Comments on CESR's Advice on Possible Implementing Measures of the Transparency Directive

Part 1: Dissemination and storage of regulated information

- Executive Summary -

Prof. Dr. Ulrich Noack & Dr. Dirk Zetzsche, LL.M. (Toronto)*

The authors would be grateful for comments.
If CESR is interested the authors will be willing to discuss their efficiency concerns with regard to CESR's model, as well as the potential benfits of their own alternative model with CESR.

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Executive Summary

Re Part B: CESR's concept of dissemination based on competition between information intermediaries

CESR promotes dissemination of information through a system that relies primarily on information intermediaries (operators, media). CESR assumes that competition among information intermediaries would improve market efficiency. In order to achieve a viable operator-based dissemination system, CESR suggests dense regulation of information intermediaries. By emphasizing the need for information intermediation and refraining from clarifying "dissemination", CESR essentially forces issuers to enter into service contracts with operators. Finally, CESR suggests a regime in which issuers must meet three requirements (filing with operators, the Competent Authority, and the central storage mechanism (CSM)) in order to meet their obligations under the Transparency Directive.

CESR's concept is flawed from its outset, with potentially grave consequences:

1) The Transparency Directive does not state that issuers *must* use information intermediaries. Unfortunately, CESR has apparently not seriously considered alternatives to the use of information intermediaries.
2) A system that is primarily predicated upon the activities of information intermediaries cannot be established under the Transparency Directive. Under the Lamfalussy procedure, Level 2 legislation must not impose duties beyond the entitlement of the Level 1 legislation. We believe that the Directive does not entitle CESR to impose detailed regulation on information intermediaries, since the Directive primarily addresses issuers and competent authorities.
3) The framework that CESR suggests perpetuates the need for using information intermediaries (operators and media). However, there are technologies (e.g. RSS feed) which render information intermediation useless, and achieve – nevertheless – the goal, namely that information is widely spread. Investors should have the choice as to whether they want to use new technologies or (stone-age) information intermediation.
4) Further, CESR's competitive concept is inefficient with respect to small issuers and is inconsistent: in the absence of regulatory interference on the grounds of competition law, information intermediaries will merge. Competition will cease to exist. This will result in supra-competitive prices, and further the already existing inefficiencies in CESR's dissemination concept.
5) CESR's three-stop-shop model (filing with operators, competent authorities, and a central storage mechanism) is extremely costly, especially to the thousands of issuers who must disclose information many times each year. These costs will increase the costs of capital, blur the performance of quoted firms, and will thereby reduce the incentive go public in the first place.

The following **one-stop-shop model** avoids the aforementioned weaknesses:

1) Our model is predicated on the assumption that issuers must be enabled to file the information with one institution by using a template and individual access codes. Filing must be as uncomplicated as possible.
2) For the reasons stated above, the one-stop-shop must not rely on the use of information intermediaries. The Competent Authorities must receive the information under the relevant Directive. Thus, Level 1 law implies a system under which an issuer files the data with the Competent Authority. In order to yield appropriate dissemination of information and, at the same time, maintain the one-stop-shop for issuers, the Competent Authorities must establish a mechanism that automatically and immediately forwards company data to the officially appointed storage mechanism, and to an interface that enables news agencies, operators, and any other interested person to access such information.
3) Investors would strive for obtaining new information as soon as possible. Some of them may use information intermediaries in order to achieve this goal. Others may use technology (e.g. RSS feed) and achieve the same or better results due to their technological advantage. There is no justification for imposing the costs of operators on the issuers, since these costs only benefit some of the investors. Further, if information intermediaries are slower than technology, then they are useless form the outset. Our system would provide incentives to further develop information technologies in the EU.
4) The officially appointed storage mechanism must disclose the data in real time on its website in order to enable access and the use of RSS feed technologies by technologically advanced investors.

We recognize that our one-stop-shop model requires that CESR overcomes the rent-seeking behaviour of information intermediaries, political institutions and authorities. We nevertheless encourage CESR to refrain from imposing regulation from which such lobbyists will benefit to the detriment of society.

Re details of the officially appointed central storage mechanism

We hold that there must be one officially appointed storage mechanism in each Member State. These mechanisms should be run by private entities. Investors must have free access to information for thirty years after the filing. The private entities are, however, allowed to charge fees to issuers. These fees must be authorized by the Competent Authorities. The monopoly of these private entities should be limited in scope (only “basic data” services), time (five / ten years), and should be further limited by pre-defined security and service level requirements (e.g. a mirror-site requirement, etc). Further, CESR must rank the national storage mechanisms on a regular basis, and disclose the results of such ranking. Thereby, CESR would counter adverse incentives to refrain from innovation, or to reduce the service level that the storage mechanism provides. Merger among national storage mechanisms should be possible until three to four different systems remain that provide each other with mirror site services.

Re consultation with regard to details of the electronic network

First, it is unwise to establish two different storage systems for Company Law Directive information and Securities Law Directive information. This would impose double costs on issuers, investors, and Competent Authorities in the long run. We believe that one highly technologically advanced system for all company law related information in each Member State maximizes efficiency. The reasons CESR provides for its views are inconsistent and disregard new developments in corporate and banking law.

Second, CESR's proposal to refrain from a network between a database in which Company Law Directive information is stored and a database in which Securities Law Directive information is stored disregards CESR's duties under Article 22.1 of the Transparency Directive. We hold that, under this provision, CESR is obliged to establish a link between these databases (if there are two different ones).

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B. Consultation Paper on Dissemination of Regulated Information by Issuers and on Conditions for Keeping Periodic Financial Reports Available

Section 1: Dissemination of Regulated Information by Issuers (Q 1 - 12) (12)

1. Minimum standards for dissemination (Q 1 - 2)

Question 1: What are your views on the minimum standards for dissemination? Are there any other standards that CESR should consider?

We would note that, under CESR's concept, information intermediaries could access price-sensitive information before investors. This raises concerns with regard to the behavior of certain persons working on the media level. We would like CESR to consider whether issuers shall be allowed to distribute the information, at the same time, to the media and to investors, e.g. via an open email distribution list. This would improve the level of information with regard to small enterprises and would reduce information asymmetry between institutional and retail investors (see below question 9 and 10).

Further, CESR should clarify that an issuer is obliged to grant investors free access to information that has been disseminated. An issuer can fulfill this requirement by installing a link to the central storage mechanism on its website, or by disclosing the files on its website.

Question 2: What are your views on the standards for dissemination by issuers? Are there any other standards or related issues that CESR should consider?

We believe that dissemination by issuers as well as by operators and media is a bad idea in itself. Instead, CESR must establish a one-stop-shop model (see Q 4). If the regime that establishes this one-stop-shop-model necessitates an interface from which all regulated information can be downloaded by any interested party market forces will provide incentives for efficient dissemination: Dissemination will take place either through technology (e.g. RSS feed) or operator services, at the choice of investors. Since there is some likelihood that faster access will result in an advantage with regard to investment decisions, while being slow results in a sure disadvantage, active investors will strive, and pay, for the fastest way to achieve information. If operators offer the fastest way they will find many customers. If technologically more advanced solutions enable faster access to regulated information operators will cease to exist.

If (small) issuers disseminate regulated information the Competent Authority will not be able to measure effective dissemination by taking a look at newsboards etc.: In the absence of extraordinary circumstances (scandals, insolvency) small issuer information is simply a non-event. Thus, CESR should define the expression positively. See also answer to Question 11.

2. "Dissemination by Competition among Operators" model and alternative models (Q 3 - 4)

Question 3: Should an issuer be able to satisfy all of this Directive's requirements to disclose regulated information by sending this information only to an operator? Please explain reasons for your answer.

Whether or not an issuer relies on external or internal services should be up to the issuer itself. It must be clarified, however, that the issuer has not fulfilled its duties until the information is filed with (rather than sent to) the Competent Authority (which should feed the the central storage mechanism and all any other interested person to access such information.)

Question 4: Do you agree with the structure set out in Figure 1? Are there other structures that would be in line with the Transparency Directive requirements? Please set out reasons for your answer.

With all due respect, we do not agree. CESR promotes dissemination of information through a system that relies primarily on information intermediaries (operators, media). CESR assumes that competition among information intermediaries would improve market efficiency. In order to achieve a viable operator-based dissemination system, CESR suggests dense regulation of information intermediaries. By emphasizing the need for information intermediation and refraining from clarifying "dissemination", CESR essentially forces issuers to enter into service contracts with operators. Finally, CESR suggests a regime in which issuers must meet three requirements (filing with operators, the Competent Authority, and the central storage mechanism (CSM)) in order to meet their obligations under the Transparency Directive.

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to exist. This will result in supra-competitive prices, and further the already existing inefficiencies in CESR's dissemination concept.

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We recognize that our one-stop-shop model requires that CESR overcomes the rent-seeking behaviour of information intermediaries, political institutions and authorities. We nevertheless encourage CESR to refrain from imposing regulation from which such lobbyists will benefit to the detriment of society.

For details on the economics of the market for information intermediation, please take a look at our answer C, Section 1, Answers 2 – 8.

3. Minimum standards to be satisfied by operators (Q 5 – 8)

Question 5: Should operators be subject to approval and ongoing monitoring by competent authorities or not? Please set out reasons for your answer.

The Securities Laws Directives regard the issuers and the Competent Authorities of the Member States. We believe that Article 21.1 of the Transparency Directive does

not entitle European regulators to impose regulation on operators. It merely entitles the Member States to require *issuers* to use certain media.
Notwithstanding this significant hurlde, we hold that approval should not be required. Approval raises barriers to entry into the market for operators. These barriers enable operators to charge higher prices than necessary, increasing the costs of capital for the firms. Further, even if the Competent Authority approved operators the approval would not release the authority's need to monitor the licensed operators, because licensed operators can cheat to the same extent as unlicensed operators.

Question 6: What are your views on the proposed minimum standards to be satisfied by operators? Are there any other standards that CESR should consider?

We hold that these standards are unnecessary from the outset, and should not be imposed on a European level. Imposing duties on operators

a) Is at odds with the legal system of the Transparency Directive which considers the issuer to be responsible
b) raises concerns as to the entitlement under the Transparency Directive (see answer to Q. 5), and
c) furthers that issuers shift responsibility from themselves to the operator.

Further, these requirements would constitute a new field of regulation, with new bureaucracy and new costs imposed on the issuers that pay for the operator services. These requirements would eventually harm small firms. This is, because small firms would have essentially the same (increased) costs for hiring operators, but they would benefit from dissemination only to a minor extent.

From a legal point of view we believe that if there are any concerns these must be addressed in the rules with which issuers must comply because the issuers are responsible for meeting the requirements under the Transparency Directive.

Question 7: Should issuers be required to use the services of an operator for the dissemination of regulated information?

No. Such a requirement would enable operators to charge supra-competitive prices for their services. Further, this would establish an industry which technological advancement is going to render useless: RSS feed technologies are likely to substitute for information intermediation. Thus, such a requirement is short-sighted: To the same extent that the internet rendered many intermediaries on the level of supply of traditional goods obsolete, new technologies render informational intermediaries obsolete and thereby, enhance market efficiency. A requirement to use informational intermediaries on the European level would stall the development of these new technologies. Consequently, these new technologies would likely be developed and patented in the United States, rather than in Europe.

Instead, enabling issuers themselves effectively to adhere to their duties under the Transparency Directive would limit the prices that operators and other intermediaries can charge. Society would benefit from such a limit through lower costs of capital.

Question 8: What are your views concerning the role of Competent Authorities in disseminating regulated information as operators? Please set out reasons for your answer.

We need clear rules stating that it is entirely the issuer's concern that information is filed with the Competent Authority. Under our alternative one-stop model, the Competent Authority functions as addressee of information that automatically and immediately forwards the information to its interface where operators, media and any other interested person to access such information may download the regulated information.

This does not mean that the Competent Authority itself disseminates the regulated information. Dissemination will take place through RSS feed technology or operator services, at the choice of investors. Since there is some likelihood that faster access will result in an advantage with regard to investment decisions, all investors will strive for the fastest way to achieve information. This incentive will drive investors for the most efficient technology. If this is, e.g. RSS feed, this technology will find many customers. Under this condition, operators with regard to "basic information" will cease to exist, or extend the scope of their business into "value added" services. But, as long as operators are more efficient than technology, operators will license dissemination services to investors who are willing to pay for topical information.

4. The concept of competition and its effect on small issuers (Q 9 - 11)

Question 9: What are your views concerning the role of competent authorities in disseminating regulated information as operators? Please set out reasons for your answer.

First, we missed a question with regard to the viability of competition as regulatory concept for dissemination (with regard to No. 24). This is unfortunate because the dissemination market itself exhibits characteristics which render the prospects of efficient competition in the long run dire: Operator business exhibits significant economies of scale when the number of customers increases, while limits on these economies of scale are not obvious. The significant economies of scale in the operator business will drive concentration among pan-European operators. Thus, there is a serious risk that competition is merely a short-time regulator for effective dissemination services at a competitive pricing level. This aspect strengthens the argument with respect to answers 4 through 8.

With regard to question 9, we believe that the Competent Authority must provide an interface where operators, media and any other interested person to access such information may download the regulated information. Everything else should be up to the market forces. The possible benefit of fast access, combined with the sure loss due to slow information, will provide the right incentives for the development of the fastest dissemination services and technologies (compare Q 8).

We believe, however, that if CESR establishes a regime of dissemination of information through a system that relies primarily on information intermediaries there

will be, in fact, a need to address the problems resulting from the impact of market forces. We would note that media will not only refrain from publishing information, as CESR states, if there are no investors within a specific Member State, but also if the costs for publishing these data are lower than the prospective income, which is possible if there are a few but not many investors *among the customers of the media*. This aspect renders unlikely that information with regard to issuers with merely a few shareholders will be disseminated under CESR's regime. For example, in Canada, a state with particularly many quoted issuers,[2] issuers hardly achieve any publicity, and thus start paying media for publishing their data and issuer related research.[3] Further, limits on the available space for publications will reduce dissemination of information. The latter aspect is particularly true with respect to print media. These effects increase in proportion to the number of issuers.

Question 10: Which of the options presented above would, in your view, minimise this risk? Please set out reasons for our answer.

We believe that solution c) is the best. Please see also our comments on Part C, Question 14.

Questions 11: Do you consider there to be other methods of dissemination that would satisfy the minimum standards for dissemination? If so, please provide a description of such dissemination methods, and how they would work.

First, we believe that minimum standards for dissemination will be useless if there is a one-stop model, as suggested at Q 2, 4, 8 and 9.

Second, we want to note that the text at No. 27 contrasts with the (wise) considerations stated at No. 5 et sequi. As stated above it is important to emphasize that it is the issuer's (and merely the issuer's) responsibility to ensure dissemination.

If CESR does not establish a one-stop-shop model, we encourage CESR to consider a positive definition of dissemination as a substitute for operator-driven dissemination. If an issuer meets these requirements it must not be held liable for breach of its duties to disclose.[4] This would enable small issuers to calculate the costs for using operators, and it would facilitate transparency in the market for operators.

5. Overall evaluation (Q 12)

[2] In Canada, a country with 30 million people, approximately 5000 firms are quoted at the stock exchanges.
[3] See National Post, Carrie Tait, "Don't call us promoters", December 2, 2004, at IN 1.
[4] The following definition might provide a starting point: "The issuer is considered to have disseminated the information if it send regulated information to at least

a) Three freely accessible websites dedicated to financial matters that publish financial information real time in each Member State, and
b) Three newspapers dedicated to financial matters in each Member State, and to
c) All commercially active news agencies dedicated to financial matters that are active in the EU.

We would recommend removing sentence two of No. 1 (e) from the Draft Advice. It is unlikely that there will be free competition among operators in the long run (see above, answer to question 9). Further, the minimum standard requirement is likely to raise costs for using operator services even further (answer to questions 5 and 6, above).

The Transparency Directive addresses the issuers rather than the operators. This is unclear under CESR's proposal. We hold that CESR is not entitled to impose regulation on operators (b – g). Further, these provisions would be obsolete if there were a (preferable) one-stop-shop model, as suggested under Q 4.

Section 2: Conditions for keeping periodic financial reports available (Q 13 - 14) (28)

Question 13: Do you agree with CESR's advice in relation to this mandate? Please give reasons.

With regard to No. 10, we agree that information should be accessible at *an* archiving facility. However, we disagree that there is a need for the *creation* of an archiving facility, as CESR suggests, because this storage mechanism can be developed on the basis of the registers that already exist or which are going to be established under the Company Law Directives. For details, see infra answers to questions 41 – 51.

Question 14: Do you consider that it is necessary for CESR to establish a minimum time period for which all regulated information should be made accessible to end-users?

We hold that *all* regulated should be made accessible to end-users via the central storage mechanism for a period of time that should significantly exceed the five year period for which the issuer may be held liable. We suggest a period of 30 years, for two reasons:

1) The costs for storage of and keeping information accessible are not significant, once they are processed. Long time accessibility, however, provides important data to research facilities. The American EDGAR register grants unlimited access to company data. Thus, historical analyses of capital market events are legion. The same should be possible in Europe since it furthers insights into the functioning of capital markets.
2) Some civil law countries' limitation provisions establish that the maximum limitation of claims is thirty years. Even though does not necessarily pertains to this liability due to fraud on the capital markets, data stored with the central storage mechanisms will provide important evidence with regard to criminal liability and civil claims which are predicated on criminal liability (e.g. s. 823 (2) of the German Bürgerliches Gesetzbuch - BGB).

C. Progress Report in the Role of the Officially Appointed Mechanism (Article 21.1/2) and the Setting up a European Electronic Network of Information about Issuers (Article 22) and Electronic Filing (Article 19.4 a):

I. The Role of the Officially Appointed Mechanism (Art. 21.1/2) and the Setting up a European Electronic Network of Information about Issuers (Article 22)

Section 1: Discussion of central storage mechanism options (37)

Directive requirements

Question 1:	Do you agree with CESR's interpretation of the requirement of Article 21.1/2 that central storage does not necessitate *physical* storage in one place? Please give reasons.

We agree. From our point of view, however, the wording "central storage" necessitates two additional requirements. These include

1) that the addressee of the information can access all regulated information from **one access point** (e.g. the internet, postal address etc.);
2) that there is some **central organization** behind the storage system. For example, a random collection of company data (as exists with respect to software in the open source community) does not suffice the Directive requirements.

A) Should there be one storage mechanism, or more than one? (Q 2 - 8)

CESR outlines three different ways to organize the central storage mechanism on a national level. These include:

(i) Different registers, each providing some, but non providing all, of the regulated information that is available on a national level;
(ii) several mechanisms, each of them storing all regulated information, and
(iii) one single storage mechanism, which holds a monopoly over the regulated information.

<u>Ad (i) (Questions 2 – 4):</u>

CESR defines merely those registers to constitute storage mechanisms *by type of regulated information* that are not digitally connected among themselves, for example through a common internet access point. Under our definition of central storage mechanisms given above, these different registers do not fulfill the requirements of the Directive, and, thus, do not need to be considered in detail.

We delineate, however, these storage mechanisms *by type of regulated information* from a system in which besides the fact that information is stored at several different places (distinguished by type of information), neither the issuers, nor the addressees realize that there is physical fragmentation. This could be possible due to an overall organizational structure which results in a common access point for both issuers (for

filing of) and addressees (for retrieving the data). We think that, under CESR's definition, the latter constitutes a "single central storage mechanism". This alternative is, in fact, a viable option that will be discussed below.

Ad (ii) (Questions 5 and 6):

CESR suggests that competition between national central storage mechanisms each of which stores all regulated information for a particular jurisdiction is possible and improving the overall service level for issuers and investors. Even though we agree on the general principle that competition may be a powerful force which substitutes for regulatory activity in many circumstances, we hold that this is not the case with respect to the market for information intermediaries. CESR's suggestion to rely on competition disregards the preconditions for a competitive environment for different national central storage systems.

First, the multiple mechanism concept necessitates **private activities**. In many Member States, however, storage systems are run by different arms of the administration. It is unlikely that the administration of Member States is open to competition. Further, it would not need to compete on a service level, because state funding would enable a competition over price which, in contrast to private acteurs, is not predicated on enhanced efficiency.

Second, even if European regulators would require that exclusively private entities provide regulated information, information fulfills two **characteristics which render the prospects of such a competition dire**. These are (1) natural monopolies, and (2) network effects.

Ad (1) The expensive factor in the market for providing regulated information is the software and server-set up infrastructure (incl security, firewall, access points etc). Additional server capacities are cheap and easily available. Thus, the market for databases exhibits economies of scale that are not capped through other factors of production. The larger competitor will supersede the minor one, since the larger can distribute the fixed costs (which are almost the same for both competitors) over more customers than the smaller one. This economic characteristic of the market will necessarily result in mergers or takeovers in the market for information storage and intermediation.
In such a constellation, which economists describe as "natural monopoly"[5], market forces will drive the market towards concentration and, finally, monopoly.

Ad (2): From the issuers' point of view, the benefit increases proportionally to the number of addressees to which the information intermediary delivers information. This is because, the better the information is distributed, the greater is the likelihood that financial market prices are based on financial data rather than noise trading, and

[5] The term "**natural monopoly**" describes a situation in which a single firm can produce a given level of output at a lower total cost than can any combination of multiple firms. This means that high fixed costs and low marginal costs for a single unit of a product come together with instant scalability of production.[5] Any competitor who wants to enter into the market faces huge investments before offering even a single unit. Even then, he will have to price his product much higher than the incumbent supplier, since the incumbent can regain his fixed costs by distributing them over a much larger number of units, due to established customer relationships, than the new entrant can do. See, for example, Richard A. Posner, Economic Analysis of Law, 6th Edition, (Aspen Publishers: NY 2003), at § 12.1.

the greater is the efficency of the capital markets for the firm's stock. The size of the network of customers to which the information provider sends information increases the use of the information for the issuer. These are requirements which new entrants into the market can hardly fulfill, given that the addressees already subscribe to their information provider, and the larger network can charge lower prices than the smaller (hence, the new entrant's) network. Under these circumstances rational investor would not finance new entrants into the market for information storage and intermediation.

Both factors together are likely to drive the market for information intermediaries, in general, and in particular that for storage mechanisms, towards a monopoly structure. It is merely due to the fractured structure of the sources of information across Europe that these characteristics of the market for information intermediaries have not been revealed. Under these conditions it does not make sense to rely on competition as substitute for direct regulation.[6]

Ad (iii) (Question 7 and 8)

One may suggest that CESR interferes with this development by imposing dense regulation in financial intermediaries. However, CESR does not have the jurisdiction over operators and information intermediaries since Article 21.1 merely entitles to impose regulation on issuers. CESR can, however, impose regulation on officially appointed storage mechanisms (see Article 21.2 of the Transparency Directive).

Under these conditions, having one central storage mechanism for each Member State is the only viable option. The upside of this solution is that Member States would have clearly fulfilled their requirement under the Transparency Directive to ensure that there is at least one officially appointed mechanism for central storage of regulated information.

The possible disadvantages of having only one central storage mechanism (which are CESR states in its consultation) are typical for monopoly markets. There is, however, some research on which CESR may rely in order to counter the lack of incentives to innovate or to provide services, and the risk of higher costs to issuers. By the way, in addition to the risks stated by CESR we want to add the risk of supra-competitive pricing (meaning, pricing beyond the limits that the costs and a reasonable benefit to the provider justifies) (Questions 8).

In the following we suggest regulatory efforts to counter the monopoly problems in the market for central storage mechanisms. These measures strive for low barriers to enter, and thus firece competition in, the market for advanced services, while a monopolist under strict regulatory scrutiny must provide basic services.

The literature on regulation suggests the following regulatory measures:

a) **Market segmentation**: clearly define / delineate / restrict the monopolist's field of activities to the part in which the natural monopoly exist ("basic services"): The monopolist must bundle and provide the raw data free of charge and in a certain pre-defined standard to anyone free of charge on its own and the

[6] This is the lecture the faltered deregulation of, f.e., electricity and railroads taught us.

Competent Authority's website. It must not offer "value Added" services (such additional services, which CESR mentioned sub No. 50., 51.). These should be developed and offered by different (private) entities specialized on information services. Under these conditions, the monopolist would have no interest to interfere with the businesses of dissemination and advanced services. Further, the market barriers for new entrants would be lower as compared to a situation in which the imcumbents also possess the core assets – information –. This would hold prices for advanced services on a reasonable level.

b) **Input-output regulation**. By requiring to (1) publish the basic data by decreding the monopolist's "fees", or by regulating that the monopolist can merely charge fees for filing or retrieving information to a customer base which is strong in collective bargaining processes, regulators can keep control over prices. To these customers belong (1) the (relatively speaking: few) listed companies which can organize themselves, and (2) commercial news sources that intend to provide additional, information related services to their customers (for which they can charge money).

c) **Limit monopoly by time**. Providing the basic services to a pre-defined customer base is merely a technical service, which many private entities in the field of data protection and data service can provide. We suggest that each Competent Authority asks one private entities to provide the services of the monopolist for a limited period of time (f.e. five or ten years) on their own financial risk. The relatively short timeframe of the monopoly, together with a limited capacity to raise prices (which is due to regulation) will result in enhanced efficiency. The fact that there are 25 different markets in which – at least at the beginning - several providers act will provide the competent authorities with the credible threat the the provider at the end of the term is changed if it does not implement the necessary technologies and services.

d) **Avoid blackmail potential by requiring mirror-sites**. If a monopolist is the mere source of important data it might blackmail the Competent Authority. Blackmailing behavior is unlikely to be stated expressively, but it might happen inherently by mentioning security concerns when the Competent Authority requires the central storage mechanism (CSM) to embedd new technologies, or to reduce fees, and – probably the most significant event – when it is required to transfer data to a successor at the end of its mandata. Thereby, risk factors would influence the Competent Authority when deciding of whether the contract with the CSM is extended or not. Consequently, the CSM would be able to defend its monopoly by other means than providing security and quality to the Competent Authority and investors. This influence may harm the modell of artificial competition for which the "limit-monopoly-by-time"-modell strives.

   The Competent Authority may reduce this threat by requiring the CSM permanently to feed mirror-sites of at least three CSMs of other Member States with the data that are stored in the national database. The CSMs that run the mirror site must be independent from the CSM that runs the main-database of one Member State. Thereby, at the end of the contract period, at least three competitors can enter into the incumbent's market at relatively low

costs. Further, in the period of the tender offer, which is most critical, or in the transition period from one provider to the other, the Competent Authority may threat to disclose the CSM-providers' behavior, ban it from further tender offers, and switch from the main site to one of the three providers of the mirror site (either permanently, or until a new operator has downloaded all old files from the mirror sites, and established a functioning software system at a national level). Besides this pro-competitive effect, the mirror-site requirement also raises the security of the database significantly (see below, I. Question 25-26).

e) **Counter-measures against the risk of that a regulator is captured by a supplier.** If there is a long-time relationship between regulators and suppliers, regulatory scrutiny is decreasing over time since the regulator starts to trust in the capabilities of the supplier, and persons acting on the regulators' behalf become friends with persons acting on the supplier's side. This phenomenon is termed the "capture" of a regulator by a private entitiy. Therefore, we suggest CESR to establish on a regular basis "efficiency reviews" of national CSMs, resulting in a grading scale with respect to certain characteristics of the national CSMs (fees, services, response velocity, security etc.). The results of the efficiency reviews must be published in order to enable competitors to complain about the performance of a national CSM.

f) **Dealing with concentration among national CSMs.** On the long run, there will be significant concentration among national CSMS. Given that there is close regulatory scrutiny, this may enhance efficiency, as well. However, until the optimal pricing level can be determined at certainty, competition regulators should be encouraged by the Competent Authorities to prohibit mergers among CSM-providers which result in a market share beyond the definition of a "dominant position" in the market (approximately 30% of the market), even though it may increase efficiency from a short term perspective. This measure ensures that at least three new entrants could threat the incumbent with new entrance into its national market – a measure which keeps prices down.

B) How should investors receive access to regulated information? (Q 9-10)

CESR suggests three options:

(i) Regulated information accessible through a Competent Authority's website;
(ii) Regulated information available directly via the central storage mechanism;
(iii) Basic low cost service available through a Competent Authority's website. "Value added" services offered commercially by the central storage mechanism(s).

In light of our comments above, we argue in favor of a fourth alternative: Basic low cost service available through a Competent Authority's (and/or the CSM's) website; "Value Added" services provided commercially by and accessible through information intermediaries (which may also voluntarily provide storage services).

If CESR disregards the concept outlined in detail above we favor alternative (iii) because publication of the raw data on the Competent Authority's website

- enables investors to review the authenticity of data that were provided by someone else;

- sets certain limits to monopolistic pricing by the CSM (even if these limits are very high, unless the Competent Authority also offers a digital interface for these data)

C) How should regulated information get to a storage mechanism? (Q 11-12)

CESR considers four options:

(i) Delivery of information to both dissemination and central storage mechanisms by issuers
(ii) Central storage mechanisms receive a combination of regulated information from issuers and media
(iii) Central storage mechanisms receive combination of regulated information from "Document Capture Services" and media
(iv) Central storage mechanisms receive all regulated information from operators

Question 11: We prefer option (i). It guarantees the issuers' responsibility for the content stored at the central storage mechanisms. Further, we have legal concerns whether it is lawful to establish operators as regulated entities in the implementing measures, since the Level 1 Transparency Directive is merely directed towards issuers and competent authorities. Finally, it is, from a market perspective, not wise to establish a duty to use operators. This would increase the prices which the operators charge the issuers, and thus increase the costs for a quoting at capital marktes.

Question 12: We do not think that the implementing measures should prescribe one particular option. Some firms would like to fulfill the duties themselves (in-house-solutions), other would like to rely on external services provided by operators. As long as it is clear that it is the issuer's responsibility to fulfill all duties vis-à-vis the CSM, further rules are not necessary.

D) Issuer's responsibility to make regulated information available to a central storage mechanism (Q 13)

CESR suggests three alternatives: At the point at

(i) which regulated information is actually sent to a central storage mechanism;
(ii) when the issuer receives confirmation that the regulated information has been received by the central storage mechanism;
(iii) which regulated information is accessible by an investor directly from a central storage mechanism or via a Competent Authority's website

We hold that option (ii) is the only viable solution. Under option (i), the issuer may avoid liability despite the fact that it treated the filing of regulated information with the CSM *or the Competent Authoritiy* (see supra Section B, Q 4) sloppily. Under option (iii), the issuer would bear liability for the CSM's or the Competent Authority's conduct. This would prompt difficult procedural questions.

However, we would suggest to refrain from requiring CSMs or the Competent Authority to *send* a formal confirmation to the issuer. Rather, web-technologies may provide that immediately after the filing the filer is informed that the system received the filed message (as, e.g. on CESR's website for public consultations). This screen (html-format) can be stored or printed out.

E) When should regulated information in the central storage mechanism be accessible? (Question 14 - 16)

Question 14: Price-sensitive information should be accessible real time through the central storage mechanism, in order to enable market efficiency with respect to small- and medium enterprise issuers, and in order to enable small investors real time acess.

First, we note that there is no reason to provide protection from more efficient information technology to operators. If technology disseminates information most efficiently, CESR must push for technologically advanced solutions.

Second, we do not think that real time access disrupts dissemination based on operators. This is, because professional investors seek to achieve the disseminated news real time per push system. Due to this, they are willing to pay for either advanced technologies or operators. The fact that professional investors achieve the news in their email account functions as a warning system for reviewing the company's evaluation. A real time disclosure on the CSM's website does not endanger this warning function.

Third, the real time disclosure counters the drive for market concentration (and thus supra-competitive-pricing) on the level of the operators.

Finally, if operators can merely survive by distributing *exclusive* information they, in fact, freeride on small investors whose financial restraints prevent them from licensing operator services as well. A system that, based on European law, gives, in practice, exclusive information to professional investors perpetuates the informational advantage of the institutionals. This clientele is, however, already ahead of retail investors with regard to economic skills, market knowledge, and financial capabalities.
From an economic point of view, the benefits resulting from the informational advantages of institutional investors are paid by retail investors (through worse securities prices) and partially internalized by the operators. A real time disclosure might partially desintegrate the operators' and institutional investors' externalization of costs to retail investors, which will result in slightly higher prices for dissemination. This is, however, not a bad, but a good thing, since it furthers market efficiency on the level of information intermediation (and thereby, it furthers advanced technologies).

Finally, we would note that a real time requirement is necessary for CESR's proposal mentioned below at No. 210 et sequi. Pursuant to this proposal, the information under the Prospectuses Directive should be subject to the same requirements with regard to dissemination and storage as defined in Article 21 and 22 of the Transparency Directive and interpreted by CESR. If dissemination is spurred by

competition among the operators (as CESR suggests on pp. 12 et sequi of this consultation – a concept which we criticize above), the dissemination of prospectus information will, in most cases, result in the information that a prospectus has been filed and, in the case of a prospecturs for a securities issue, the price for the securities to be issued. Other information contained in a prospectus are simply not sellable on a large-scale basis. This will be particularly true if the issuer itself and its sell-side analysts have distributed the other relevant information with regard to the issuer, as usual, *in advance of the filing of the prospectus*.
Thus, in order to ensure that Prospectuses Directive Information makes any sense at all, and in order to guarantee the information's *effective* dissemination within the market participants, Prospectus Information must be immediately accessible for the few market participants who nevertheless look more closely at the prospectus. This requires real time access to the Prospectuses Information.

Questions 15: We do not agree. CESR's assumptions are based on the old paper-based dissemination process. The future which should be CESR's concern is based on digital processes. Already, many operators have website templates for price-sensitive information. CSMs may have these, as well.
We would recommend to define the same short deadlines for large and short documents. Thereby, the CSM will be forced to use the most modern technologies for its register. This will be particularly necessary if CSMs are private entities that act on behalf of the Competent Authority, or that are private actors altogether.

Question 16: Any digitally filed, non-price sensitive information can be easily made available within 48 hours following the filing. The German CSM "Elektronischer Bundesanzeiger" already practices a 48 hrs handling period. Thus, we suggest a deadline of two trading days.

F) Should regulated information be available free of charge to investors? (Q 17 - 18)

Considering who should fund the operating a central storage mechanism, CESR suggests three alternatives:

(i) Investors who use the CSM;
(ii) Issuers whose regulated information is made available via the CSM;
(iii) Commercial entities that make use of regulated information;
(iv) Investors that contact for additional services with the operator;
(v) Public funding of the total operating costs of the CSM;
(vi) A combination of the above options.

We believe that alternative (vi) is preferable.

First, it is important to notice that in an economic model world of perfect markets there is no difference between a model in which investors pay fees for retrieving the data, or issuers for filing the data, since the money paid by the issuers comes essentially out of investors' pocket in form of reduced dividends. However, reality is a world of imperfect markets with imperfect competition, transaction costs and price-sensitive investor behavior:

- **Imperfect competition:** vis-a-vis the CSMs, the single investor is in a relatively weak bargaining position with regard to the fees the CSM charges.

He cannot effectively enter into a collective bargaining process without partially paying costs of other investors. This typical collective action problem will result in an imperfect incentive to bargain with the CSM in the first place. Further, due to the structure of the martket for information, the CSM either has a monopoly, or is part of an oligopoly that is driving towards a monopoly (see above). Finally, the investor is likely to experience significant time pressure for making an informed decision, while the CSM does not experience a pressure to make a contract. All these factors together render the investor's position vis-avis the CSM very weak.

- **Transaction costs**: when investors pay fees for using the CSM, they need to pay transaction costs for the transaction "retrieving information", as well. For example, they need to pay fees for the money order or the use of their credit card, or they need to bear the costs (time, money) for paying their bills. One can assume that these transaction costs are decreasing proportionally to the volume of a transaction. Thus, the transaction costs for fees being charged for retrieving information *by a single investor* can be presumed to be relatively high. In contrast, with regard to one piece of information the transaction would have the biggest possible volume and thus the transaction costs would be the lowest if one party paid the costs for both filing, and retrieval of information to *all* investors. (In practice, only the issuer can function as such party, see below.)
- **Price-sensitivy of investors**: Even if the costs for all investors' retrieving the data equalled the sum of all issuers' fees for filing the data, some investors would refrain from retrieving some parts of information if the value of this specific part of information is not obvious to them from the outset. This is, because these investors avoid costs which are certain for a benefit which is uncertain. Information is a good that always fulfills the uncertain benefit characteristic since a consumer does not know what he "buys" until he consumes it. Thus, charging costs for information would result in less-informed investor decisions, which is at odds with the rational-informed investor ideal.

All of these reasons require a regime which imposes the bulk of the costs on party. In practice, only the issuer can function as such a party:

- **A public funded system** raises efficiency concerns with regard to bureaucratic interference by the funding state agencies (see above A) and below G). Further, the costs for running the capital markets would be externalized to society, in general.
- **Operators** would require the CSM to be granted ownership of the content if they were to pay the costs for the CSM. These property rights would hamper the dissemination of information. Some fees might be charged, however, to operators who wish to retrieve data over interfaces that fulfill certain data standards, e.g. XBRL, covering the expenses for the interface itself and for updating this interface. These fees, however, should not be charged for the content (the data themselves), but merely for the medium (the interface), hence they should merely cover the costs for the technical service.
- Issuers and investors are the parties that immediately benefit from disseminated information, the former through lower costs of capital, the latter (hopefully) through a more informed decision making that improves the pricing function of the capital markets and lessens the risk of noise trading. But merely the former are an party that is apt to reduce the impact of imperfect competition: the relatively few issuers can enter into a collective bargaining

process with the CSM at lower costs than millions of investors. In addition, if the issuer bears the transaction costs, the likelihood is the greatest that transaction costs are low. Finally, if the issuer bears the fee-based transaction costs investors would merely bear the insignificant costs for their internet connection, which is not perceived by investors to constitute a cost for retrieving data, as such.

G) Who should operate central storage mechanisms? (Q 19 - 20)

CESR consider two options:

(i) the Competent Authority
(ii) commercial entities that are appointed

First, we want to note that we do not share CESR's technical concerns (No. 129). At least, they do not raise serious barriers for a digital storing and retrieval system across Europe. *Databases with very large capacity* exist in manifold places and countries, run by public and private entities. *Retrieval of very large documents* becomes easier from day to day due to the spread of high bandwith among institutional and retail investors (by means of high-speed internet access, DSL technologies etc.). At the same time, flatrates are increasingly accepted by both telecommunication service companies and their customers. In a system based on flatrates, the *amount of data retrieved* influences the price of information to a lesser extent. The *software* enabling intelligent search functions (boolean search etc.) and the technical capacity for retrieving data by millions of users exist in libraries, as well as many public and private entities (such as google, the stock exchanges, etc.). Besides, the American EDGAR-System, which was designed in the early 1990s, is capable of handling thousands of files of thousands of issuers for more than 150 million investors. It is unclear why a database of similar complexity should constitute a serious problem in Europe in the years 2005 et sequi.

Questions 19 and 20 are embedded in our answer to A), Questions 2-8. In this section, we suggest to establish a monopolist CSM (in each country),

1) which is run by a private entity – a technical solutions provider, rather than an information intermediary that adds "added value" services -,
2) which is under heavy regulatory scrutiny by the Competent Authority,
3) which must "defend" its monopoly in public tender offers every few years,
4) which is prohibited from engaging in activities other than providing "basic services", and
5) which must provide at least three mirror sites that are run by independent CSMs primarily storing and covering other nation's data, with the data stored in the database.

In the long run, economies of scale and scope will drive mergers between these national monopolists, resulting in a European wide data storage system. See on this perspective our comments to supra A), Questions 2-8.

I) What quality standards should be established for central storage mechanisms? (Q 23 - 40)

Electronic transmission of the regulated information into the storage mechanism and its presentation (Q 23 –24)

We hold that it is, in fact, premature to set a data standard (XBRL?).
Further, we think that CESR setting a standard, in general, is problematic. Given that this standard is XBRL (which is, essentially, an idea and development triggered by American firms), regulatory interference might prevent the development of European modifications where necessary. This would weaken the bargaining position of European firms when discussing the further development of XBRL.
Further, we hold that it is very important to consider who holds Intellectual Property Rights in a standard that is officially declared to be the general accepted standard for financial information in Europe. Only a non-proprietay standard may declared the official European standard.
Thus, we would suggest that CESR merely uses open expressions, such as "standards customary in the sphere of international finance."

Security (Q 25)

We agree that the CSM-provider should be required to ensure the veracity, authenticity and completeness of information it publishes and stores.

We disagree that CSMs do not need to be subject to confidentiality requirements. Issuers might err with regard to the importance of some facts which are disclosed via the CSM. Further, we hold that the CSM should publish price-sensitive information real time (see above, answers to e), Questions 14-15). Consequently, CSMs need to ensure confidentiality to the same extent as operators.

Integrity of stored regulated information (Q 26 - 27)

We agree that the CSM-provider should be required to ensure the veracity, authenticity and completeness of information it publishes and stores. It should be clarified, however, that Member States can fulfill this requirement by entering into contracts with the officially appointed CSM.

We do not think, however, that Document Capture Services may be subject to regulation under the entitlement of the Level 1 Directive (see answer to Question 11). Further, in order to clarify who is responsible, all duties should be regulated in the issuer – CSM relationship. Issuers who want to enter into contracts with service providers should do so on their own risk. Finally, new technologies might render these services useless, altogether. A regulation by CESR would interfere with these future developments.

Certainty of source (Q 28)

First, we want to note that the authenticity requirement has not caused any serious problem, in practice. We nevertheless think that a CSM should be obliged to ensure

that the regulated information it recieves is from an authentic source. However, this raises much more difficult questions than set out in the CESR consultation. For example, if shareholders, rather than the management, call a shareholder meeting (which may happen under some corporate laws), a strict authentication process may hamper the exercise of shareholder rights. Further, we have concerns that a regulation regarding Document Capture Services is beyond the entitlement of the Level 1 Directive, and that it may not exhibit the flexibility which is required to capture fast evolving market practices.
We would recommend that CESR refrains from any detailed regulation, and merely states the principle that a CSM should be obliged to ensure that the regulated information it recieves is from an authentic source. Market practice and case law will define this requirement more precisely than CESR can do.

Time recording of the receipt of information for purposes of measuring the performance of CSMs (Question 29)

Time recording may, in fact, be useful for the Competent Authority. However, there are alternative measures as well, for example by requiring the issuers to disclose the sent date and time on the disclosure item. All these subjects are nothing that require regulation on the EU level. We hold that it should be up to the contract between the officially appointed mechanisms and the Competent Authorities to agree on performance measuring mechanisms.

We hold that Document Capture Services are a bad mechanism to ensure that documents are filed with the CSM, in the first place. Further, we think that these services are not subject to the entitlement under the Transparency Directive (supra answers 11, 27).

Time recording of the receipt of information for the purposes of investors (Question 30)

We disagree that CSMs do not need to be subject to a time recording for the purposes of investors. We hold that the CSM should publish price-sensitive information real time (see above, answers to E), Questions 14-15). Consequently, CSMs need to establish a time-recording to the same extent as operators.

Easy access for end investors (Question 31 - 32)

We agree. The CSMs services will be used by operators, who are likely to add “value added” services, and sell the package to institutional investors. These operators should have access to the data at the lowest cost possible. This requires electronic access to the data. Further, small investors need access to the CSMs’ data in a straightforward manner.
We also agree with the requirement to store reference data. However, we believe that a filing must include the name of the person who is responsible for the conetnt of the filing (e.g. the CEO, company secretary, legal adviser etc.) and the name of the person who technically submitted the filing to the CSM (if these persons are not identical).

Language (Q 33)

It seems at odds with the language requirements established under Article 20 of the Transparency Directive to require the CSM-provider to translate its directory in 20+ languages if the content it provides must be merely presented in, at the most, two languages. We would recommend to require the CSM-provider to present its directory in the language of the home member state which it represents as well as in a language customary in the sphere of international finance. Concentration among CSM-providers will result in a larger number of languages, anyway.

Operational hours (Q 34)

We need 24/7 access to the financial data. The financial markets are worldwide. If Europe intends to establish liquid and efficient capital markets, it will be unwise to limit information, the "fuel to functioning capital markets", to certain business hours and/or days. Both aspects are merely geographically and culturally based – a restriction, which is not true with respect to global investor activities.

Failures in the transmission of regulated data and and alternative methods of receipt (Q 35) and alternative methods of submission to a central storage mechanism (Q 36)

We do not deem a regulation with regard to failures of transmission or alternative methods of submission necessary. The issuer is responsible for *complete* filing of the document. A diligent issuer will take appropriate measures which will result in a "confirmed" message by the CSM. The standard of the data (electronic or paper form) is irrelevant.
We would encourage CESR to refrain from regulating a field in which the proper incentives for the parties that are involved already exist. We would further encourage CESR to refrain from overdoing their function as detail-regulator on the EU-level. Both types of behavior would result in exorbitant costs for the issuers.

Provide access to regulated information in paper form (Question 37)

We believe that a paper-based retrieval process is not a viable option to cope with technical problems of the database. Modern technologies enable CSMs to establish mirror-sites at low costs (see, for example, the mirror sites of the scientifc network SSRN at Columbia University, Stanford University and Hong-Kong University – a non-commercial website!). Instead of the paper-option, we encourage CESR to require CSMs to establish at least three mirror-sites, run by independent CSMs of other countries (for details, see answers to questions 2-8, and 22).

Service support (Question 38)

Given that CESR establishes the monopolist concept presented at answers 2-8, a regulation would be unnecessary, since the monopolist needs to offer a high service level in order to become CSM, in the first place, and in order to defened that lucrative monopoly.

Demarcation of "regulated information" (Question 39)

We hold that CSMs should not be allowed to offer "value added" services (answers 2-8). Thus, a demarcation is not necessary. If CSMs were allowed to enter into competition with providers of "value added" services, they would have serious competitive advantages over their competitors.
If CSMs are nevertheless allowed to offer "value added" services, they should be required to separate regulated information from other types of information, as a means of avoiding to blurr the authenticity of regulated documents.

Transparent charges to investors (Question 40)

We hold that CSMs should not charge fees to investors, but to issuers. The amount to be charged should nevertheless be transparent. We hold, however, that this transparency can best be achieved by competition among private entities to become CSM for a limited amount of time in the first place, combined with regulator disclosure of these fees.

Section 2: Requirement for an electronic network (Article 22) (63)

1st aim of guidelines (Q 41- 42)

Do you agree with CESR's interpretation of the first aim of this guideline? Please give reasons.

We agree that the adressee of the Article 22 guidelines should be "the public."

First, with regard to information, it is simply not practical to grant holders of securitized creditor rights exclusive acess. Information will always disseminate to other groups of investors (shareholders?).

Second, in light of the purpose of information (which is 1. facilitating trading and thereby enabling the pricing function of capital markets to work, 2. exercising voice or other rights that further the investors' influence on managers), it does not make sense to distinguish between creditors and other groups of investors (shareholders?). Both investor groups together act as a monitor of management by their choice between exit and voice.

Third, while one may discuss whether shareholders should have exclusive access to *some* information (since shareholders rather than creditors are the residual claimants - at least as long the firm is not insolvent), European Securities Law Directives have decided this question by stating that shareholder information is available to the public. Thus, creditors have acess to the same information as shareholders.

In contrast, there is no sound policy reason to grant creditors (as a group of securities holders) a preference. Consequently, the information under Article 22 which merely regards information of creditors should be open to the public, as well.

Question 42: Do you agree with CESR's proposal to extend Article 21 to include information disclosable under the Prospective Directive? Please give reasons.

We believe that Article 21 should be extended to include the information disclosable under the Prospective Directive.

However, this requires that the storage system grants real time access to the Prospectuses Directive Information because this type of information may contain many information which will not be disclosed in the dissemination process that CESR proposes under Article 21 of the Transparency Directive. See for further details the answer to question 14 (at the bottom).

2cd aim of guidelines (Q 43 - 44)

A) The creation of electronic links between national securities regulators and operators of the regulated market (Question 43 - 44)

We agree. A mandatory link between operators of the regulated market and national securities regulators increases the risk that market participants mix up actions undertaken by market operators with regulatory measures undertaken by national securities regulators.
However, we believe that market places, as every private entity, should be allowed to create a link on a voluntary basis.

B) Links between information produced by issuers who admit securities to trading on a regulated market, and information that is held in national company registers covered by Council Directive 68/151/ EEC (Company Law Directive)

Question 45: Do you consider that the overlap between types of information required by the directives justifies the creation of links between these two separate sources of information? Please give reasons.

First, we want to emphasize that we do not share CESR's view mentioned on p. 11 and No. 44 of the consultative document that the company registers pursuant to Article 3 of the First Company Law Directive and the storage mechanism under Article 22 of the Transparency Directive are totally different mechanisms as CESR's comment suggests. Both strive for transparency with regard to corporations.

Besides this, from our point of view, merely formal difference we do not deem the differences CESR cites at No. 225 et sequi so significant that they account for two different registers within the Member States. We account for this position by analysing CESR's reasons in detail. Following these consideration, we would like to consider a few other reasons for separated databases, which CESR does not raise.

CESR states four reasons for refraining from a connection between general corporate information and information required to be disclosed under securities law directives.

(i) The scope of the companies covered;
(ii) Number of companies covered;
(iii) The type of information that is disclosable.
(iv) Costs for linking both systems.

Ad (i) and (ii): It is correct that the securites laws merely apply to a *part of* all corporations, and this part is, by definition of the word part, *smaller* than all corporations.[7] But three developments need to be considered:

1) From a legal point of view, securities and corporate law are increasingly converging, in particular in the field of corporate governance.
2) Reforms in the credit market (Basel II) prompt more and more corporations to issue (equity or share) securities in order to finance their businesses.
3) Greater use of modern technologies has started a convergence between securities and product markets. In particular, goods like energy, cereals, and resources are traded at markets that are similarly structured as the securities market.

These developments let the group of issuers grow in proportion to the overall group of corporations.

Ad (iii): CESR alleges that the type of information that is disclosable is different due to the fact that the purpose of the disclosure is different. One could assume that the different purpose results, as CESR states, from the fact that securities law based disclosure is aimed at investors, market participants, and regulators, while corporate law directive disclosure is aimed primarily at business counterparts. A closer look at this assertion, however, reveals that this is, in fact, not the case.

First, it is not uncontested that securities law related disclosure is *exclusively* directed at investors, market participants, and regulators, as CESR states. The view cited by CESR disregards that competitors frequently use information disclosed under securities laws. Due to this, accounting law restricts disclosure to a greater extent than a merely investor directed disclosure approach would justify.

Second, even if securities law based information were exclusively directed at investors this would not account for a clear distinction between both types of disclosure, as CESR suggests. It is granted that securities law based disclosure should spur trading in securities, and thereby facilitate the pricing function of capital markets, and capital market efficiency, overall. However, it is generally accepted that trading (hence, the buy / exit decision) is not the mere function of investor-directed disclosure. Rather, disclosure also spurs the exercise of the investors' Voice, which is particularly important for periods in which capital markets function inefficiently. CESR can derive from the extensive provisions on Voice in Articles 17 and 18 of the Transparency Directive that this purpose of disclosure was also in the purview of the European primary legislature.

[7] Consequently, argument (i) and (ii) are not different arguments, but the same argument.

Third, CESR emphasizes the group of investors vis-à-vis the business counterparts. There is, from a legal point of view, not a significant difference between investors and business counterparts. From a legal point of view, both firms enter into contracts with the firm. Investors enter into credit contracts or a membership relationship, while business counterparts enter into supply / demand contracts which frequently include short- or long-time loans, as well. Hence, both parties are contractors with the firm.

Fourth, from an economic point of view, there is not a significant difference between investors and business counterparts either. Both parties bear the risk of insolvency of their "investment", and both investments may be economically significant or not. Consequently, if a Member State predicates it corporate law system on a supervisory, rather than a liberal approach it is stringent to let the same authority supervise securities law and corporate law issues. The fact that many Member States do not follow a supervisory approach with respect to the enforcement of intra-corporate organization is based on the liberal approach that shareholders, managing and supervisory boards rather than authorities would best know what is good for the firm.

Ad (iv): The cost-argument is, from our perspective, very weak.

Establishing one system for corporate and securities law based information, prompts three types of costs. 1) *Issuers* must immediately bear the *costs for double-filing* of the annual report by hundred thousands of corporations *every year*. 2) Two databases must be run, two security systems must be established, and two csm-providers must be supervised. This will significantly increase the costs of supervision, which is eventually paid by the tax payers within the Member States. 3) Investors will spent useless time looking for information in the corporate law database that is merely stored in the securities law database.

On the other side, there are the costs for a *one-time setting up* of a system in the Member States that closely intertwines corporate and securities law issues. It is true that the one-time setting up of a system requires more complex organization in the present. Further, probably more significant costs are prompted by discussions among the institutions *within the Member States* in order to overcome the rent-seeking behavior of groups and lobbyists benefitting from a separation of the databases. It can be presumed that there are rent-seekers within the Competent Authorities, as well, since some of the Competent Authorities have to enter into agreements with other authorities within their Member State on which of the authorities within the Member State will supervise the overlapping part of the information, and which authorities has to reduce its influence.
Overcoming rent-seeking behavior is, in fact, costly, and we can only assume that these are the costs to which CESR is referring in No. 230. However, we strongly encourage CESR to strive for a higher one-time investment, rather than imposing higher average costs on European issuers, investors, and authorities in the long run. One-time investments will be depreciated over time. Permanent costs that are due to rent-seeking behavior, however, will decrease the efficiency of European capital markets in the long run, and in particular as compared to the strong American capital markets.

In addition, an integrated system would achieve great economic benefits in the future if regulators enhanced the disclosure duties of non-issuers, because the procedures developed for frequent filers can be easily transferred to non-issuers. Thus, we are convinced that the higher costs in the very present are offset in the future.

In addition, we would like to consider a couple of other arguments.

Timing and frequency. Securities law-based information is filed a) more frequently than corporate law information, b) at times that depend on the trading time of the securities markets, and c) needs to be disseminated into the market as fast as possible in order to fulfill its purpose to spur trading among investors on a fair and equal-footing level.
However, pursuant to CESR's concept, primarily operators should disseminate information. If dissemination is not the prime function of the storage system, the need for timeliness does not account for a clear distinction between corporate and securities law based information. This does not exclude that the storage system should nevertheless disclose issuer related information as fast as possible in order to guarantee fair pricing in the information market (see answer to question 14).

The timing and frequency requirement can be met, in practice, by requiring the CSM to first publish issuer related information before processing non-issuer related information, or by setting up a separate department for issuer-customers.

Securities law based information in other jurisdictions is separated from corporate law based information. In the U.S. and Canada, there exist specialized storage systems for securities law based information. This is, however, due to the fact that corporate law based information is not stored, at all, and/or that the Federal State (equivalent to the EU level) does not have jurisdiction over corporate law based information. Both aspects are not true with respect to the EU.

Consequently, we hold that the overlap between types of information required by the directives justifies the creation of links between the Securities and the Company Law based disclosure and storage systems.

Question 46: If you consider linkages between these two types of information to be justified, when do you think the creation of such links should be established? Please give reasons.

In order to avoid double costs for the setting up, supervision, filing and use of the storage system, links must be established in a way that users do not realize that both databases are grounded on different legal requirements. This requires, at best, one integrated database, meaning that all filed information is forwarded into one common database.

We encourage CESR, however, to consider the feasibility of establishing different departments for issuers and non-issuers within the integrated database. This would help delineate the jurisdiction of authorities within the Member States over the

different groups of filers and it would facilitate the definition of the different filers' requirements and needs.

3rd aim of guidelines (Q 47 - 51)

With respect to the economics of the market for information storage and information, see above answers to questions 2-8, 14 –18.

Question 47: Do you agree that a small number of CSMs operating at a European level would benefit from economies of scale?

Yes, we agree that the CSMs would benefit from economies of scale. The problem is, however, to ensure that *society, rather than the CSMs*, benefit from economies of scale. The latter aspect requires some tricky adjustements. See on the underlying economic problems our answer to Questions 2-8.

We believe that whether economies of scale are passed on to filers and operators[8] and thus probably to society as a whole, depends on the scope of economic activities that CSMs are permitted to undertake. If CSMs are allowed to enter into the market for "value-added" services, it is likely that a bundling-problem occurs which prevents the economies of scale from being passed on to filers and investors.[9] If CSMs offer "value added" services, customers would pay for a mix of basic information and "value added" services, and thereby subsidize inefficient basic services with fees for high-quality "value added" services. Thus, there would be intransparency with regard to the pricing level of the basic good, which hampers informed customer decisions that would finally drive efficiency by tipping the market in favor of the most efficient supplier of basic information.

Further, if concentration will nevertheless take place the suppliers will hold significant power in its hand to manipulate the market, since they hold power over both the raw data and the interpretation thereof. It would require major regulatory efforts by the Securities Regulators and Competition Authorities to scrutinize and control this large-scope (both "basic" and "value added" services) oligopoly's manipulating and pricing potential.

Consequently, merely if the Member States ensure that there is, at the beginning, one officially appointed CSM in each Member State which is subject to the restrictions pointed out above (answer to Questions 2 - 8), in particular that the Member States limit the scope of CSMs' activities to "basic services" and impose close regulatory scrutiny on the national level with respect to pricing and service behavior, there is some likelihood that CSMs will pass on the, in fact, significant economies of scale directly to filers and operators.

Under these conditions, competition will demonstrate who is the most efficient CSM-provider: If CSMs cannot compete by enhancing their scope of activities ("economies of scope") they must compete on the service level (hence, technical accessibility, user-friendly adjustments, such as search engines, etc.) and on the pricing level.

[8] Investors should be granted access for free, see answers to questions 17-18.

[9] This type of anti-competitive behavior is well known from the European Commission's "Microsoft" Decision.

Further, the limited scope of activities hampers cross-subsidization by parent companies.
This would effectively qualify for candidacy to pitch for running the one European monopolist CSM to which economic forces would drive the market. However, we are not sure whether one monopolist CSM on the European level is desirable, or whether a monopolist on the European level would prompt more regulatory problems than society would benefit from its economies of scale. The EDGAR-database is, insofar, not a good example since it is unclear whether the filing-fees for EDGAR equal the hypothetical competitive pricing level.

One important step will become necessary once merely a handful of operators remain in the European market. An oligopoly renders supervision of pricing behavior and some security requirements, such as the mirror-site requirement (see Questions 2-8), complicated. Then, regulators must consider to establish further supervision and security requirements in order to ensure appropriate pricing levels, or regulators must interfere with further concentration in the market (limiting the possible economies of scale). In any event, we would encourage CESR not to decide on whether a monopolist CSM is desirable in the long run. This is, because it would incentivize parent companies to cross-subsidize inefficient CSM-providers in order to cash in once the monopoly is established.

Questions 48: Do you agree that economies of scale would also be gained if multiple central storage mechanisms were operated commercially? Please give reasons.

We understand that multiple central storage mechanisms in the context of this question means that multiple storage mechanisms exist on the national level. The problem of multiple central storage mechanisms, in general, is discussed at Questions 2-8.

We believe that the same dimensions of economies of scale will not be passed on to society in the same amount of time, since it takes longer until concentration takes place. Further, it is much harder to ensure regulatory scrutiny if securities regulators must watch the activities, and ensure the quality, of many rather than one CSM in each country. Finally, we believe that it would be politically infeasible to prohibit a large number of CSM-providers from being active in the market for “value added” services, which is, however, necessary in order to achieve that society rather than private entities benefit from the full potential of the economies of scale.

Questions 49: Do you agree that central storage mechanisms could, in part, be publicly funded?

We do not believe that public funding is a good idea, for two reasons.

First, it would lessen the private entities’ incentive to pass on economies of scale to society: rather than increasing its efficiency, they would ask for additional funding by the Member States. In contrast, it must be clear from the outset that providing CSM-services means bearing the risk of miscalculating one’s costs. This will ensure proper calculation and help avoid cheating in the tender process for becoming a CSM, in the first place.

Further, public funding is, essentially, an externalization of costs. It is not transparent to the investor how his taxes are used. Hence, public funding would harm the transparency of costs related to an investment at the securities markets vis-à-vis other forms of investing. Thereby, it might further investment in securities even though an investment in securities is not the most efficient investment, from a societal point of view. Thus, public funding would reduce the distributing efficiency of the capital markets, in general.

Questions 50: Do you believe that central storage mechanisms, within a pan-European context, should be operated commercially or by a Competent Authority? Please give reasons.

Questions 51: What risks do you consider are inherent to either option? Please give reasons.

We hold that establishing CSMs that are run by commercially entities but that are under close regulatory scrutiny is the best solution. For details, see answer to Questions 2 – 8. This is because running a database system is not the core-qualification of the Competent Authority, which may result in a lack of expertise, skill, or funding for the constant innovations that are required for running an online database efficiently. Private entities, in contrast, may sacrifice security, reliability, and service for profits. Above we issued proposals (answer to Question 2-8) with which regulators can ensure that the typical weaknesses of private activities are unlikely to occur.

II. Electronic Filing (75)

The preference for electronic filing (Q 52 - 53)

Question 52 - Use of electronic means: We agree. Sending papers is antique. Issuers can be presumed to have access to webbased technologies.

Question 53 - Transition period / gradual introduction of electronic filing: We disagree. The implementing measures will be adopted and come into force until the end of 2007. By then, we can assume that all issuers, Competent Authorities, and CSMs through Europe can handle electronic files. There is no need to impose the costs for paper-based filing on the related parties.
In addition, it is important to note that the American EDGAR system recently prohibited paper filing. Thus, a European transition period would raise the costs for the storage system, and constitute a competitive disadvantage of European capital markets.

We agree, however, insofar as the electronic filing of documents *in certain standards* should be introduced gradually.

Nature of the filers and type of the regulated information (Q 54 - 55)

Question 54 - Special requirements for occasional filers or small entities: CESR should refrain from developing different requirements if it pushs for a regime which enables effective dissemination of information with regard to SMEs. This would require that CSMs disclose regulated information real time (see answer to question 14). It could be assisted by a positive definition of dissemination (see answer to question 11 in Part B of the consultation). If CESR does not implement these measures, special rules for dissemination of information regarding SME are required.

Question 55 - Provide specific solutions on the procedure of electronic filing: Templates are useful. We believe, however, that CSMs that are engaged in service competition (see answers 2-8) will develop these services to filers even without a detailed regulation.

Proposed Minimum Standards (Q 56 - 58)

CESR proposes the folling minimum standards:

(a) Open architectures
(b) File Format standard
(c) Validation
(d) Recept and non-repudiation function
(e) Docketing of Electronic Filings
(f) Acceptance of waivers and recovery
(g) Security, by means of User Athentication, Confidentiality, Data Integrity, and Availability

Generally speaking, we agree on these minimum standards. However, please take the following notes into account.

Ad (a): As stated above, we believe that competition on the level of the CSMs is not a viable option on the long run. Thus, we evaluate your requirement from the perspective that *a* CSM in each Member States is granted a monopoly that is limited by time and scope of activities (see questions 2-8), or that a CSM becomes a monopolist as the result of the competitive concept you suggested above. In both cases, your requirement of an open architecture would facilitate the Competent Authority's decision to grant the monopoly to another tenderer, or the entry of new entrants into the market of the incumbent, respectively.
More importantly, an open architecture enables easy adjustments to new legal and technical developments. In a fast-developing field such as corporate law, this is an imperative characteristic of any IT system.

Ad (b): we support the open standard requirement. For details, see answer to question 24.

Ad (c) and (d): though we generally agree on a validity requirement and a rejection function, we believe that there are significant difficulties in delineating the jurisdiction of the Competent Authority from the functions of the CSMs themselves. This will be particularly true if CESR decides to let by private entities run the CSMs.

It must be clarified that issuers bear the responsibility for the *content* of the filing. Acceptance in a CSM does not shift the responsibility to the CSM and/or the Competent Authority. Consequently, the Validation and Rejection-Function can merely extend to the completeness of data that the CSMs are supposed to record under CESR's proposals at No. 179, 180 (re Question 32). These data include the name of the issuer, the type of regulated information, and the name and title of the regulated information, while time and date on which the regulated information was published will be added by the CSM after the publication. Further, we believe that a filing must include the name of the person who is responsible for the content of the filing (e.g. the CEO, company secretary, legal adviser etc.) and the name of the person who technically submitted the filing to the CSM (if these persons are not identical).

Ad (g) security, re User Authentication: We want to emphasize the need that other persons or legal entities must be enabled to file on the issuer's behalf. Under the corporate laws of the Member States, these entities include – at least - the courts, a quorum of shareholders, the shareholder meeting, or individual shareholders. The CSM-system must not interfere with the exercise of shareholder rights by raising formal requirements for the user authentication vis-à-vis the filing. For example, the CSMs must not require proof of the quorum, or the shareholders' position when shareholders call a shareholder meeting. This is, because these tests are not subject to (1) the jurisdiction of the Competent Authorities of all Member States (in particular, the exercise of shareholder rights depends neither in the U.K. nor in Germany on the leave of the Securities Regulators), and (2) the Securities Law Directives of the European Union do not entitle CESR to interfere with these intra-corporate mechanisms.

Ad (g) security, re Data Integrity and Availability: We believe that these aims may best be achieved by requiring CSMs to establish mirror sites run by CSMs of other Member States, which are economically and legally independent from the national

CSM. Mirror sites prompt other economically positive effects, as well (see answers to questions 2-8, 19-20, 37).