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15 June 2004

Mr. Fabrice Demarigny
Secretary General
The Committee of European Securities Regulators
17 Place de la Bourse
75082 Paris Cedex 02
France

Re: "CESR Technical Advice on Implementing Measures of the Proposed Financial Instruments Markets Directive (ISD2); Transaction Reporting, Cooperation and Exchange of Information Between Competent Authorities" (Ref. CESR/04-073b)

Dear Mr. Demarigny:

The European Advocacy Committee ("EAC" or the "Committee") of CFA Institute[1] is pleased to comment on The Committee of European Securities Regulators' ("CESR") consultative paper, *Transaction Reporting, Cooperation and Exchange of Information Between Competent Authorities* (referred to as the "Consultation"). The EAC is a standing committee of CFA Institute charged with reviewing and responding to major new regulatory, legislative, and other developments that may affect investors, the investment profession, and the efficiency and integrity of European financial markets. The Committee has 14 investment professionals volunteering from throughout Europe who provide a variety of viewpoints based on their market experience and expertise, and who are able to draw upon the collective knowledge of CFA Institute's global network of investment professionals.

General Comments

Background

The specific inquiries of the Consultation deal with Articles 25, 56 and 58 (the "Articles") of the proposed Financial Instruments Markets Directive ("ISD2" or the "Directive"). The Articles address general issues of transaction reporting, cooperation between and among competent authorities in member states (the "Authority" or "Regulator"), and the exchange of information among Authorities, as indicated below:

[1] With headquarters in Charlottesville, Virginia, U.S.A., and regional offices in Hong Kong and London, CFA Institute is a non-profit professional association of more than 70,000 financial analysts, portfolio managers, and other investment professionals in 121 countries and territories of which more than 57,500 are holders of the Chartered Financial Analyst® (CFA®) designation. CFA Institute's membership also includes 129 Member Societies in 48 countries.

- Article 25 – transaction reporting:

  Investment firms are required to report transactions in listed securities to the Authority of their home member state, but can receive a waiver by passing along this responsibility to others, such as regulated exchanges, multilateral trading facilities ("MTFs"), or other entities involved in facilitating these trades so long as they meet the requirements of the Authorities for providing such information.

- Article 56 – competent authorities' obligation to cooperate:

  Regulators are required to provide proportionate cooperation "when a regulated market has established arrangements in a host member state," as opposed to its home member state. This requirement is effective only when the regulated market's arrangements are "of substantial importance" to the securities markets and investors of the host.

- Article 58 – the exchange of information between competent authorities:

  Authorities in member states are obliged – either through rules or existing agreements – to immediately supply their counterparts in other member states with information each need to perform their duties as Regulators.

Based on the text of these Articles, the European Commission (the "Commission") has requested that CESR suggest Level 2 implementing measures for the Directive (the "Mandate"). Under the Mandate, CESR is charged with seeking ways to determine what trade information Authorities should collect, when and in what manner it should collect this information, and ways to ensure its effective and efficient sharing among interested Authorities.

To fulfill its Mandate, CESR has determined it must first define "liquidity" and "markets of substantial importance" to establish when trading information is relevant to Authorities outside the member state in which it was generated. CESR also has proposed to determine what instances would trigger the sharing of this information among these Regulators and the mechanisms needed to ensure its effective and efficient communication.

EAC Response to CESR Proposal

The Committee does not believe the approach proposed, which essentially prescribes how and when Authorities communicate with one another, will achieve the goal of improving information flow. The Committee believes that even if CESR were able to develop an acceptable definition for liquidity as it relates to determining which markets are most relevant to the thousands of different securities listed on EU and other markets, it is likely that Authorities will not always communicate in a timely fashion with each other. Likewise, even if CESR were to develop a suitable definition for "substantial importance of the operations of a regulated marketplace" to help determine whether the activities of a regulated market affect capital markets in another member state, it is still possible that market forces may alter the level of importance, resulting in misapplication of resources.

It also is unlikely that the proposal will reduce the inertia inherent in the flow of information among Authorities. In large part this is because Regulators will not always see how activity within their jurisdictions affects the financial systems of other member states, and vice versa. Such difficulties are likely regardless of the quality of the implementing measures CESR and its members can create regarding communication and cooperation among Authorities.

The Committee believes that these difficulties will arise, in part, because of the structure proposed. In particular, the proposals make it the responsibility of the Authorities to recognize how trading activity in other jurisdictions may affect the securities, securities issuers, investment firms and financial markets they supervise. Once they have made such determinations, they then must make a request for the information from their counterparts in those other markets.

The proposed communications and cooperation system likely will cause delays, however. First, it will take time for Authorities in both the host and the home markets to detect suspicious trading activity. It also will take additional time for the preparation and submission of requests for the relevant information from their counterparts where the activity occurred. Further delays will occur in fulfilling the requests. Even after the information is delivered, it is conceivable that the receiving Authorities could experience more delays as they attempt to convert the data to formats or programs they use internally. By the time this process is complete, individuals or firms may have had ample time to manipulate market prices for their own benefit and at the expense of other market participants.

Furthermore, not all shares listed on regulated markets in Europe are traded on those exchanges. Many are traded in the over-the-counter ("OTC") markets while many others may occur in markets outside the EU. Regardless of the venue, though, these transactions can have significant effects on the price formation of transactions in listed securities. This is particularly true in the case of OTC trades where such transactions may reflect sophisticated investors' opinions about the value of listed securities.

Equally important, though, are the times when Regulators will not recognize the relevance of trading activities to their counterparts in other member states. For example, the Authority in Germany may not realize the relevance of a large number of small trades executed in Spain by a Dutch investment firm in shares of an Austrian company whose primary listing is in Germany. Unless the German Regulator is aware these trades are occurring in Spain, it may not know that it should request the information from its counterpart there. Furthermore, Authorities in Austria, Spain and the Netherlands may not realize how these transactions may affect their markets and therefore may not communicate and seek to coordinate their actions with those of the German Regulator. In this vacuum, however, the Dutch company could acquire a critical number of shares that it can use as leverage to launch a more aggressive purchase program on German markets without having to treat all shareholders equally.

Uniform Market Data Collection Facility

To prevent such problems, the Committee suggests that CESR consider and propose the creation of a uniform market data collection facility ("DCF") to collect, store and distribute all the trading information sought by Authorities.

As envisioned, such a system would require all reporting entities, including regulated markets, MTFs, listed companies and all other entities facilitating and approved to report trades on securities listed in the EU ("Sources"), to supply real-time information about all their on- and off-exchange trades to the Authorities in relevant home and host member states. These Sources would supply this information in a standard format and computer program mandated by the Commission and in a language or languages customary to transacting financial business in the European Union.

Upon receiving the information from the Sources, Authorities in each member state would have a legal obligation to automatically share all of it immediately by delivering electronic files to the DCF. The DCF then would make all the data available to all EU Regulators as well as to investors and all other market participants at the same time.

The benefits of such a system include:

- It would eliminate the need for complicated implementing measures directing cooperation and communication among Authorities that may not accurately consider market evolution.
- It would standardize the format under which the Sources provide the information, and the Authorities and the DCF collect and distribute it. This would reduce the time and cost needed for Authorities to put information from other member states into a format they can recognize and use.
- Regulators in all markets would likely create algorithms to automatically download vital trading information from the DCF about companies or investment firms and funds headquartered and/or listed in their home markets, thereby enhancing the efficiency of the regulatory system.
- It would make the information immediately available to all Authorities at the same time, enabling them to recognize abusive or suspicious trading activity occurring on EU financial markets and, in turn, to raise the level of communication and cooperation amongst the Regulators.
- Investors across the European Union would have one place to obtain vital trading information instead of having to visit Web site addresses and know the languages used by Authorities in all 25 member states.
- Investors would have better information about events and news affecting their investment positions.
- Insiders and others would have a harder time using the information to manipulate market prices.

- Authorities would not have to make judgments about when to share information and which of their counterparts should receive it.

Complete Transaction Reporting

Of equal importance is the collection and reporting of all transactions in listed securities. Regardless of whether trades are conducted on regulated exchanges, through MTFs, over the counter or in private negotiations, it is fundamental for reliable and efficient markets that all trades in listed securities be reported so investors can gauge how other buyers and sellers are pricing securities. When some entities are permitted to privately swap securities without having to report the transactions to investors because custodians in some member states are permitted to merely change the names of the owners, market integrity and price formation suffer.

For example, if an investor were to try to sell 1 million shares of listed Company A at a time when the market price is €10, news of this large bloc coming on the market would likely cause a decline in the price of the securities. However, under current rules, the investor can go to a member state where anonymous trading is permitted and privately negotiate a sale at €10.10 with a subsidiary of the issuing company. In such a case, the buyer would be willing to pay a premium to prevent disclosure of the sale and the likelihood of a drop in its parent company's market capitalization.

The problem for markets is that this lack of transparency prevents all other investors from taking equal advantage of the information. Investors would act differently if they knew both that an investor wanted to sell 1 million shares and that the issuing company, through a subsidiary, is willing to pay a 10% premium for those shares. However, under current rules, the market remains unaware because the transaction is private and never reported.

Ultimately, the Committee believes the kind of private dealing just described should trigger transaction reporting under Article 4 of the Implementing Directive 2003/6/EC (the Market Abuse Directive), which relates to the definition and public disclosure of inside information.[2] Failure to report such transactions to the market at large would create false or misleading signals about market prices and, consequently, contravene the intent of this implementing directive. Nonetheless, Committee members indicate that such hidden trades occur to this day.

Summary

The Committee believes the best way to achieve appropriate communication and coordination among Authorities is to create a DCF to handle much of the collection and distribution of relevant trading information automatically. The Committee also reiterates its belief that any reporting system – whether it is a DCF or the type of manual system suggested by the Consultation – should capture details about all transactions involving listed securities, regardless

[2] Official Journal of the European Union, English version, dated 23.12.2003, p. 339/71.

of trading venue, size of the transaction, the identities of buyers and sellers, or the timing of the trades.

Consultation

Transaction Reporting

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

As discussed above, the waiver is granted to investment firms when reporting of their securities transactions is handled by the regulated market or multi-trading facility (MTF) where the trades are conducted, or by some other approved reporting mechanism. The Mandate asks CESR to consider existing waiver arrangements among Sources and Authorities in member states, so long as the surrogate Sources meet the requirements of the Directive.

The proposed approach would involve preparing an inventory of minimum conditions for Sources before they can be considered a valid supplier of trade information. This process would consider such issues as data security and system reliability, as well as specific criteria for determining when existing arrangements between Sources and Authorities are sufficient to warrant a waiver to investment firms.

The Committee believes such considerations are important and concurs with the need for such an inventory of minimum conditions. However, while consideration of minimum conditions is important, they also should apply to a consideration of the methods, computer programs and systems used by different Authorities to collect this information. Without coordination of this type of infrastructure, there is a risk that Authorities will face delays in taking regulatory action because of the time needed to recognize, translate and analyse information collected, prepared and transmitted by a Regulator in a different system.

At the same time, the Committee believes CESR should ensure that any waivers given to investment firms under the Directive do not result in de facto permission to conceal information about privately negotiated transactions involving listed securities. As suggested above, any mechanism for collecting and reporting trading information should ensure that coverage includes all trades involving listed securities, regardless of where the trades occurred, how big they were, or who the counterparties were.

Question 2: What requirements should such an inventory contain?

As stated above, the inventory in this context involves a consideration of minimum conditions that Sources would have to use for Authorities to consider them valid for transaction reporting. The Committee believes any system also should provide easy access to the data, regardless of

whether the inquiry comes from Authorities, investors or other market participants. To achieve this goal, the Committee recommends that the inventory include:

- A standard format, or one that is flexible enough to work with a variety of formats, for collecting and presenting the information;
- A standard collection, storage, presentation and distribution program, or one that is flexible enough to work with other programs, for use by all Authorities to permit ease of distribution and analysis of information;
- A central collection and storage facility to provide a single receptor for relevant trading data;
- A requirement that collection and reporting programs used by the Sources communicate directly and easily with complementary systems used by the Authorities.

Question 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?"

As stated above, the Committee suggests CESR consider and propose the creation of a DCF to collect real-time details about all trades involving listed securities and to make such information available to interested Authorities and investors, and all other market participants at the same time.

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

The Consultation suggests criteria for measuring liquidity that include:

a) The ability to compare activities in different markets and market models;

b) Ease of implementation;

c) A balance between "actuality and reliability"; and

d) Cost-benefit considerations.

In the context of the Consultation, liquidity in a particular security is relative to activity in that security only, not relative to activity in other listed securities. This focus will help Authorities decide which market provides the primary source of investor interest and activity in a particular security. On this basis, Authorities then can determine with whom they should share trading information on specific securities.

Based on this view, a market that accounts for 800 out of the 1,000 shares traded in a particular security during a given month would be considered the "most liquid market" in that security, even if by other standards the market for the securities might be considered illiquid.

The Committee is concerned CESR and its members will have difficulty proposing effective implementing measures for this purpose because liquidity is difficult not only to define, but also to measure. The Committee holds this belief for several reasons.

First, market participants go where liquidity is, not where it has been historically. Consequently, investors may shift trading activity in a particular security from Market A to Market B over a potentially short period of time. But if Market A is still deemed the primary liquidity source for that security for regulatory purposes, communications protocol among Authorities may become complicated.

Furthermore, while liquidity can be viewed as both prospective – the indicated depth of interest among investors in a given security at any one time – and realized – a reflection of actual trades at some point in the past – the only way to accurately measure it is after the fact. However, even this may distort actual activity. For one, a large over-the-counter trade in a small-cap security may distort not only the level of interest in the security, but also the location of its primary liquidity source. For another, it is possible that most trading activity in certain EU-listed securities may occur on regulated or over-the-counter markets in Switzerland, the United States, Hong Kong or other non-EU markets.

For these reasons, any definition of liquidity may understate or overstate the actual level of market interest in a security. In turn, this could lead to a false impression of the primary location of that interest and, consequently, result in delays and difficulties in communications among Authorities.

Question 5: What specific criteria could be useful in measuring liquidity? Should they be prioritized?

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

Question 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?

As stated above, liquidity can be viewed from different perspectives. Ultimately, though, it reflects the ability for an investor to realize value from some asset in the form of money[3]. This realization is affected by the length of time needed to trade the asset for money, the cost of achieving the conversion, and the certainty of the price realized.

An approximation of these qualities can come from tracking such market indicators as the bid-ask spread, price variance and average daily volume over short- or long-term periods. But while such approximations may provide indications of liquidity, they may not be easy to implement or accurate in their indication of actual market activity or interest.

Question 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?

[3] Van Horne, James, "Financial Market Rates and Flows," 1978; p. 13.

CESR proposes a two-step approach for determining the minimum content and standard format for transaction reports. First there is the identification of the types of minimum information Authorities need from Sources to adequately supervise the financial markets in their member states. Then there is a determination of what information is "essential for establishing exchangeable transaction reports" and to defining a common standard/format for fields in the reports.

In general, the Committee agrees with the first step in the proposed approach. Authorities should collectively determine what types of information they need from Sources, while also considering what information investors would find useful.

However, the Committee does not agree with the need for the second step in the proposed approach. If the information requested in the first step is, indeed, the minimum Authorities need to protect the integrity of financial markets in their member states, it is reasonable to expect that this "minimum" also is "essential."

The Committee also believes that CESR should delay proposing this list of data points until Level 3 of the Lamfalussy process. By creating a list at this stage (Level 2) in the Directive's implementation, CESR may force Authorities to have to request amendments from the EU Parliament and the Council of Ministers to permit adaptations for market changes. By delaying the list until Level 3, however, Authorities could adapt by making changes to local regulations without involving the drafters of the Directive.

Question 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?

Paragraph 4 of Article 25 establishes the minimum content of the reports sent to Authorities. It lists the following elements for the information Authorities are to collect:

- Volume and monetary amounts of each type of financial instrument traded;
- Prices of each financial instrument;
- Methods for reporting the time and date of the transaction;
- Means for identifying the investment firms concerned;
- Means for identifying the instruments bought and sold (security codes); and
- Identification of the markets where the transaction was executed.

The Committee believes this is a good list. However, it also believes CESR should not include such a specific list in the Level 2 implementing measures it presents to the Commission. If in the future markets have and can collect better and different kinds of data that would prove useful to Regulators, they would have to seek amendments to the Directive from Parliament and the Council. This would not only take time, but it would also limit the flexibility of EU securities Regulators to deal with an evolving financial marketplace.

Question 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?

The Committee agrees that all Sources of trading information should provide the same content and do so in a format that is either standard or compatible with other formats, regardless of the type, location or size of the reporting institution.

Cooperation

Question 11: Do you agree that this preliminary assessment on the scope of the implementing measures is appropriate, and with the approach suggested above to determine the criteria under which the operations of a regulated market in a host member state can be considered as of substantial importance, or would you consider another approach more appropriate?

The question relates to paragraph 2 of Article 56 of the Directive which states, in essence, that when a regulated market establishes operations "of substantial importance" in another member state, that the host and the home Authorities "shall establish proportionate cooperation arrangements." For example, the creation of a regulated market in the Netherlands, France, Portugal and Belgium would require Regulators in those nations to cooperate.

Under paragraph 5 of the same Article, the Directive authorizes the creation of implementing measures to "establish the criteria under which the operations of a regulated market in a host member state could be considered as of substantial importance for the functioning of the securities markets and the protection of the investors in that host member state." From this, CESR is charged with determining the criteria for "substantial importance," but it is not charged with determining what constitutes "proportionate cooperation arrangements."

First, the Committee is concerned that creating implementing measures that determine what is viewed as operations of substantial importance would reduce the flexibility of Authorities and CESR to adapt to changing market conditions. While regulated markets in the European Union today are, to a large degree, fragmented along regional lines, this situation has already changed considerably in recent years and could change even more in the future. Consequently, what is deemed of substantial importance today may not have relevance in a few years.

Second, the proposed solution relies on a mandate for cooperation among Authorities. While the Committee strongly supports cooperation and sees it as key to ensuring the long-term integrity of EU financial markets, the Committee is less sure that rules requiring collaboration will achieve the desired results.

What is more likely to achieve the desired goal of ensuring the long-term integrity of EU financial markets is for Authorities in all member states to monitor and discuss with each other possible trading anomalies. Using the example from above under "EAC Response to CESR Proposal,**"** if the German Regulator is able to notice suspicious trades, it may have the ability to ask its counterparts in the Netherlands, Spain and Austria about the possible importance of the trades in Spain.

Question 12: What relevant criteria should be taken into account in order to assess the substantial importance of the operations of a regulated market in a host member state?

In general, the Committee does not believe that an assessment of whether a regulated market is of substantial important to a host member state is relevant. By using a DCF to collect, store and simultaneously distribute key trading data to all market participants, Authorities, exchanges, MTFs and other Sources would have to report the same information in real time. Indirectly, this would eliminate the need for a judgment about what constitutes substantial importance.

However, if CESR is ultimately required by the Directive to pursue a course that includes a definition of substantial importance, the Committee believes the definition should state that it is whatever a reasonable investor would say is of substantial importance. In this context, the trades involving the German-listed Austrian company in the Spanish market by a Dutch investment firm would become of substantial importance to investors in all four member states. Moreover, investors in Britain and France may deem these transactions of substantial importance, as well, as a consequence of the portfolio holdings of investment firms in those nations. Ultimately, it is likely that in many cases, most, if not all, member states will represent markets of substantial importance under this definition.

Question 13: What other indicative elements should CESR take into account when drafting its technical advice in this field?

The "indicative elements" included in Article 58 of the Directive for CESR to consider are the following:

- "Define the way requests for information should be made and executed, taking into account the need to foresee a plan for urgent cases."
- "Establish the criteria to identify those particular cases where the information should be immediately supplied to other competent authorities without mediating any request. Particular attention should be paid to the transmission of information on the transactions in financial instruments to the competent authority of the most relevant market in terms of liquidity."
- "Identify the provisions of the Directive which implementation will require the exchange of information between competent authorities."

While the Committee recognizes these elements are included in the Directive, it is concerned that the mechanisms suggested for Authorities to use in determining and executing the sharing of trade data will not produce timely distribution. In some cases, these elements place responsibility for sharing on the Regulator located in the member state wishing to receive the information, not the one collecting it. In other cases, responsibility is placed on the provider. As stated above, we believe the former situation could delay, or possibly even prevent, effective enforcement of securities laws, while in the latter the provider may not be the Regulator most affected and, therefore, may not see the relevance or importance of certain transactions to its counterparts.

In both cases, however, Authorities are required to judge when to share – or request – trade data, and with whom they should share it. In this type of structure, the best way to determine when Authorities in other markets need to receive trade data is to look for circumstances where a security experiences an unusual change in price or volume. But even the most conscientious Authorities may overlook transactions that could affect investors and securities issuers from other member states.

The Committee believes the subjectivity of such a system is likely to delay action against abusive market behaviour which, in turn, could harm investor trust in EU financial markets. The best way to avoid these potential oversights is to ensure that all Authorities have access to all the trade data that may affect institutions within their jurisdictions in real time.

Question 14: To what extent should CESR take into account the nature of the information to be exchanged in order to set up different categories of information and corresponding procedures of exchange of information (i.e. routine, case specific)?

As stated a number of times in this letter, the Committee believes Authorities should make no distinctions on the information collected and shared with the market. They should share all information they collect in real time with all their counterparts and other market participants throughout the European Union through the delivery of those data to a central collection facility.

Question 15: To what extent do you agree with the approach outlined above? In particular, are there any issues which you believe would be more appropriately dealt with at Level 3? What other considerations should guide CESR?

This question presumably refers to balancing greater clarity and legal certainty among Regulators with flexibility in response to different circumstances. The Mandate suggests CESR consider existing memoranda of understanding on inter-Authority communications produced by IOSCO, European fora, bilateral parties and CESR itself to achieve these goals. At the same time, CESR notes that the "procedures for the exchange of information under this Mandate could be an opportunity for aligning, where appropriate, existing procedures in order to ensure a consistent approach for the exchange of information between competent authorities."

The Committee strongly supports CESR's statement about how the procedures adopted by CESR could represent an opportunity to ensure a consistent approach to the exchange of information among Authorities. Nonetheless, the Committee is concerned the proposed approach could result in delays in the exchange of trading data among Regulators and, therefore, does not believe it is the best alternative available.

Closing Remarks

The Committee reiterates its belief in the need for a central collection facility to help Regulators in member states immediately recognize anomalies in trading activity and initiate communications with Authorities in relevant member states. The reason for this view is that members of the Committee believe any exchange of relevant trading data must:

a) collect the information that Authorities and investors need to ensure efficient and orderly financial markets;

b) ensure that Authorities engage in effective and efficient sharing of information;

c) ensure that Authorities fulfill their role of efficiently and effectively enforcing securities directives evenly in all member states;

c) achieve a cost-effective solution to the goals of the Directive; and

d) produce a viable long-term solution for the sharing of trading information with all market participants, including investors.

The EAC appreciates the opportunity to comment on the CESR consultative paper on the *Technical Advice on Implementing Measures of the Proposed Financial Instruments Markets Directive (ISD2)*. If you or your staff have questions or seek amplification of our views, please feel free to contact James C. Allen, CFA, by phone at 01.434.951.5558 or by e-mail at james.allen@cfainstitute.org.

Sincerely,

/s/ Frederic P. Lebel, CFA

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Chair
European Advocacy Committee

/s/ James C. Allen

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