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Brussels, 4th February 2005

**Response by FESE to
CESR's Consultation Paper (04-511) on
Implementation Measures for the Transparency Directive – Part I B Dissemination**

1. FESE is the representative organisation of Europe's Regulated Markets offering trading in securities and derivatives and has incorporated EACH, the European Association of Central Counterparty Clearing Houses. Our Membership comprises all Members States of the EU, old and new, as well as the countries of the EFTA.
2. We welcome that CESR has again published an extensive consultation paper on its draft for technical advice in response to the Commission's mandate. We appreciate the opportunity to submit comments and regret the delay in our response beyond CESR's deadline.
3. We are aware that several of our Members have made individual comments. We expressly refer to these submissions; they do in certain cases focus on particularities in these Members' environment and may therefore provide additional specific insight to CESR.
4. In this response, we focus on part B. of CESR's consultation paper and address the issue of information dissemination (plus the question of availability of annual and half-yearly reports). Discussions among our Membership about storage systems, both on the national and the European level, are less advanced and it is difficult at this juncture to provide CESR with fully co-ordinated views. We will soon follow up with a representative collection of thoughts in an issues paper on storage as input to CESR's discussion on this topic and will make more detailed comments in the further course of the consultation process.
5. Finally, we would like to mention that in our document, we refer to the Articles of the Directive in their old counting (unofficial version of April/May 2004) for the purpose of easier cross-referencing to CESR's consultation paper. We join CESR in referring throughout our document to "issuers" which term should include those that are responsible for dissemination of regulated information about issuers whose securities are admitted to trading without the issuer's consent.

A.1. Dissemination of Regulated Information by Issuers

Introduction

6. FESE and its Member Exchanges support the general line taken by CESR to approach the regulatory issues surrounding the dissemination and storage of regulated information. We appreciate the relatively clear-cut distinction between the issues of dissemination and storage and would ask CESR to maintain this distinction also when discussing the relevance and possible reduction of “black holes”. At the same time, the separation of these two functions should not ex-ante rule out that both are performed by the same entity.
7. We generally approve the proposal to introduce and define the category of “operators” as intermediaries between issuers and recipients of regulated information (media, regulators, storage systems, markets). CESR has thus opted for a clear obligation to “push” regulated information and has clarified that the publication of such information on the issuer’s website is not sufficient.
8. As for the storage of regulated information, we acknowledge the broad scope of the discussion in CESR’s consultative document. However, further discussion with and among industry (including our Membership) will have to take place to identify good and feasible solutions.
9. Before entering into the more detailed discussion of the questions raised by CESR, we would like to address one issue of major concern to a considerable number of our Member Exchanges – the timing of the information flow from issuers to Regulated Markets (and regulators) in the case of price-sensitive information.
10. The Market Abuse Directive places the operators of Regulated Markets at the forefront in the prevention and detection of market abuse (Rec. 27 and Art. 6(6) MAD)¹. We are aware that the attitude varies among our Members vis-à-vis trading halts for the purpose of mitigating information imbalances around the publication of major price-sensitive news during trading hours. Nevertheless, the delicate balance between fast access to price-sensitive information and market safety ought to be addressed by CESR. We refer to the individual responses to CESR by FESE Member Exchanges and the references made there to established and functioning arrangements in their respective legal environment.
11. On more general terms, we would like to emphasise that the Transparency Directive and its implementing measures must in no way rule out (additional) ongoing information arrangements between issuers and Regulated Markets on the basis of the market’s admission rules. Such rules may of course not be designed, administered, and commercially exploited in a way that creates competitive advantages for Exchanges in their competition with (other) operators.

¹ Recital 27 speaks explicitly of “rules on the suspension of transactions” and Art. 6(6) obliges market operators to “adopt structural provisions aimed at preventing and detecting market abuse”.

Objectives of dissemination systems

12. We share CESR's objectives for the systems and procedures for the dissemination of regulated information. The reference to user-friendly input methods² is in our view highly valuable as the prescription of complicated methods could unduly delay the dissemination of price-sensitive information, thus increasing the risk of leakage.

Dissemination standards

13. In the view of FESE and its Members, the standards as collated in CESR's consultation paper reflect best practice and should therefore indeed serve as the benchmark for any dissemination, either by the issuer itself or through the services of an operator.
14. As at least one FESE Member points out in its own response to CESR, clarification could be useful as to the meaning that CESR attributes to the term "without delay" when a multi-step distribution process is involved (issuer to operator, operator to media, media to investors with a possible additional step from multiplier media to media specialised in reaching particular groups of investors). CESR implicitly refers to "natural" loss of immediacy when more communication steps are involved by specifying in par. 5(c) that dissemination channels must ensure that investors in several Member States must receive the same regulated information "as close to simultaneously as possible".

Connections with media

15. While in CESR's concept (as stated in par. 25 on p. 21) media are not obliged to publish regulated information that has been disseminated to them by operators (or issuers themselves), the burden is on the issuer (or its agent, the operator) to achieve proper dissemination in line with the aims of the Directive. This is to be achieved through an appropriate number and mix of media. We agree with CESR's expectations that this media mix might have to include different forms and channels of distribution (press agencies, newspapers, financial websites; national, cross-border, and global; free full-text websites). We are not completely sure about the meaning of the last sentence on p. 14 but take it that it contains an obligation for operators to offer their services on a commercial basis for all media. CESR may wish to clarify whether this obligation would also extend to issuers themselves.

Re-submission

16. For liability reasons, we would regard it useful to specify whether the re-sending obligation arises when the media notifies (= sends notice) or when the sender receives this notification.

² including the steps to establish connectivity (logging-in, dialling-in)

Output format

17. We would like to offer a few comments with regard to the output fields proposed by CESR as mandatory:

- For the company name, we suggest further work by CESR (probably on level 3) on the question of “foreign language” company names, and in particular on the transcription of company names in non-Latin alphabets.
- The inclusion of securities codes in the information could on the one hand avoid problems of identifying the right company from which an information originates and facilitate efficient filtering by media or investors themselves; on the other hand, it could create technical problems³ when an issuer has many different securities (shares, bonds) admitted to trading in the EU.
- To most readers of CESR’s paper it might not be fully clear what is meant by “sequence number” and “unique announcement identification number”. These may be terms originating from one specific legal/organisational environment which are, without further explanation, not self-explanatory.
- The standardisation of headlines and/or creation of a standardised information typology would also assist operators, media, and end recipients to filter information and to tailor the information flow they receive to their needs. We suggest to CESR to pursue discussions to this end, but we are aware that language could be a difficulty in this discussion.

Question 1.

FESE and its Members broadly agree on the standards for dissemination. We would, however, welcome certain additional explanations as outlined above and suggest to CESR to follow-up with clarifications and coordinated approaches on level 3.

Dissemination by issuers

18. We refer to our discussion of this option below under “Minimum Standards”, in the context of Question 7.

Question 2.

See below, after Question 7.

³ ... or an additional inflation of messages if the same information has to be sent for every single security.

Dissemination by operators

19. FESE's Member Exchanges support the operator/media model as presented by CESR. They share CESR's assessment that such a model (if properly implemented and monitored) provides indeed a "highly effective channel" for the dissemination of regulated information. In its entirety, FESE Membership does however not unanimously request CESR to introduce such a model as the only legitimate one for an issuer to fulfil its dissemination obligations.
20. Having stated this, we agree with CESR's structure as set out in figure 1. We believe, though, that CESR could have increased the value of this diagram by at least including the information flows from the issuer to other recipients (notably competent authorities and storage systems). We are confident that operators will include in their service offering, the dissemination of regulated information to these targets. CESR Members may consider including the coverage of these obligations in the required standards for operators.
21. An issue to be seen separately, however, is the information flow from issuers to the Regulated Market(s) where their securities have been admitted to trading (with the issuer's consent). We refer to the points raised in the introduction to this submission.
22. As a matter of phrasing, we wonder whether the issuer would be able to "ensure" appropriate dissemination by a selected operator or whether "verify" might be a better choice of term, particularly in the situation that level 2 measures and/or a Member State should abstain from introducing an approval system for operators.

Question 4.

We agree with the diagram in figure 1 insofar as it explains the basic concept of an operator/media system. It would have been valuable if this or an additional diagram in CESR's consultative paper had provided a more complete overview of dissemination flows (including those to regulators and storage systems) and/or options (direct dissemination by the issuer).

Approval of operators

23. FESE Members agree that some form of monitoring and oversight should be exercised over the activities of operators and most of them would indeed favour a system of approval. Approval and oversight are necessary to ensure that highest standards in this important activity are at all times maintained and that reporting standards are not compromised by profitability considerations.
24. We feel that it would be desirable to establish the opportunity for operators to offer their services across borders and call for a solution that would provide a passport-like effect, i.e. that an operator approved by the competent authority of one Member State could (on the basis of that home country recognition) offer its services in any other Member State and provide issuers there with the same possibility to fulfil their transparency obligations.

25. The final legal construction of this on both the European and the national level will have to take into account the wording of Art. 7 of the Directive stipulating the issuer's end-responsibility for contents and probably⁴ also for the publication of its information under the Transparency Directive.⁵

Question 5.

It would be of great value for issuers and for the recipients of regulated information if operators could be brought under ongoing monitoring and oversight by competent authorities. Most FESE Members would therefore advocate a system of approval, ideally combined with a (CESR-internal) passport-like function of recognising approval of an operator across internal EU borders.

Minimum standards

26. FESE and its Members support the approach by CESR towards the minimum standards that an operator ought to fulfil. We would like to offer a few suggestions for possible inclusion in the set of such standards:

Security

27. In its advice on security standards in processing, CESR should more expressly request a well-documented policy to ensure compliance with the insider rules as laid down in the Market Abuse Directive. Staff member of operators deal with highly price-sensitive information and should be subject to an appropriate set of requirements.
28. In the passage on the security of output, we suggest changing the word "media" to "recipients" as it cannot be seen as a given that in all dissemination solutions across the EU other recipients (competent authorities, Regulated Markets) will receive their information from the media and not directly from the operator.

Operational hours and service support

29. In our view, the standard on operational hours requires additional consideration by CESR. FESE Members support the principle of availability to receive regulated information at all times (24/7 minus technical overhaul periods). The (regular) overhaul pauses should be well communicated in advance and should be placed in times of expected low demand (nights, weekends). Reception availability does for us not necessarily mean availability of customer support on the same 24/7 basis.
30. FESE Members do not agree with CESR's proposal to request release availability only "between the hours of trading in all EU time zones". Firstly, the respective wording may require overhaul, taking into account (a) that the French DOMs (from Réunion in the East to

⁴ ... as addressed by CESR in par. 13

⁵ This is also stated in Recital 10(old) / 17(new) of the Directive.

Guadeloupe in the West) are part of the EU and (b) that the Directive will also apply in Iceland.

31. Secondly and more importantly, it is absolutely insufficient to start release availability (only) when trading starts within the EU time zone. It is essential and indispensable that all information received by operators during night hours or on non-trading days is released at a sufficient time before market opening in order to allow investors, intermediaries, markets, and competent authorities to prepare for the opening.

Management of regulated information

32. We agree with CESR's abstention from prescribing the technical form of the communication⁶ between the issuer and the operator. CESR may however confirm the freedom of operators to define in their service contracts with issuers the ways of communication from their issuer clients. They should have the right to refuse to work on a non-electronic basis for all or part of the issuer's communication.

Recovery

33. The provisions on recovery might include a reference to alternate site recovery. Moreover, the operator should be obliged to alert to the public immediately any failure/disruption in its services and/or the switch to its recovery and alternate procedures. The switch-back to normal operation should likewise be made public.

Question 6.

FESE and its Members widely agree with the standards for operators as set out in the draft advice, but propose to complement them as explained above. A fundamental change in the standard for release operating hours is in our view indispensable.

Mandatory use by issuers of an operator

34. Not all FESE Members advocate a compulsory requirement for issuers to use the services of an operator.
35. Those that do believe that dissemination should be allowed and could be appropriately effected by issuers themselves, emphasise however that the dissemination of regulated information is no trivial task and will be difficult to carry out without the assistance of a professional services provider. In the interest of proper dissemination of regulated information, it should be clearly stated that issuers themselves have to fulfil, as far as applicable, all standards foreseen for operators. We fully concur with CESR's related considerations in par. 7.
36. Our Members believe that competent authorities should at least express a preference or issue a strong recommendation for the use of operators. They note the commitment and preference by CESR Members as expressed in par. 27 of the consultation document. In any discussion

⁶ It is confusing that the term "media" is used in this context; this should be avoided.

about the “burden” for small issuers, careful consideration should be given to the true costs of doing proper dissemination all in-house and to the clear responsibilities under Art. 7.

37. We also see the advantage of much easier verification of the time of dissemination to the public (e.g. in the case of a market abuse investigation) when an operator service is being used.

Question 7.

Most FESE Members see clear advantages in the use of operator systems and would like to see at least strong recommendations by CESR Members for this type of solutions. We do however not regard mandatory employment of operator services as absolutely necessary.

Question 2.

Issuers undertaking the dissemination of regulated information themselves should be subject to the same standards as operators, where applicable. Certain aspects, such as record keeping and recovery provisions may require particular attention in this situation.

Role of competent authorities

38. The possibility for a competent authority to disseminate regulated information raises the usual competition concerns among our Members. Particularly if an approval system for operators were introduced (but also in the case of regulator monitoring and oversight), we would see great problems of potential conflicts of interest.⁷ In addition, we believe that competition between commercial providers particularly fosters innovation and efficiency.
39. Should, against our advice, European legislation leave open the possibility for competent authorities to act as operators, their activities must be subject to identical standards as those that have to be satisfied by private operators. Moreover, through appropriate segregation of activities, authorities would have to identify the “true” costs of the service provided and to charge accordingly in order to avoid any cross-subsidy from tax or (regulatory) fee income.
40. The observations by CESR made in par. 24 of the consultative document seem also valid in the context of the above discussion.

Question 8.

FESE Members cannot see competent authorities acting as or running an operator service. Potential conflicts of interest (between the operation and its oversight/approval) and the dangers of distortion of competition seem to rule out this option.

⁷ These would, in our view, be at least as great as the conflicts of interest perceived to exist when a Regulated Market and its operator exercise regulatory functions. In addition, we claim that competent authorities might have less experience and fewer mechanisms to identify, address, and mitigate such conflicts of interest.

Role of Stock Exchanges

41. We welcome the express clarification by CESR that (operators of) Regulated Markets should be allowed to compete for the provision of operator services in the context of the Transparency Directive. CESR's emphasis on maximising the reliance on existing technical solutions in order to avoid radical changes and burdensome additional costs is for us an indication that the well-tested role and experience of several Exchanges in this area must be recognised and acknowledged. The model of competing operators with its benefits as described does not exclude Exchanges from being part of that model – they, too can create these benefits.
42. We agree with CESR that Exchanges in this business must avoid abusing their special position vis-à-vis issuers and refer in this context to the proven ability and willingness of Europe's Exchanges to identify, address, and mitigate potential conflicts of interest at their source. Proper segregation of business and appropriate pricing are valid principles also for our Members.

Dissemination by media

43. As mentioned above, FESE Members have, like CESR, identified and discussed the problem of “black holes”, rather in the sense of less than total “geographical” coverage (to all potential investors) than in the sense of less than total company coverage (about all issuers). We share CESR's fairly confident approach that through the play of market forces the size and relevance of any black holes will be relatively insignificant. We note that Recital 15 (old) / 25 (new) of the Directive as well as the headline and the text of Art. 17 speak clearly of “access to information” as the tool towards the integration of markets. It is in this context that we see no reason to interpret the underlying “information push” concept of the Directive as an obligation to physically deliver every piece of regulatory information to every actual and potential investor.
44. Having said this, we believe that minimum standards for the activities of media are not necessary. Our Members are confident that in the market of media, competition has lead and will lead to de-facto complete availability of information. Competent authorities may however consider including in their catalogue of standards for operators⁸ an appropriate mix of media, including notably those that are known as acting as further multipliers. (National) sets of best practice could also include encouragement to operators to also cover the issuer's obligation to disseminate information to competent authorities and to a storage system – but we feel that regulatory intervention on a European level would not be warranted on this issue.
45. Of the three proposals by CESR on how to ensure an even greater degree of availability of information to investors (notably small and retail), we would overall have a certain preference

⁸ ... whether as a set of best practices or as a condition for approval

for (b), the inclusion of all received information on the operator's website. We are aware that this approach does not once and forever eliminate all possibilities of fragmentation, in particular if issuers are not being obliged to use any operator at all. Accessibility would, however, be enhanced.

46. It is worth noting that the London Stock Exchange⁹ and Borsa Italiana, as examples, currently collect and publish all regulated information released on their websites. These Exchanges, and others, see an important role in overcoming fragmentation problems just mentioned.
47. As CESR points out, some competent authorities publish regulated information on their websites. As they are at the receiving end of any dissemination of regulated information (regardless of whether they receive that information directly from the issuer, from the operators, or via the media), such an arrangement could also contribute to the closing of any black hole and thus overcome the fragmentation problem. Such an approach, however, should also not be mandated on a European level.
48. Option (a) would in our view put an undue burden on one media (which one?), and our Members are not convinced that market incentives would be strong enough for such an (almost utility-like) media to emerge through competition.
49. Option (c) would mean a confusion between the functions of storage and of distribution: In the view of most of our members, this option could create competitive distortions, in particular if the storage mechanism should be created as a centralised, utility-type mechanism.

Question 9.

CESR is right to address the risk, but we believe that the strong focus of the Directive on “disclosure in a manner ensuring fast access” justifies CESR’s pragmatic approach.

Question 10.

Accessibility of information could probably be further enhanced by an obligation for operators to publish all received information on their websites (option 2). The function of dissemination and storage should probably not be mixed (option 3) as this may compromise the underlying idea of active dissemination.

50. We agree with CESR that a system of competing operators that handle the whole range of regulated information from all sorts of issuers offer the best solution.
51. With regard to factor (2) mentioned by CESR in par. 26, we agree that the market segment should not influence the regulation of dissemination methods.

⁹ The London Stock Exchanges publishes all regulated information disseminated by all UK operators.

52. In the discussion of factor (3), we feel that CESR is confusing the obligation to disseminate all regulated information (Art. 17(1) in connection with Art. 2(1)(k)) with any obligation of a company (possibly under competing, but not contradicting company law) to distribute annual reports to all existing shareholders. The natural filter function (leading to avoiding that all potential investors have the annual reports of all European companies delivered to them by electronic means) will be exercised by the media (see also par. 26 on p. 8 of CESR's paper). From the issuer's viewpoint, a distinction in its dissemination behaviour does not seem automatically justified.

Question 11.

As already outlined above, we see (a multitude of) operator systems as the most promising approach to achieving the Directive's goals. Not all of our Members agree that alternative methods of dissemination should be outlawed if they are subject to the same performance and success criteria. We do not favour monopolistic (public or private utility) solutions.

Question 12.

Our comments on CESR's work in establishing its draft advice are contained in above considerations.

B. Conditions for Keeping Periodic Financial Reports Available

53. CESR's advice in this section of the paper is not easy to detect, but we join CESR in its opinion that the Commission's idea to have issuers fulfil their obligations under Art. 4(1) and 5(1) by sending the relevant information to the central storage mechanism is practicable.

54. For the information pursuant to Art. 4(1) and Art. 5(1), the Directive specifies an archiving period of at least five years. FESE Members would believe that with modern IT mechanisms, the storage of all regulated information for the same time is possible. CESR may however, on the basis of feedback received, consider differentiated storage periods for different types of information.¹⁰

Question 13.

We agree with CESR's advice to foresee for the issuers the possibility to comply with Art. 4(1) and 5(1) by sending their annual and half-yearly financial reports to the/a central storage mechanism.

Question 14.

We would find a minimum storage period for all regulated information useful and indeed necessary since, in extremis¹¹, the absence of such a period could completely jeopardise the purpose of any storage obligation. Minimum storage times could be differentiated according to the category of information, but our Members have no strong views in this respect.

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We hope that CESR will find our comments useful in its deliberations, we are of course always available for the discussion of any related matters, and we look forward to further good co-operation.

Yours sincerely,

Gregor Pozniak
Deputy Secretary General, FESE

¹⁰ We could imagine that the level of interest for interim reports from five years ago differs from that for information on directors' deals at the same historic point of time.

¹¹ ... when stored information could be deleted after, say, a day.