FEDERATION OF EUROPEAN SECURITIES EXCHANGES (FESE)
Rue du Lombard, 41
B-1000 Bruxelles
P662/3

T (0032 2) 551.01.80
F 512.49.05
www.fese.org

Brussels, 15th April 2004

Response by the Federation of European Securities Exchanges (FESE) to CESR's Consultative Concept Paper 04-073b Implementing Measures of FIMD/ISD2 – Art. 25, 56 and 58

Introductory remark

We appreciate the efforts by CESR to collect at an early stage input from market participants, market operators, and other interested circles on these issues. Hence, we welcome the opportunity to raise a few issues that have raised concerns among our Membership or that might warrant additional attention by CESR in its further work.

ad B.2.2. Methods and arrangements for reporting financial transactions

Several of our Member Exchanges are today actively engaged in transaction reporting to competent authorities as governed on a European level by Art. 20 of the ISD 1993. They tend to welcome the intention by CESR to explore commonalities between post-trade transparency requirements and transaction reporting requirements although it is in their view to early to make any judgement of the extent of such commonalities and the possibilities to exploit them.

FESE Members do of course always support cost-benefit considerations during the process of drafting any new regulation. We welcome in this context the approach by CESR to take existing arrangements as a working basis. Such considerations should, however, not lead to the creation of an unlevel playing field, just because for one player on that field costs to achieve a certain compliance level may be more costly than for others.

When drafting an inventory of minimum conditions of reporting systems, we urge CESR also to provide a level playing field for all transaction reporting solutions (investment firm, regulated market, MTF, trade matching system, reporting system – whether run by a market operator[1] or a third party) – **see Q 1.**

[1] When a market operator/MTF undertakes to forward to the competent authority reports about transactions that were NOT completed "through its systems" but that were reported to it on the basis of any other arrangement, the market operator/MTF would most likely be categorised as a reporting system or as a "third party" (EP amendment). Some clarification as to the classification of reporting arrangements in this context would be valuable.

ad B.2.3. Most relevant market in terms of liquidity for financial instruments

The Federation would like to repeat its concern about the level 1 concept of forwarding transaction information to the competent authority "of the most relevant market". We reject all concepts that artificially reinforce the stickiness of liquidity and may thus be seen as influencing competition.

We acknowledge the difficulties that CESR Members may see themselves confronted with when discussing the criteria to determine the most relevant market. FESE Member Exchanges may during the further discussion of this problem contribute to finding a feasible approach. We trust that CESR will come back to the issue of determining liquidity at a later stage, also in the context of forthcoming work on implementing measures for Art. 27. On a general level, we support the four general criteria outlined by CESR but find it too early to provide detailed responses to **Q 4 through 7**.

In any case, FESE welcomes the clear language in CESR's document that it is in principle the task of the competent authority to pass on transaction reports. We claim that CESR's intention to avoid "imposing any additional obligations or burden on investment firms" apply equally to Regulated Markets and to MTFs.

Without any intention to interfere with the internal arrangements between CESR Members, we would emphasise that any additional deadline before which forwarded transaction data should arrive at the competent authority of the most relevant market should be kept as short as possible lest the purpose of concentrating all info about any given security at one place be thwarted.

CESR might wish to consider whether the "most relevant market" needs to be – or should indeed be – always a Regulated Market. Competent authorities may see a benefit in concentrating all transaction reports for a given security in the hands of a competent authority where the security is actually admitted to Regulated Market – even if an MTF in another Member State (where the security is not admitted to an RM) could be regarded as "more relevant". The argument for such an approach may be even stronger in a case where the highest liquidity in a certain security is available on an internalisation platform (rather than on a Regulated Market or an MTF).

Finally, we would like to emphasise that when considering revision procedures for the assessment of "highest relevance", sufficient time must be allowed since new links may have to be established. There might be implications for Exchanges' reporting activities and their respective arrangements with their regulators.

The key question of the addressee of transaction reporting

The legal text on level 1 is relatively unambiguous. Transaction reporting is an obligation of the investment firm and has to be addressed to the competent authority of the investment firm. Branches have to report to their local competent authority that in turn has to transmit ("copy") this information to the home competent authority of the investment firm. That latter competent authority can opt out of this possibility.

For Regulated Markets that do the reporting of all transactions that are completed through their systems, this change in the legal situation may have serious consequences. In the absence of an opt-out clause modelled after Art. 20(2) ISD 1993, a Regulated Market with remote Members would have to establish

reporting links to all home competent authorities of its remote Members (potentially up to 27, including the EEA).

Combining this obligation with the forwarding obligation to the most relevant market (Art. 25(3) second subpar), this could result in a ludicrous to-and-fro traffic of data:

> Example:
> A Regulated Market in country A has a remote member from country B. That remote member executes a transaction on the RM in a certain security. The Regulated Market usually does the transaction reporting for all the transactions completed through its systems to its competent authority in country A. The investment firm, however, is obliged to report to its competent authority in country B. The Regulated Market may therefore have to send the transaction report to country B.
> If the most relevant market for that security is located in country A, the competent authority in country B may have to send – through its bilateral arrangements – a copy of that report to the competent authority in country A.

FESE and its Members urge European regulators to explore all possibilities for co-operation with the aim of avoiding solutions that are unnecessarily cumbersome and hence costly

(a) for them,
(b) for investment firms that operate across borders by becoming remote members of Regulated Markets, and
(c) for Regulated Markets that further the formation of the Single European Financial Market by linking up remote members.

One possible approach could be making bilateral data exchange links a two-way street, regardless of the legal origin of the data. (In our example, the regulator in country A would accept to forward the data on transactions by the remote Member that it receives from the Regulated Market in its jurisdiction to the competent authority in country B – at the same time keeping a "copy" for its own purposes, should it itself be the "most relevant" competent authority.)

At the same time, we invite CESR to make extensive use of the wording in Art. 25(3) which requires (only) that it be assured that the competent authority of the most relevant market "also receives the information" – without specifying from what side and without an explicit pushing obligation by the "less relevant (home) competent authority".

The special situation of commodity derivatives markets

For several reasons set out below, commodity derivative markets warrant in our view particular attention by CESR.

Firstly, this whole industry is being brought for the first time under the scope of the ISD. Market operators and market participants recognise the regulatory justifications which underpin transaction reporting; still, such requirements will be new for them. Consequently, their solutions may not be based on experience or existing arrangements under the ISD 1993. We would therefore urge CESR to take full account of cost-benefit considerations before imposing particularly prescriptive requirements onto the commodity derivatives markets.

Secondly, in framing the transaction reporting requirements for commodity derivatives, CESR should take into account the wholesale nature of this business and the unique interlinkage between the market in the (financial) derivative and the physical market in the underlying commodity. In the context of the Market Abuse Directive, CESR has already had the opportunity to develop tailored regulatory approaches for this market.

Thirdly, the commodity derivatives markets that are Members of the Federation (Euronext.liffe, the International Petroleum Exchange, and the London Metal Exchange) rightly underline that bulk of European trading and expert knowledge in commodity derivatives is concentrated in London. They see a particularly strong case for a collection of all trade reports in "their" instruments at one place, namely their own competent authority, the FSA. In this context, it should be noted that they have a significant number of foreign remote members.

ad B.2.4. Minimum content

As a technical remark, we note that nowhere in the discussion about possible data contents reference is made to a data field indicating whether the reported transaction is actually a buy or a sell transaction – unless this is to be signalled by a plus or minus sign before the number/value of securities transacted.

In response to **Q 10**, we emphasise again the importance of a level playing field (i.e. equal data content) between all reporting entities and between all types of transactions (RM/MTF systems, OTC under reporting obligations to a RM, OTC without any relation to a RM).

ad C.2.1. Co-operation

The Federation and its Members continue to be convinced that supervision by the home Member State competent authority is key to the removal of barriers for cross-border financial markets activity in Europe. We express therefore our serious concern about the potential for host country intervention embedded in the text of the new ISD (Art. 56(2)).

Many of our Members are, as modern international multi-service providers in the field of financial markets, active beyond their national borders or even on an almost pan-European basis. They request early clarification by CESR what is to be understood under "operations of a regulated market that has established arrangements in a host Member State" which could become of such "substantial importance for the functioning of the securities markets and the protection of the investors in that host Member State" that formalised co-operation arrangements are needed.

Cross-border activities of Regulated Markets and their operators are manifold and include the search for participants (remote members) and for issuers (admission of securities), the operation or the sharing of a trading platform, and others. We take it from the wording of the level 1 text ("regulated market that has established arrangements") that, if anything, remote access should be at the focus of CESR's attention. Clear words as to how European regulators see their role in the implementation of Art. 56(2) – whose spirit, as we would like to repeat, tend to reject. (Restrictive response to **Q 12**)

ad C.2.2. Exchange of information

As a general comment, we suggest leaving much of the discussion about the exchange of information between competent authorities to level 3 (see also **Q 15**).

As an exception, we would expect clear language and precise arrangements for information to be exchanged in the case of trade suspensions and removal. Such information ought to be supplied immediately by the initiating competent authority (need not be the competent authority of the issuer nor the one of the most relevant market) and be actively pushed to all other competent authorities in order to minimise the chance for illicit exploitation of information imbalances.

It flows already from these considerations that information exchange procedures should of course differentiate between types and categories of information, especially between urgent and routine ones. (**Q 14**)

In our view it would be in the general interest of all involved in Europe's financial markets if information exchange between competent authorities under European law other than ISD2 could be aligned. This, however, must not happen at the expense of speed where needed.