies (which includes Euroclear UK and Ireland, also an Approved Reporting Mechanism (ARM) to the UK FSA whose input on this consultation has been sought and incorporated), welcomes the opportunity to respond to CESR's consultation – CESR Technical Advice to the European Commission in the context of the MiFID Review – Transaction Reporting CESR/10-292

The attached response reflects the collective views of the members of the BBA, AFME and FOA – most of which are clients of Xtrakter – who have jointly contributed to this response through the BBA/Xtrakter Transaction Reporting Working Group.

Xtrakter trust CESR will note the industry is extremely concerned with the proposals within the consultation regarding the additional trading capacity of riskless principle and standards for client/counterparty identifiers. You will note we have received considerable feedback in respect of these issues and would stress the industry considerable concern in respect of changes to the current approach.

Xtrakter clients are committed partners of Competent Authorities in tackling market abuse which is understood to be the major driver for changes to reporting obligations. Overall the industry believes the proposal would not provide the targeted benefits and would urge further consultation in the event CESR believes there continues to be merit with implementing changes in these areas.

We trust CESR will find the response to the consultation beneficial when considering the issues raised and we remain at your disposal if you require further clarification in respect of the feedback provided.

Kind regards,

Yours sincerely

Adrian Gill
Compliance Manager
adrian.gill@xtrakter.com
+44 (0) 20 7510 2646

CESR Technical Advice to the European Commission in the context of the MiFID Review - Transaction Reporting

(*CESR/10-292*)

A response by:

The British Bankers Association,
Xtrakter®, Association for Financial Markets in Europe, and
The Futures and Options Association

May 2010

Introduction:

The British Bankers Association (the 'BBA'), Xtrakter, Euroclear, the Association for Financial Markets in Europe (AFME) and the Futures and Options Association (the 'FOA') welcome the opportunity to response to the Committee of European Securities Regulators (CESR) consultation on its 'Technical Advice to the European Commission in the context of the MiFID Review – Transaction Reporting (CESR/10-292)". For the remainder of this paper the BBA, AFME and the FOA will be collectively referred to as the 'joint associations'.

The British Bankers' Association is the leading association for UK banking and financial services sector, speaking for over 200 banking members from 50 countries on a full range of UK and international banking issues. All the major institutions in the UK are members of our Association as are the large international EU banks, the US banks operating in the UK, as well as financial entities from around the world. The integrated nature of banking means that our members engage in activities ranging widely across the financial spectrum encompassing services and products as diverse as primary and secondary securities trading, insurance, investment bank and wealth management as well as conventional forms of banking.

Xtrakter is a leading provider of capital markets data, operational risk management, trade matching and regulatory reporting services to the global securities market. It has an established track record in providing innovative, secure and reliable systems for the financial services sector. Under the Markets in Financial Instruments directive (MiFID), Xtrakter is an Approved Reporting Mechanism (ARM) to the: FSA (UK), AMF (France) & AFM (Netherlands). Xtrakter additionally provides Primary Dealers with an onward reporting facility to the National Bank of Belgium (NBB) in accordance with the NBB and Securities Regulation Fund requirements. Xtrakter was established in 1985 and is now part of the Euroclear group of companies (which includes Euroclear UK and Ireland, also an Approved Reporting Mechanism (ARM) to the UK FSA whose input on this consultation has been sought and incorporated). It has 300 clients located globally, processes 2m transactions daily and has registered offices in the United Kingdom.

AFME, the Association for Financial Markets in Europe, promotes fair, orderly, and efficient European wholesale capital markets and provides leadership in advancing the interests of all market participants. AFME was formed on November 1st 2009 following the merger of LIBA (the London Investment Banking Association) and the European operation of SIFMA (the Securities Industry and Financial Markets Association). AFME represents a broad array of European and global participants in the wholesale financial markets, and its 197 members comprise all pan-EU and global banks as well as key regional banks, brokers, law firms, investors and other financial market participants. AFME provides members with an effective and influential voice through which

to communicate the industry standpoint on issues affecting the international, European, and UK capital markets. AFME is the European regional member of the Global Financial Markets Association (GFMA). For more information, visit the AFME website, www.AFME.eu.

The Futures and Options Association is the industry association for some 170 international firms and institutions which engage in the carrying on of derivatives business, particularly in relation to exchange-traded transactions. The FOA's membership includes banks, brokerage houses and other financial institutions, commodity trade houses, power and energy companies, exchanges and clearing houses, as well as a number of firms and organisations supplying services into the futures and options sector. For further information please visit the FOA website, www.foa.co.uk.

Our members of the joint associations[1], which are also clients of Xtrakter, are the strongest partners of Competent Authorities in tackling market abuse. Clean markets are a vital basis for the prosperity of the single European market. The BBA/Xtrakter Transaction Reporting Working Group has worked closely alongside the regulators for the preceding three years in order to assist it in developing and improving systems in respect of the requirements pertaining to transaction reporting under MiFID. A significant proportion of trading also takes place out of London which results in considerable volume of transaction reporting being undertaken to the UK regulator which is subsequently shared with the European authorities via the Transaction Reporting Exchange Mechanism (TREM). Our membership therefore possesses extensive experience with regard to reporting their activity, and welcomes the opportunity to respond to CESR's consultation – CESR Technical Advice to the European Commission in the context of the MiFID Review – Transaction Reporting CESR/10-292. This response represents our members' considered view.

Trading Capacity

Question 1: **Do you agree with the above analysis on trading capacity and the proposal to introduce a third trading capacity (riskless principal) into transaction reports?**

No, we do not agree with CESR's analysis. Our members have significant concerns over CESR's proposal to introduce the additional trading capacity of 'riskless principal'.

[1] Any further reference in this document to Members is intended to reflect the collective views of the members of the BBA, AFME and FOA – most of which are clients of Xtrakter – who have jointly contributed to this response through the BBA/Xtrakter Transaction Reporting Working Group.

Market Convention:

At the outset, we would like to highlight that 'riskless principal' is not a term that is commonly used across the markets. There is no clearly established definition of 'riskless principal', and therefore, no existing cross-market indicators that would enable firms to readily identify the transactions that CESR wishes to be reported in this way. Currently to the best of our knowledge, only the London Stock Exchange (the 'LSE') employ the term 'riskless principal' in those instances where a firm is facing the LSE to illustrate that a client is behind the order. It is not common usage for other markets (including NYSE Euronext). They will instead use the term 'principal' in cases where a firm transacts and owns the security, no matter how briefly.

Neither does 'riskless principal' form part of market convention in the non-equities space. It is apparent from the consultation document that CESR's analysis has looked exclusively at the equities space. From our informal communications with CESR members, it is our understanding that CESR's proposals are intended to apply across all product types. We are therefore disappointed and concerned that CESR's analysis has not taken into account the impact its proposals may have across all asset classes, instead of examining equities in isolation.

Concept of 'Risklessness':

We would argue that the notion of "riskless" is inappropriate, and does not exist in this context. Firms are placing their capital at risk in all cases as they assume settlement risk and/or market risk. It is likely that the firm would then hedge its risk. Unless firms act in clear agency capacity - where they do not take ownership of the security at anytime - there is always some element of capital being put at risk.

Rationale of Proposal:

Our members recognise that the overarching aim behind CESR's proposal is to determine where the initiative behind a trade has come from. We do appreciate that in certain circumstances it may be difficult for Competent Authorities to ascertain this information. The regulator today receives transaction reports for **principal market** side executions - the final beneficiary of the transaction is the firm. The regulator today receives transaction reports for **principal client** side executions - the final beneficiary of the transaction is the **client**. The issue facing supervisors is that it is not possible for them to identify the final beneficiary as being a client on the **market side** transaction reports where the **market side** activity is as a result of a client order. The regulator is therefore unable to eliminate transactions that the firm instigated from its investigations quickly and easily. This information would be valuable for market abuse detection purposes. CESR therefore consider that there is currently a gap in their surveillance. However,

our members do not consider that the introduction of 'riskless principal' as a new trading capacity will remedy this problem.

We understand authorities consider the current wording in respect of 'principal' and 'agency' reporting confusing. Currently 'principal' is whereby a firm takes ownership of the asset - even in the event this is for a very short period, whereas with an 'agency' transaction the firm never takes ownership. Our members understand that 'riskless principal' activity is perceived as those transactions that do not appear as agency transactions, even though they are still executed on behalf of a client - rather than compromising the proprietary capital of the firm. This scenario typically happens when two matching trades are entered at the same time and price with a single party interposed following a client's order. CESR propose that 'riskless principal' transactions would be represented in a single transaction report with the originator of the transaction being identified in the client field. The price and quantity of both transactions would have to be the same.

Practical Issues with Implementation:

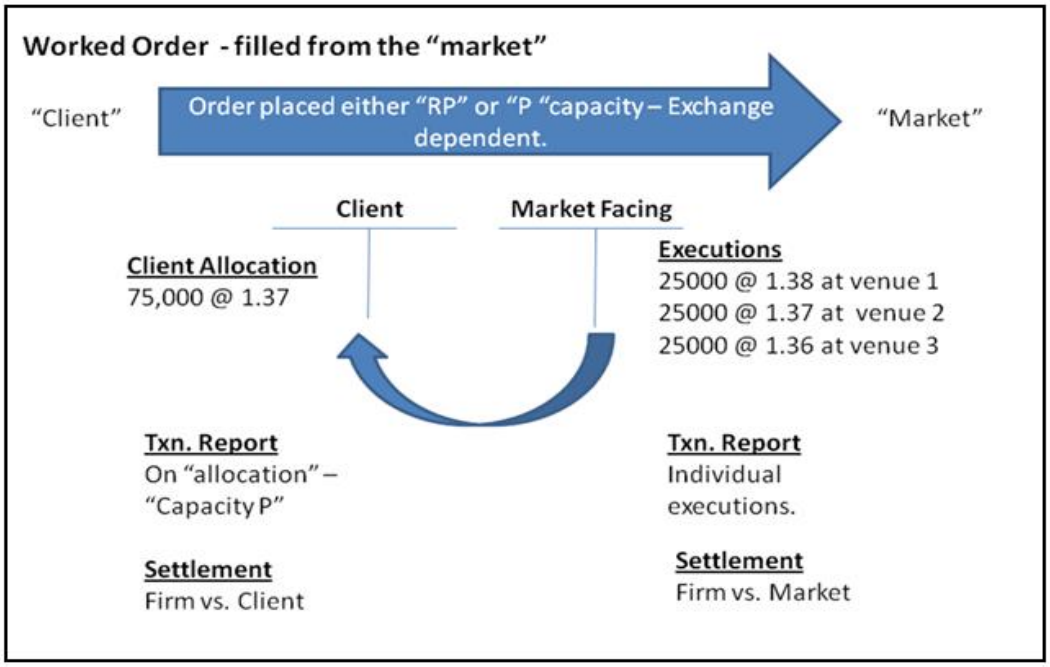
Whilst we understand the theory that has underpinned the definition of 'riskless principal' we believe that a great deal of further work is required to make clear how the definition would operate in the context of the many different booking processes that our members use. A given client initiated order can be fulfilled in a number of ways, besides that of "riskless principal". In reality, there is very often not a direct (back-to-back) relationship between a single client order and a single market execution. A client order filled from one market execution at the same quantity and price is not a common execution category.

Rather, it is likely that the client order will be filled through a series of other trades (multiple market fills) and at multiple execution venues, in order to execute the order for the client (Please see figure 1.1 below). Some client orders may also be partially filled from the firm's own account. Consequently, a single client allocation - and transaction report - may have been accumulated from a number of sources, including "riskless principal".

CESR's proposal is not clear as to how firms are expected to report using 'riskless principal' in these cases. Currently, firms are aggregating the client side for confirmation and transaction reporting purposes. To report the correct capacity according to CESR's proposal, it would seem that there would be a requirement on firms to break these trades down to their constituent parts to match client and market side. Is it intended that firms now report individual market fills to the regulator identifying the client / venue? If so - and as can be seen from the Figure 1.1, page 6 - firms would transaction report fills but confirm to the client aggregations. In effect we would have to create artificial transactions in order to fulfil our transaction reporting obligations.

The market side executions are transaction reported as stand-alone trades and they are not linked to the client side execution downstream for transaction reporting. The client side execution is transaction reported when the completed order is allocated i.e. confirmed to the client. The introduction of 'riskless principal' would give rise to a number of complexities in the allocation and reporting process, and potentially a significant increase in the number of client side reports. CESR should not underestimate the magnitude of system changes that would be required if firms were made to report - what are effectively, and considered legally - two separate transactions as a single submission. More importantly, and following our explanation in the previous paragraphs, it is clear that the addition of this flag ('riskless principal') will not solve the issue of transparency in respect to how the order was initiated.

Figure 1.1



The issues outlined above are exacerbated further in cases where individual client orders are aggregated into single market orders that are subsequently filled with multiple market executions. It would not be possible to report the resulting transactions as 'riskless principal' as each market side trade would need to be linked to two or more clients. Similar issues would emerge in instances where a broker part fills a client's order on a risk / house fill basis and then works the remaining quantity in the market on a riskless basis. Both examples would cause complications from a technical reporting perspective under CESR's proposals.

Non-Equities:

There are certainly instances in which the concept of 'riskless principal' will create particular problems for those asset classes outside of the equities space. At the current time the marketplace recognises that all OTC Derivative transactions are executed on a 'risk' basis. OTC transactions are initiated by a client and executed bilaterally between an OTC market counterparty and a client. The concept of a market side and a client side trade does not exist in the same way it does in the cash equities world. Two transactions at the same quantity and price therefore do not exist. On this basis all OTC transactions are executed on a 'principal' basis, yet arguably the transactions are always initiated by a client.

We respectfully suggest therefore that there is little to be gained by regulators seeking to identify market abuse by indicating these bilateral trades as "riskless principal." If CESR's view is that such transactions could be deemed to be riskless if the trade is initiated by the client, it will be very difficult in practice to distinguish between 'riskless' client facilitation trades and others for the purpose of transaction reporting.

In the Fixed Income space all trades are done as 'principal' facing the client – i.e. the price/quantity is confirmed to the client. The resulting firm position is then hedged. Although the resulting hedge trades may be as a result of a client initiated trade there is never the concept of a market side trade linked to a client trade executed at the same quantity and price.

Other Issues:

The definition as per the CESR guidelines of 'riskless principal' for transaction reporting purposes is not equivalent to the definition of 'riskless principal' for the purposes of trade reporting. Such discrepancies will lead to confusion and potential issues with the perception of market transparency. Such differences also lead to firms having to implement amendments to complex reporting systems to allow such systems to make the distinction between reporting riskless trades for the purposes of trade and transaction reporting. On a more general note, adding further complexity to transaction reporting could lead to increased errors in the transaction reports, causing additional problems for both firms and Competent Authorities.

There would also be complications for firms who use third-party Approved Reporting Mechanisms (ARMs) to report transactions to Competent Authorities on their behalf. Again, this demonstrates the magnitude of systems changes required to either allow the third party to continue to make the reports, or for the reporting firm to bring the transaction reporting processes back in-house.

The addition of the 'riskless principal' capacity could make chains of transactions more difficult for Competent Authorities to interpret. This could potentially occur where a reporting firm in middle of a chain will also be

identified in the client field of another firm's report. This destroys any reliance the Competent Authorities places on the client field to identify the initiator of a transaction, as it will also identify firms that are simply acting as facilitators in a chain of transactions. Any loss of consistency in interpretation along the chain will lose the audit trail that the regulators are trying to achieve.

CESR should accept that under MiFID there are, and are always likely to be, certain system limitations to the transaction reporting mechanism. That being said, firms do have an existing responsibility to monitor their trading activity and to report any transactions of a suspicious nature to their Competent Authority. The industry should ensure that the high standards of engagement and commitment to market cleanliness continue to be in evidence.

Summary and Alternatives:

The industry does not agree with either CESR's analysis, or its plans to introduce the additional trading capacity of 'riskless principal'. We would urge CESR to reconsider its proposals. Our members seriously question the validity of the rationale underpinning the proposals, and are concerned that they will provide minimal benefit from a regulatory perspective to assist with or improve current market abuse detection ability. At present, it has not been possible to identify how firms will consistently identify transactions of this type. 'riskless principal' is not a concept that is defined, or indeed applicable, to all markets and instruments. Furthermore, the fact that a given client initiated order can be fulfilled in a number of ways - besides that of "riskless principal" (including from the firm's own book) - make it clear that the addition of this flag ('riskless principal') will not solve the issue of transparency in respect to how the order was initiated. In sum, the proposals will not have their desired effect.

The proposal set out by CESR would also require firms to carry out very complex IT developments, so as to enable them to report - what are effectively, and legally considered - two separate transactions as a single submission. The costs required to make such a change would be enormous. The extent of the challenge in adding a further trading capacity should also not be viewed solely from a systems development costs perspective; but also from an educational / training perspective. It will be necessary to ensure that the new trading capacity is fully understood and used consistently by all relevant front office staff. Furthermore, a full cost-benefit analysis should be carried out before proposals reach any further stage, so CESR is able to demonstrate and evidence how such a significant spend can be justified in terms of market abuse detection.

As we have made clear, we do not support the introduction of the additional trading capacity of 'riskless principal'. If a harmonised approach is required at the European level, it should be harmonised according to major market practice – i.e. to treat the transactions as two principal transactions with the counterparty field populated but the client field left empty in both transaction reports (option 1 in the consultation document), as opposed to the 'junior'

market model whereby the two transactions are represented in a single principal report with both the counterparty and client fields populated (option 2 in the consultation document). We believe Option 1 to be appropriate.

Client and Counterparties

Question 2: Do you have any comments on the distinction between client and counterparties?

Current regulation requires the effective distinction between clients and counterparties and our members are already attuned to this proposed distinction.

Collection of the Client Identifier

Question 3: Do you agree with the above technical analysis?

Yes. We agree that client identifiers are required to enable Competent Authorities to efficiently monitor the market.

Question 4: Do you see any additional advantages in collecting client ID?

We recognise the value Competent Authorities will receive from the additional transparency that is derived from the collection of client identifiers. Such reporting may assist in the identification of suspicious behaviour due to increased accessibility to comparable information within the EEA.

Collecting client ID can also assist investment firms to comply with other regulatory obligations which involve the management of client data such as the 'single customer view, large exposures, liquidity risk reporting, anti-money laundering, and credit exposures reporting.

Question 5: Do you agree with the above technical analysis?

Yes. We agree that the disadvantages of collecting client identifiers include large start up costs and ongoing maintenance costs. However, it does not make sense to collect transaction reports without a client identifier. The industry would like to be confident that Competent Authorities are fully utilising existing client identifiers (where collected) before imposing additional complexities such as the new trading capacity of 'riskless principal' and pan-European internal identifiers.

Firms would also appreciate further clarification concerning the definition of 'Ultimate Client' (see paragraph 68 on page 12 of consultation paper). In the case of an investment management client, will the reporting requirement remain at the portfolio manager fund manager level? We are of the view that the sell side firm's client reporting obligation should remain at the portfolio manager level, as the portfolio manager is both the investment decision maker and also typically the EEA regulated entity.

Question 6: Do you see any additional disadvantages in collecting client ID?

In the event that CESR recommends a unique independent client ID, we foresee that a number of logistical problems will need to be addressed. A central utility would need to be set up to issue and maintain the client IDs. Not only will there be costs in establishing and maintaining the register, there will also be a question as to who should pay for the establishment of an ID for a particular client. Decisions would have to be taken to decide whether the client directly paid for the establishment of his unique ID or whether the first investment firm who applied (on behalf) of the client for an ID would pay. Should a decision be taken for the latter option, it would mean that other investment firms who subsequently use that client ID bear no direct cost for establishing or using the ID.

Given that client IDs are used within an investment firm are transmitted to exchanges and regulators and possibly are used on an international basis, data protection concerns inevitably arise, particularly where client IDs are transmitted to jurisdictions outside the EEA that do not have data protection legislation equivalent to that within the EEA. Issues such as the purpose and/or additional use of the data by regulators and other third parties; record retention; and, data security on the part of the regulators and other third parties will need to be addressed. It must be recognised that the investment firms have no control over the data after it is passed to the regulators and therefore require immunity from actions based on breaches of the data protection or banking secrecy regimes.

Question 7: Do you agree with this proposal?

Yes we would agree with the proposal to mandate the collection of client identifiers.

Question 8: Are there any additional arguments that should be considered by CESR?

We suggest that there are a number of additional issues that should be considered by CESR:

- Given that many clients of investment firms operate on a global basis, it would be advantageous for clients to have a unique international client ID that may be used for client identification purposes including transaction reporting anywhere in the world;
- The scope of use of the identifier and its granularity over the lifecycle of the identifier's existence (e.g., requirements at creation, modification, update and deletion of the identity). These requirements will drive quality and service level requirements;
- Compatibility with transaction and other reporting regimes in non-EEA jurisdictions. As many investment firms operate within the EEA and outside it, maximum harmony of reporting requirements would be an obvious benefit;
- The consistency with standards developed by the European Supervisory Agencies and the ISO process
- As stated above, data protection/banking secrecy issues have to be fully addressed;
- Compatibility with other regulatory initiatives. It would greatly assist both investment firms and regulators if the client ID used for transaction reporting purposes could also be used for other regulatory reporting purposes such as 'single customer view' purposes and 'large exposures' reporting purposes;
- Whether an investment firm may be permitted or not to act on behalf or with a client who does not have the appropriate client ID and the extent to which this may be incorporated into the "Know Your Customer" procedures performed by each investment firm;
- Legal liability and consequential losses in the event that the centralised register provides incorrect data to an investment firm;
- As there will inevitably be a cost associated with maintaining and validating client IDs, it is highly likely that the costs will fall onto clients, albeit indirectly;
- Whatever decisions are taken on client ID should be, to the maximum extent possible, be "future proof" so that investment firms do not have to change or amend client IDs as a result of future regulatory initiatives;
- A Cost Benefit Analysis should also be provided to assess the respective benefits of creating a central utility and a global client ID against maintaining the current, admittedly imperfect system. It is clear that the introduction of yet another system of client identification in addition to the current systems would be the most costly in terms of IT and personnel costs as it would create another layer of complexity, which would need to be mapped against other layers.

Standards for Client and Counterparty Identifiers

Question 9: Do you agree that all counterparties should be identified with a BIC irrespective of whether they are an EEA investment firm or not?

We agree that all counterparties should be identified with a single identifier irrespective of whether they are an EEA investment firm or not. Whatever code CESR decides to use, it should display the following properties:

Have widespread coverage;

- Fair access and reasonable costs;
- Permit sufficient granularity for countries, groups and industries;
- Have a properly defined and clear hierarchy that addresses the use of subsidiaries within a corporate group;
- Be inexpensive to maintain;
- Have a centralised register which investment firms may verify client IDs against;
- Be supported by operators with a clear service level agreement negotiated by all relevant parties.

Our members also firmly support the use of industry standards that are generally available from a reasonable and viable cost basis in respect to appropriately identifying counterparties with the use of a Bank Identification Code (BIC). The Bank Identification Code has the advantage of already being widely used. Nevertheless, CESR and the Competent Authorities should be aware that there are still issues within the industry associated with the identification and use of the correct / up-to-date BIC codes - particularly for clients and counterparties where multiple potential BICs exist. BICs are assigned by ISO (administered through SWIFT). We understand that SWIFT has always indicated to Competent Authorities that they will always allocate BICs free of charge. Nevertheless, there is no general right to obtain a BIC.

We would also ask that if CESR does recommend that all counterparties be identified with a BIC – irrespective of whether they are an EEA investment firm or not – reporting firms are not precluded from using the FSA Reference Code (FRN) to identify counterparties. The removal of this option would be viewed as a backward step.

Question 10: Do you agree to adapt coding rules to the ones available in each country or do you think CESR should pursue a more ambitious (homogeneous) coding rule?

Our members firmly believe that where possible a pan-European approach must be sought in respect of transaction reporting to minimise the considerable costs incurred by the major market participants and particularly those conducting activity in multiple jurisdictions within the EU. It is already clear from the implementation of MiFID that authorities have adopted differing approaches to the requirements and this has resulted in firms developing multiple reporting feeds with unnecessarily complex IT infrastructure to

adhere to local requirements. Members therefore would be in support of a harmonised approach, where possible, across authorities in respect of reporting requirements. It is essential however, that when striving for harmonisation across the EU, that the overall benefit to authorities is considered alongside any costs that would be borne by the industry to implement such measures.

Question 11: Is there any other available existing code that should be considered?

At present our members are not aware of any consistently availiable code that is available to the industry for the purpose of uniquely identifying every end client.

Question 12: When a BIC code has not been assigned to an entity, what do you think is the appropriate level for identification (unique securities account, investment firm, national or Pan-European)?

We consider that Proposal C. under paragraph 88 is the most appropriate level of identification in cases where a BIC (or FRN) code has not been assigned to an entity.

Our members - although appreciative of the regulatory authorities desire to clearly identify every end client - would firstly question what evidence CESR has to show that non-institutional clients do actually hold accounts with multiple firms. Ambitious proposals such as those set out within the consultation document should not be pursued until there is supporting evidence to show that this is the case. The industry would also like to be confident that Competent Authorities are fully utilising existing client identifiers (where collected) before imposing additional complexities such as the new trading capacity and pan-European internal identifiers. The industry is extremely concerned at the practicalities of achieving the ability to identify every end client. Industry participants are unconvinced that the use of tax codes etc. as suggested within the consultation will provide a practical solution in respect of this issue. As highlighted above, a suitable solution must consider a consistent approach and avoid differing requirements that are contradictory to the sharing of information amongst authorities.

Our members are extremely concerned that the overall benefit of achieving a unique identifier for every client will result in considerable cost and complex changes to system infrastructures. If the regulators consider a provision of a standard code for clients it is inevitable this will also need to be implemented within the firms 'Know Your Customer' (KYC). This in turn would need to be incorporated into firms' static data for regulatory reporting purposes. This highlights the complexity - and therefore considerable cost - of such implementation.

For the aforementioned reasons, the industry would question the overall benefit to regulators and are concerned that the costs incurred are not consistent with the ultimate benefit to authorities in respect to improved surveillance, which is the primary focus of the requirement.

The consultation document also overlooks the fact that many firms operate on a global basis and so will have clients outside of the EEA. Any approach that covers EEA clients alone would not meet the objectives that CESR is seeking to achieve.

Question 13: What kind of problems may be faced at each of these levels?

We believe the following problems will be faced for each corresponding proposal:

Proposal A (*Pan-European level*)

The proposal is highly theoretical, being based on the potential for a suitable unique pan-European investor identifier. The cost and effort of identification/creation of a suitable identifier added to the costs associated with firms updating their systems & processes to capture this for all existing and future clients is likely to significantly outweigh the benefits.

The proposal raises a number of issues including data protection considerations, the problems associated with obtaining the information, in particular where personal data is required and a lack of consistency of available information in different jurisdictions.

Paragraphs 89 and 90 reflect some of these issues recognising that consistent codes will not be available even within a single jurisdiction. However this leads to the conclusion that it is highly complicated and impractical to provide a unique identifier and would be particularly problematic for Competent Authorities to define workable solutions that operate across national borders. The only plausible solution to this would seem to be the establishment of a global database by regulators that all firms could use for reporting purposes.

Proposal B (*National level*)

We have detailed some of the costs and issues with regard to proposal B within our response to question 12 of the consultation document. These costs would impact firms both in countries not currently required to report client identifiers and in those countries where firms are required to report a different type of client identifier.

The proposal raises a number of issues including data protection considerations, the problems associated with obtaining the information, in particular where personal data is required and a lack of consistency of available information in different jurisdictions.

Paragraphs 89 and 90 reflect some of these issues recognising that consistent codes will not be available even within a single jurisdiction. However this leads to the conclusion that it is highly complicated and impractical to provide a unique identifier and would be particularly problematic for Competent Authorities to define workable solutions that operate across national borders. The only plausible solution to this would seem to be the establishment of a global database by regulators that all firms could use for reporting purposes.

Proposal C (*Firm level*)

Proposal C. under paragraph 88 seems to reflect the current UK FSA approach, in that a code internal to the reporting firm can be used in the absence of a BIC (or FRN) code. We would endorse the use of this approach as a practical solution to the issue. The obvious issue facing supervisors with regard to Proposal C is that it allows those intent on committing market abuse to spread their trading activity over a number of different investment firms. However, the same issues exist with Proposal A and B, albeit at a different scale.

Proposal D (*Securities Accounts level*)

We see no clear benefit to identification at the account/fund level. The Competent Authorities aim should be to identify the person/firm that has initiated the trade and made the investment decision in order to identify potential cases of market abuse.

Client ID Collection when Orders are Transmitted for Execution

Question 14: What are your opinions on the options presented in this section?

As reflected in the paper, the key point of consideration is that transactions of this type i.e. the receipt and transmission of orders would not generally be viewed to be executions. However the concept of 'execution' remains undefined. It is our understanding that CESR is considering the definition of 'execution' in a separate, but nonetheless related, work stream. We believe any decision regarding the reporting of business events should be postponed until this work stream has reached fruition, given its bearing on the debate. That being said, if CESR is to adopt the proposals under Section 3 of the consultation paper, and ultimately makes the collection of client ID's for all counterparties by Competent Authorities mandatory within the MiFID framework, it is clear that client IDs will need to be collected when orders are transmitted from an RTO firm to another firm for execution.

When our members receive an order from a fund manager for execution (which has passed the order for execution either as an RTO or discretionary basis) they are able to report the ID of the fund manager as the client in its transaction report. This is consistent with what the UK Financial Services

Authority (FSA) expects. Our members do not report the details of the underlying account of the fund manager. They do not have the capacity to do this because they are not always in possession of the fund manager's underlying client's details. Accordingly, CESR's proposal must ensure that regulatory responsibility to report the client ID in cases where the order has been transmitted for execution must be placed onto the fund manager. It may be the case that the firm transmitting the order for execution wishes for the executing firm to report on their behalf. However, this would be a contractual arrangement – regulatory responsibility should remain with the firm transmitting the order.

In instances where the brokers pass on client trades under an RTO model without including the details of the underlying client, the reason is normally that the underlying client does not wish for their details to be passed to the executing firm. It is unlikely an underlying client would give their consent to the RTO firm to pass their details on to an executing firm with which they have no direct relationship.

Recognising this, it would seem that CESR's flexible approach to allow the RTO firm to either transmit the client's details to the receiving firm, or to report the trade itself seems the most workable solution. Therefore, if CESR is to adopt the proposals under Section 3 of the consultation paper and make the collection of client ID's and (thus) meaningful identifiers for all counterparties by Competent Authorities mandatory within the MiFID framework, we agree that it will be necessary for an RTO firm to either:

- Transmit the client ID to the receiving firm; or
- Report the trade, including the full client ID, to the Competent Authority

This approach however, is not without its problems. Firstly, CESR's proposals do not consider situations where transactions are initiated outside of the EEA. Indeed, for transactions of this nature, Competent Authorities will receive no additional information. It could also result in executing firms having to build multiple systems (some RTO firms may report, and some may not) in order to identify whether there is a reporting obligation or not, and if so, what that reporting obligation is. CESR's approach also raises questions in relation to double reporting. If the executing firm also has to report (which we assume to be the case) then it will have to make double reports, and it is also unclear in what capacity the RTO report will be made.

Given that the reporting of the client ID when a firm receives and transmits an order is not a current reporting requirement, we trust that CESR recognises it would take a significant period of time for firms to adjust and consolidate their front office / back office IT systems and internal processes before they are able to comply with such a requirement.

Transaction Reporting by market members not authorised as Investment Firm

Question 15: Do you agree with CESR's proposal on the extension of reporting obligations? If so, which of the two alternatives would you prefer?

Our members understand currently that local traders and remote members not authorised as investment firms in their home state are not captured for the purpose of the regulation to transaction report. Our members can appreciate the reasons behind CESR's proposal and acknowledge the perceived benefit it brings to regulatory authorities in order to improve their surveillance ability in respect of this activity. We therefore have no concerns regarding the change.

Other Issues:

Home/Host Reporting:

We are pleased that the consultation document attempts to harmonise transaction reporting standards. However, our membership is disappointed that the consultation does not seek to address the issue of home/host reporting. Despite the clarification in the level three guidelines (CESR/07-301), many firms are still unclear as to which Competent Authority they should report certain transactions to. Whilst firms welcome the advice that they can report all transactions executed by branches to the host Member State, they would welcome further advice on how to determine where the transaction was executed. For example, a firm's salesman in its Paris branch may agree all the terms of a transaction with a client in Paris, but the order was actually satisfied by a trader in the London branch. If these transactions were on a principal basis, should the London branch report the market side to the Financial Services Authority (FSA) and the Paris branch report the client principal transaction to the Autorité des Marchés Financiers (AMF)? Our members are currently receiving contradictory advice from Member States as how to deal with scenarios of this nature. Naturally, they consider they could be subject to unreasonable regulatory risk. From a Competent Authorities perspective, it must also be difficult for them to be confident that they are receiving all the transaction reports they should be (although the Transaction Reporting Exchange Mechanism - if working as intended - should alleviate these concerns). Further confusion can arise when direct market access (DMA) facilities are used. We would like to see example scenarios worked into further CESR guidance.

We hope that you will find these comments useful, and remain at your disposal should you wish to discuss this response. In such instances, please contact either Christopher Ford (020 7216 8895; christopher.ford@bba.org.uk) of the British Bankers Association, Adrian Gill (020 7510 2646; adrian.gill@xtrakter.com) of Xtrakter; Mark Hart (020 7743 9307; mark.hart@afme.eu) of AFME, or Devrim Baki (020 7090 1331; bakid@foa.co.uk) of the Futures and Options Association.