bankenverband
BUNDESVERBAND DEUTSCHER BANKEN

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Response to CESR's Consultative Concept Paper on the proposed Directive on Financial Instruments Markets (Articles 25, 56 and 68)

Dear Mr Demarigny,

The Association of German Banks welcomes the opportunity to respond to CESR's Consultative Concept Paper on the proposed Directive on Financial Instruments Markets concerning Articles 25, 56 and 68.

The Association of German Banks represents some 240 private commercial banks and eleven regional associations, as well as the special mortgage bank and ship mortgage bank associations. Measured in terms of business volume, these banks hold a share of around 40% of the banking market as a whole. They have a total of some 180,000 employees.

The Association of German Banks is a member of the *Zentraler Kreditausschuss* (ZKA), the joint committee of the central associations of the German banking industry. We fully support the Joint Comments of the ZKA which you will find enclosed.

Should you require any further information, please do not hesitate to contact us at any time.

Your sincerely,

Thomas Weisgerber Dorit Bockelmann

Enclosure

ZENTRALER KREDITAUSSCHUSS

MEMBERS: BUNDESVERBAND DER DEUTSCHEN VOLKSBANKEN UND RAIFFEISENBANKEN E.V. BERLIN · BUNDESVERBAND DEUTSCHER BANKEN E. V. BERLIN · BUNDESVERBAND ÖFFENTLICHER BANKEN DEUTSCHLANDS E. V. BERLIN · DEUTSCHERSPARKASSEN- UND GIROVERBAND E.V. BERLIN-BONN · VERBAND DEUTSCHER HYPOTHEKENBANKEN E. V.BERLIN

Comments of the Zentraler Kreditausschuss[1] on the CESR Consultative Concept Paper "Technical Advice on Implementing Measures of the Proposed Financial Instruments Markets Directive (ISD2), Articles 25, 56 and 58 (Transaction Reporting, Cooperation and Exchange of Information between Competent Authorities)"

April 2004

[1] The ZKA is the joint committee operated by the central associations of the German banking industry. These associations are the *Bundesverband der Deutschen Volksbanken und Raiffeisenbanken (BVR)*, for the cooperative banks, the *Bundesverband deutscher Banken (BdB)*, for the private commercial banks, the *Bundesverband Öffentlicher Banken Deutschlands (VÖB)*, for the public-sector banks, the *Deutscher Sparkassen- und Giroverband (DSGV)*, for the savings banks financial group, and the *Verband deutscher Hypothekenbanken (VdH)*, for the mortgage banks. Collectively, they represent more than 2,500 banks.

A. Introduction

We welcome that the CESR expert group plans to hold early discussions with market participants in order to clarify the conceptual road map for the technical implementing provisions on transaction reporting (Art. 25) as well as for cooperation and exchange of information between competent authorities (Art. 56 and 58). The consultative concept paper provides a suitable basis for this.

The German banking industry's main focus in this respect lies on the issue of transaction reporting. Over the past ten years, on the basis of Art. 20 ISD 1 (Directive 93/22/EEC), Germany has seen the establishment of a highly sophisticated reporting system which has been tested and tried in practice. Therefore, we have a keen interest in actively accompanying CESR's work in this area and in sharing the practical experience of our member institutions during the discussion. Due to the considerable changes which provisions in the field of reporting will have for the reporting parties we feel that a final regime at Level 2 will be necessary.

B. Answers with regard to individual questions

With regard to the individual questions that have been highlighted, we would like to submitthe following answers:

Q 1: Do you agree with the approach suggested above to determine the methods and arrangements for reporting financial transaction in one set of criteria applicable to, both, the conditions for a trade matching and reporting system to be considered valid to report transactions to competent authorities, and the criteria allowing for a waiver? If you do not agree, what other approach would be more appropriate in your view?

Q 2: What requirements should such an inventory contain?

Q 3: What other issues, if any, should CESR take into account when responding to the Mandate concerning the "methods and arrangements for reporting financial transactions"?

Due to their close interrelation, questions 1 to 3 should be answered together.

With regard to the issue of transaction reporting, we feel it is important to generally take account of two fundamental aspects:

- Firstly, setting up new reporting systems as well as changing existing reporting systems is associated with a high IT effort making any such undertaking an extremely costly exercise.

- Secondly, the reporting systems which currently exist in the various Member States feature different stages of maturity. Whilst Germany and Austria have seen the establishment of highly complex, fully electronic reporting systems, this has not yet been the case in other Member States.

Due to this circumstance, CESR should adopt an extremely cautious approach when it comes to the concrete specification of the reporting obligations. We therefore welcome the fact that CESR does not plan to impose a reporting system that was developed on a "green field site" but that CESR plans to use existing reporting systems as a working basis. Here, the most sophisticated reporting systems should serve as a benchmark representing the maximum threshold for regulatory provisions at Level 2. We would like to reaffirm that any technical implementing provision in the field of transaction reporting has to be subject to strict compliance with an adequate cost-benefit ratio.

In this context there should also be a careful review of the regulatory goals to be met by means of transaction reporting. In our understanding Art. 25 paragraph 7 stipulates that any potential technical implementing provisions at Level 2 must exclusively serve the purpose of protecting market integrity. More specifically, this means that transaction reporting should assist supervisory authorities in efficiently sanctioning offences in terms of insider dealing and market manipulation as defined by Directive 2003/6/EC. The regulatory objectives which are laid down beyond this in the Consultative Concept Paper, i.e.

- detection of potential breaches by investment firms of conduct of business rules,
- assessment whether trading venues are functioning in an orderly manner, and
- ancillary objectives such as the detection of money laundering or the identification of market trends

are not covered by the mandate contained in Art. 25 paragraph 7. The Consultative Concept Paper's extremely far-reaching objective should therefore be revised. Otherwise there might be the danger of implementing costly reporting obligations which fail to meet the regulatory goals specified by the Directive. Any such “overshooting” approach must be prevented under all circumstances.

Basically we welcome the fact that CESR plans to consider potential overlapping with the reporting obligations pursuant to Art. 25, paragraph 3 under post trade transparency

obligations (Art. 28). It is, however, doubtful whether both reporting procedures will be *de facto* compatible with each other. This is due to the fact that, on principle, post trade transparency reports will have to take place as close as real time as possible, whilst the deadline pursuant to Art. 25 for transaction reporting is much longer. It would also appear to make sense to postpone this matter for systematic reasons until the mandate for Art. 28 is issued. Subsequent to this, however, it would be possible to consider a waiver for those investment firms which, on rare occasions, engage in off-exchange trading of a volume that is not material in terms of market efficiency; such waiver could provide that these securities firms will be able to meet their post trade transparency obligation by way of a report issued pursuant to Art. 25.

Concerning the preparation of an "inventory of minimum conditions" it is our understanding of the proposal that such an inventory should only be prepared for trade matching and reporting systems that have to be approved by the competent supervisor. Whenever the reports are being prepared by the investment firm itself or by one of its agents[2], no regulatory provisions on data integrity and system resilience should be stipulated. In this respect, there should rather be no change with regard to the general organisational requirements that have already been stipulated with regard to investment firms under Art. 13. However, apart from the foregoing caveats, we have no objections with regard to the inventory proposed by CESR.

Q 4: What would general criteria for measuring liquidity be?

Q 5: What specific criteria could be useful in measuring liquidity? Should they be prioritised?

Q 6: What could be an appropriate mechanism for assessing liquidity in a simple way for the purposes of this provision?

Q 7: What other considerations should guide CESR in its work regarding the assessment of liquidity in order to define a relevant market in terms of liquidity?

From our point of view the issue of "assessment of liquidity" is a complex matter. Its impact goes well beyond the provision contained in Art. 25 because the pre-trade transparency regime (Art. 27) refers to Art. 25 paragraph 5 when it comes to the competent regulator for defining a standard market size. Hence, we propose to deal with the matter there, i.e. in the context of the forthcoming mandate under Art. 27 and thus refrain from any further comments at this stage.

[2] In this context, CESR should bear in mind that the European Parliament, in its second reading, agreed a change of Art. 25 Paragraph 5, so that a report can now also be issued by a commissioned third party acting as an agent for and on behalf of the investment firm.

Q 8: Do you agree with the approach proposed by CESR for determining the minimum content and common standard/format for transaction reports? Are there other approaches that could usefully be considered?

Basically we agree to the two tier approach favoured by CESR. Yet, the reporting parties should be afforded maximum flexibility in the technical implementation of these obligations. The obligation to share reported information between regulators or, moreover, the obligation to forward data to the regulator of the "most relevant market in terms of liquidity" must by no means lead to a situation where investment firms shall be obligated to prepare their reports in one and the same standard IT format across the whole of Europe. This would lead to unjustifiable, disproportionate costs for the adjustment of pre-existing, complex IT systems.

Q 9: Apart from the types of information set out in Art. 25 par. 4 and the Mandate, what other information might be usefully included in transaction reports?

Apart from the reporting matters specified in 2.4, the reporting clause should contain an additional notice clarifying whether the transaction concerned is exchange trading or OTC-trading and also clarifying whether the party making the report has carried out the transaction on own account or on account of a client. In addition to this, there should be a regime for handling incorrect reports as soon as the reporting party becomes aware of the fact that these reports are deficient.

Q 10: Do you agree that the content of transaction reports has to be equal irrespective of the entity reporting the transaction? What considerations could justify a different treatment of reporting parties?

We agree that the content of transaction reports should be equal irrespective of the entity reporting the transaction.

Q 10 bis Q 14:

No comments.