



FEDERATION BANCAIRE DE L'UNION EUROPEENNE

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Mr Fabrice DEMARIGNY
Secretary General of CESR
CESR, 11-13 avenue de Friedland
F- 75008 PARIS

Subject: Transparency - Response to CESR Consultation Paper Part 1

Dear Mr Demarigny,

On behalf of the European Banking Federation (FBE), it is my pleasure to submit to you our response to CESR's consultation on the CESR's Advice on Possible Implementing Measures of the Transparency Directive (Ref.: CESR/04-511).

I remain at your disposal for any questions you may have. Alternatively you can contact Mr Stephen Fisher, Financial Markets Adviser: Stephen.Fisher@fbe.be; +32 2 508 37 45.

I look forward to meeting you,

Yours sincerely,

Guido RAVOET

Enclosure: 1



RESPONSE

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

Part 1: Dissemination and storage of regulated information

Ref.: CESR/04-511

I. INTRODUCTION & EXECUTIVE SUMMARY

1. The European Banking Federation¹ (FBE) welcomes the opportunity to comment on the Consultation Paper issued by CESR on its advice on possible implementing measures in the Transparency Directive.
2. We welcome the CESR's decision to separate into two parts the various strands of the request from the European Commission for advice on possible implementing measures. We also consider the division between dissemination and storage of regulated information and the other issues to be a logical one. This way, respondents can better conceptualise the nature of the request for advice and better focus on their responses to the proposals put forward by CESR.
3. In terms of the format of Part 1 of the consultation, we think that it is important for CESR to seek input on the second element of the Commission's request at this juncture. This part of the request refers to the progress report on the conditions for officially appointed mechanisms for storage of information and on possible electronic networks of information about issuers. Whilst the information contained in Section C of the consultation paper is dense and asks a significant number of questions of respondents, we feel it was nonetheless important for CESR to be thorough in this exercise.
4. We are supportive of the generally open approach taken by CESR in both sections B and C of the paper. We feel that such an approach demonstrates CESR's stated openness to a variety of options before formulating its advice to the Commission. We therefore recommend that this format continues be used as a basis for consultations of a similar nature in the future.
5. Overall, the FBE is broadly supportive of the CESR's stated preferences throughout the paper. We have responded in detail to the most relevant questions for the commercial banking industry in Europe. Our responses to issues raised in the consultation paper can be summarised as:

¹ Set up in 1960, the European Banking Federation (FBE) is the voice of the European banking sector. It represents the interests of over 4,500 European banks, large and small, with total assets of more than €20,000 billion and over 2.3 million employees.

- for the dissemination of regulated information, we support market led solutions, where feasible, to facilitate innovation and realise the boon of competition.
- certainty for issuers as for when and how their obligations in respect of disseminating and storing information are to be fulfilled.
- avoidance of duplicitous requirements placed on issuers, in particular in respect of the storage of information. In this regard we strongly support the central storage mechanism model.

II. GENERAL REMARKS

Flexibility of choice

6. Europe's banking industry recognises the need to develop effective dissemination and storage mechanisms which address the needs of an increasingly integrated Single Market. Moreover, the banking industry is fully committed to working with CESR to develop the principles of transparency.
7. However, given the nature of the proposals set out by CESR in this consultation, we believe that Member States should, in the majority of cases, retain sufficient flexibility to work out the solution which best fits the particular market without prejudice to achieving the aims of the Transparency Directive in the construction of the Single Market. We consider that proper implementation of the Directive does not automatically require harmonisation to a high level of detail at Level 2. For example, asked the question whether commercial entities or competent authorities are best placed to store information, we concluded that either can adequately fulfil the role. Moreover, we do not feel that the finding one single solution in this and many other examples, would necessarily facilitate increased efficiency in the Single Market. Therefore, in this case, we suggest that this area should be subject to a directive rather than subject to a regulation.

Clearly defined terminology

8. As regards the use of the term 'end-user' throughout the Consultation Paper, the FBE considers that the delineation between investor and end-user is not a helpful one. Everybody must be seen as a (potential) investor, irrespective of whether or not that individual holds any security. Any potential holder of securities must also be dealt with as an 'investor.'
9. A specific example of where we consider this delineation to be particularly unhelpful is found in Paragraph 39 of Section C; "*CESR acknowledges that not only investors but all end users of regulated information could fall within the definition of "end-users."*"
10. Naturally, the conclusions CESR draws from the responses it receives on this consultation will be shaped by respondents potentially differing notions of investor and end-user. Therefore, the FBE seeks clarity from CESR on how it differentiates an end-user from an investor and/or invites it to explain why it feels that such delineation is necessary.

III. DETAILED REMARKS

B. Consultation Paper on dissemination of regulated information by issuers and on conditions for keeping Periodic Financial Reports available

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.*

11. The FBE believes that issuers should be able to satisfy all of this Directive's requirements to disclose regulated information by sending this information only to an operator. This would be especially beneficial to issuers as it would allow for a "one-stop shop" to disseminate regulated information to investors on a pan-European basis, ensure regulated information is made available to a central storage mechanism and ensure that regulated is filed with a Competent Authority.
12. However, we also believe that issuers should not be obliged to use an operator. Therefore issuers must retain the right to choose how they fulfil this obligation.

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

13. The FBE is not convinced by the rationale to subject all operators to an approval process and ongoing monitoring by competent authorities. We think that harnessing the boon arising from competition between [regulated and non-regulated] operators is key and we would be supportive of measures taken to ensure that issuers have flexibility in the choices they make as regards the type of operators they use.

QUESTION 9: *Do you consider it necessary to attempt to address the risk that regulated information may not reach every actual and potential investor throughout the EU? Please set out reasons for your answer.*

14. The FBE agrees with CESR in that we consider it feasible that stock exchanges, as commercial entities, themselves or through subsidiaries or affiliates may choose to offer operator services. Where this is the case, we support CESR by stating that the entity must not use its special position vis-à-vis the issuer in the unfair manner set out in paragraph 21 of Section B.
15. Separately, following on from the points raised in paragraphs 8 to 10 of this paper, the FBE is concerned with the use of the term 'potential investor' in respect of the implications this could have on the responsibilities of issuers to disseminate information. We feel that if the issuer provides the operator with the correct information within the defined timeframe then the issuer's responsibility ought to be fulfilled in respect of getting information out to the investor. Moreover, we consider it unrealistic and ultimately unworkable to require issuers to assure that regulated information is disseminated to every potential investor, i.e. every individual, across the European Union.

C. Progress Report on the role of the Officially Appointed Mechanism (Article 17 1a) and the setting up a European electronic network of information about issuers (Article 18) and electronic filing (Article 15 4a)

16. Set out below are the responses of the FBE to a selected number of questions, where the banking industry has most interest.

QUESTION 1: *Do you agree with CESR's interpretation of the requirement of Article 17.1.a that central storage does not necessitate physical storage in one place? Please give reasons.*

17. We feel that there are a number of reliable ways to store information. Therefore, the FBE agrees with CESR that central storage does not necessitate physical storage in one place.

QUESTION 2: Do you consider storage of regulated information by type to be a viable option?

QUESTION 3: How do you consider the difficulties set out above could be overcome?

QUESTION 4: Are there any advantages or disadvantages to this option that have not been set out above? If so please give details.

18. The FBE is not convinced of the benefits of storing regulated information by type. Therefore, we are supportive of CESR's approach in this regard.

QUESTION 5: Do you consider a multiple storage mechanism regime to be a viable option? Please give reasons.

QUESTION 6: Are there any advantages or disadvantages to this option that have not been set out above that are necessary for CESR to consider? If so, please give details.

QUESTION 7: Do you consider having one central storage mechanism to be a viable option? Please give reasons.

QUESTION 8: Are there any advantages or disadvantages to this option that have not been set out above that are necessary for CESR to consider. If so, please give details.

19. It is assumed that issuers would have to file regulated information with each of the multiple storage mechanisms. CESR sets out the rationale behind opting for multiple storage mechanisms as follows:

- Ease of access for investors to all regulated information without the need to create a network of different mechanisms;
- to facilitate competition, and potentially reap the benefits from competition between storage mechanisms;
- the possibility of storage mechanisms diversifying into other value added services;
- lowered costs for the issuer; and
- the provision of alternative systems in the case of failure.

20. In respect of the ease of access for investors to all regulated national information, we do not see any benefits for end-users because in the case of a single national storage mechanism investors would have even fewer incentives to create a network. We think that investors might be rather confused by more than one storage mechanism.

21. As regards competing storage mechanisms, the FBE believes that a multitude of storage mechanisms could lead to unnecessary complexity particularly since ways of storage and communicating to the investor could differ. This could lead to the issuer having uncertainties about where, when and with whom to file regulated information. The FBE also feels that there is a real risk of the investor receiving asymmetrical of information which is undesirable. Furthermore, we believe that there should only be a single official document containing regulated information. The positive effect of

competition should rather be achieved by means of diligent selection of the commercial entity at the time of its appointment and periodic appraisals thereafter.

22. As for value added services, the banking industry feels that officially appointed mechanisms should focus on delivering on the objectives of its legal mandate, which is well-defined, rather than collecting additional information. Therefore, the exact content of the information to be submitted by issuers would be comprehensible, uniform and clear. However, we feel that even in the case of a single mechanism being officially appointed, other commercial entities would of course not be prevented from offering additional value added services.
23. Regarding the argument that multiple storage mechanisms could lower costs, the banking industry feels that costs for issuers could actually increase if issuers were required to file regulated information many times. The FBE feels that duplicating the costs of storage in this way would off-set the boon of competing mechanisms driving down prices. Significant costs could also be incurred if issuers were to be required to file regulated information in a number of different formats to the various multiple storage mechanisms.
24. The potential risk of having a single, as opposed to multiple, storage mechanism(s) is mitigated by ensuring that all storage mechanisms meet the minimum quality standard of security which is required by the Transparency Directive. Moreover, backing up data and storing it offsite would provide for a de facto disaster recovery storage mechanism to be in place as a safeguard against failed systems.
25. Therefore, for the reasons set out above, the FBE does not consider a multiple storage mechanism regime to be a viable option. Likewise, we are of the opinion that one central storage mechanism would be more viable.

QUESTION 9: Which of the above options do you prefer? Please explain the reasons for your choice.

QUESTION 10: Do you consider there to be any advantages to regulated information being accessible through a Competent Authority website? If so, please give details.

26. The FBE notes that CESR distinguishes between the storage mechanism itself and the access point, where access points could be the home Competent Authority of the issuer, a commercial central storage mechanism or a combination of both. However, from a cost point of view, we do not consider the distinction between access point and storage mechanism to be a significant issue.

QUESTION 11: Which of these options do you prefer? Please explain the reasons for your choice. Are options missing? Please explain which ones.

QUESTION 12: Do you consider it necessary for CESR to prescribe one particular option? Please explain your reasons.

27. As we are in favour of a single central storage mechanism, the FBE prefers option one; that is the delivery of information to both dissemination and central storage mechanisms. In this case the downsides associated with the significant administrative burden as described set out by CESR in paragraph 76 of the paper would be largely avoided.

QUESTION 13: When should an issuer's responsibility to send information to a central storage mechanism be considered fulfilled? Please explain your reasons.

28. The FBE considers the point at which an issuer receives confirmation that the regulated information has been received by the central storage mechanism to be the point at which the issuer's responsibility is fulfilled.

QUESTION 15: Do you agree that non-price sensitive regulated information does not need to be made accessible by a central storage mechanism to the same deadlines as price sensitive regulated information? Please explain your answer.

QUESTION 16: To what time deadlines should a central storage mechanism be required to make regulated information available?

29. The banking industry believes that price sensitive information should be made available as soon as possible and not later than one hour after receipt. Non-price sensitive information should be made available as soon as possible.

QUESTION 17: Which of the above options or combination of options do you consider to be most desirable? Please give reasons.

QUESTION 18: Are there any other options that have not been identified above that you consider to be desirable? If so, please give details.

30. As regards the question of who should fund the operation of central storage mechanisms, we support CESR's view as expressed in paragraph 127. However, this is with the proviso that issuers, investors and the public could all make contributions to operating costs.

31. We feel that investors would take maximum advantage from access to regulated information at source along with issuers and commercial entities. The FBE does not support the idea that investors should only be charged in the case that they contract for additional services as per paragraphs 124-125.

QUESTION 19: Which of the above do you consider to be the best option? Please give reasons for your answer.

QUESTION 20: Do you consider there to be any other advantages or disadvantages to a Competent Authority or a commercial taking on the role of the central storage mechanism that have been discussed that are necessary for CESR to consider? If so, please give details.

32. The FBE broadly supports the option of appointing a commercial entity to perform the function of storing and providing access to regulated information. Specific experience and know how of already existing well operating commercial entities should be taken into consideration. However, we feel that ultimately it should be up to Member States to work out which solution best fits their particular markets without prejudice to the construction of the Single Market (see paragraph 7 above). Likewise, we do not oppose Competent Authorities playing a role and/or delegating their storage role to another provider if this model best fits a particular market.

QUESTION 21: Which of the above options do you prefer? Please give reasons.

QUESTION 22: Do you think it is necessary to make the status of the stored information as reviewed or not reviewed by the regulator transparent in the central storage mechanism? Please give reasons.

33. Europe's banking industry believes that it would be most effective if regulated information could be retained or put on embargo for the period of time necessary for its

analysis, and then subsequently made available. This ties in with our view that an issuer's obligation to of making information available to the storage mechanism is fulfilled once the issuer has received confirmation from the central storage mechanism. Therefore, we believe that paragraph 152, option (iii), provides for prompt and correct information to both market participants and (retail) investors and therefore transparency requirements would be best met.

QUESTION 23: Do you consider that it is necessary for CESR to mandate the standard to which all regulated information should be transmitted? Please give reasons.

QUESTION 24: Do you consider that the standard to which all regulated information should to be transmitted is something that should be left to some point in the future, after the Directive has been implemented? Please give reasons.

34. We agree that there should be a single defined transmission standard. This provides for maximal certainty and cost effectiveness. However, at this stage the FBE believes that standards of transmission still need to be scrutinised both in terms of technical and cost aspects.

QUESTION 26: Do you consider that a central storage mechanism should be obliged to ensure that the regulated information it holds is complete and unedited? Please give reasons.

QUESTION 27: Are there any other issues relating to security that you think CESR should consider? Please give details.

35. We believe that a central storage mechanism should be obliged to take reasonable precautions in order to keep received information unedited.

36. However, we are opposed to any obligation of the central storage mechanism to check or approve regulated information. Therefore the central storage mechanisms should neither be obliged nor entitled to check completeness of received information. Moreover, such competence is not covered under the Transparency Directive.

QUESTION 28: Do you believe that a central storage mechanism should be obliged to ensure that the regulated information it receives is from an authentic source? Please give reasons.

37. As regards the certainty of information source, we believe that an authentication is of importance as issuers are liable for their correct filings and investors should only get access to authentic information. We therefore believe that guidelines of authentication (e.g. as for electronic signatures) would be very useful.

38. Paragraphs 165 to 186 do not refer to cases where issuers file information directly with the central storage mechanism. In this regard we believe that there is a need for additional guidelines.

QUESTION 30: Do you believe that a central storage mechanism should be obliged to record the date and time on which it receives regulated information for the purposes of investors? Please give reasons.

39. We think that recording of the date and receipt time is very useful for the purpose of providing a credible audit trail. We feel that it is in the interest of both issuers and investors to be able to refer to authentic data and to be able to identify the date of stored information.

QUESTION 31: Do you believe that a central storage mechanism should be obliged to hold all regulated information in an electronic format? Please give reasons.

40. On the grounds of cost effectiveness and ease of flow of information Europe's banking industry fully supports central storage in electronic format.

QUESTION 32: Do you believe that a central storage mechanism should be obliged to record all the above reference data for each price of regulated information? Please give reasons.

41. We believe that a central storage mechanism should be obliged to record all the reference data listed under paragraph 179. However, the time and date on which the regulated information was published ought not to be included since as there is no appropriate inquiry procedure applicable according to the Directive.

QUESTION 33: Do you believe a central storage mechanism should be obliged to offer its internet based services in all native languages of every Member State? Please give reasons.

42. The FBE does not support the idea of such multi-language regime as this would have a substantial impact of the setup and operation of the central storage mechanism. Ultimately, the high costs of operating the system in a multi-language regime would be passed on to end-users and investors. The language accepted by the competent authority in the home Member State as well as a language customary in the sphere of international finance should be considered sufficient, which is line with the broader language provisions of the Directive.

QUESTION 34: Do you consider a central storage mechanism should be obliged to offer its services on a continuous basis 24 hours a day, 7 days a week? Please give reasons.

43. It would be highly desirable for access to be provided on a continuous basis assuming that the fees charged to end-users were not prohibitive. Moreover, it should be made clear that such round the clock service ought not to be required in terms of the filing and updating of regulated information.