International
Capital
Market
Association Ltd

ICMA

March, 30 2006

Mr Fabrice Demarigny
Secretary General
The Committee of European Securities Regulators
11-13 avenue de Friedland
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Dear Mr Demarigny

CESR`s Consultation Paper on Possible Implementing Measures Concerning the Transparency Directive: Storage of Regulated Information and Filing of Regulated Information

Ref: CESR / 06-025

The International Capital Market Association (**ICMA**) is pleased to respond to the CESR`s Consultation Paper on Possible Implementing measures Concerning the Transparency Directive: Storage of Regulated Information and Filing of Regulated Information (the **Consultation Paper**). ICMA is the self-regulatory organisation and trade association representing the investment banks and securities firms issuing and trading in the international capital markets worldwide.

We attach our response as an Annex to this letter. CESR has asked a number of specific questions in the Consultation Paper. We have focussed only on certain areas of the Consultation Paper in preparing our response. We submit in Part I of the Annex our general comments on the Consultation Paper. Any specific comments we have on the questions asked by CESR appear in Part II of the Annex. Certain comments and suggestions of a more technical nature are contained in Part III of the Annex.

We would be pleased to discuss our response with you at your convenience.

Yours faithfully,

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ANNEX

Part I: General Comments

EU-wide availability of "regulated information", as this concept is defined in the Transparency Directive (the **TOD**), is a key element of an integrated European capital market. Investors from jurisdictions where such a system exists often observe that it is one of the essential features currently missing in the EU. In principle, we therefore support the efforts to create an EU-wide system in which all regulated information would be stored, easily accessible and searchable, from any single access point ("one-stop shop"), by users of regulated information.

The proposals contained in the Consultation Paper find our general support. In particular we find it important that:

- The legislation takes the form of high-level principles rather than specific rules.
- The system is easy to use for both filers and users, implying in particular a fully electronic storage and flow of information, amounting to a "one-stop-shop" for both filers and users, and an alignment with filing to competent authorities.

We commend CESR for its thorough analysis of the issue. At the same time, we feel that there are two areas of key importance which should be further explored, namely:

- Ensuring competition between the officially appointed mechanisms (the **OAM**s), both on the national and pan-EU level; and
- Ensuring fair allocation of costs of establishing the OAMs and linking them into a pan-EU network, in particular by not expecting the issuers to fully cover these costs.

In Part II of this Annex we only answer those questions asked by the CESR where we have additional comments or where we – by way of an exception from our general endorsement of the proposals in the Consultation Paper – take a different view.

The technical challenges of creating a system envisaged in the Consultation Paper will be substantial. While we generally do not comment on technical and IT issues in this Annex, we would like to emphasise the need for their further thorough consideration. In particular, full cost/benefit analysis and consideration of financial aspects, competition impacts and market impacts of each possible model should be undertaken. By way of an exception (and without endorsing any particular technical solution) we provide in Part III of this Annex a description of certain technical solutions which we have been asked to clarify during the public hearing on the Consultation Paper on March 2.

Part II: Specific Comments

We further provide the following answers to the questions asked by CESR and other related specific comments.

Regulated information, easy access (**Q1** to **Q3**)

It is important that OAMs do not, in the interest of their users or operators, impose further obligations on the filers of regulated information in addition to those imposed by the TOD and Market Abuse Directive (the **MAD**). We therefore strongly support the suggestions that regulated information should be provided by the filers to the OAM without any additional changes to their content or format and without any other translations than those that may be required under the TOD or the Prospectus Directive (the **PD**) if, as discussed below, the OAMs will store information required under the PD. We do not support suggestions that there could be exemptions from this rule, relating e.g. to input standards (par. **54**) or any structuring of the regulated information (par. **57**). We note that the requirement to convert filed information into a proprietary format is the one feature of the US storage system most criticised by market participants because of the costs and technical difficulties it involves.

In connection with the discussion of who may be an "end user" (par. **23**) we note that the US experience shows that such a system would also be used extensively by legal and financial advisers to monitor disclosure practices in the market which would in time lead to a certain degree of harmonisation of disclosure standards. Such a development would be beneficial both to filers and investors.

Storage of prospectuses in OAMs (**par. 24**)

Without diminishing the importance of the regulated information, prospectuses are, especially for bond issues, the information in practice most sought after by investors. Availability of prospectuses in OAMs would increase their accessibility to potential investors with all the attendant benefits to the investors and issuers. We would in principle support any initiative which would result in prospectuses and, possibly, other information under the PD being available in the OAMs.

Unless the OAM was directly operated by a competent authority (which solution we do not generally support for competitive reasons), such availability would currently not constitute "public availability" of the prospectus under the PD. We are aware that an amendment to the PD would be required to achieve this goal. In addition, this kind of availability of prospectuses may give rise to concerns about possible infringements of third country securities offering laws. This issue therefore requires careful analysis. Unless these concerns are dispelled at the international level, the availability of prospectuses in OAMs should be only optional, allowing the filers to assess third country legal risk on a case-by-case basis.

Network model (**Q4** and **Q5**)

We agree that a pan-EU network of OAMs (irrespective of whether its constituent OAMs are sole national OAMs, one of several national OAMs, OAMs covering several jurisdictions or any combination of these) is the more feasible solution at present, although regulation should not hinder future developments. We express no preference, however, on whether a centralised system should be a long-term goal. As long as the system has the functionalities described in the Consultation Paper and addresses concerns expressed in this Annex, its architecture should not be important to filers or users.

At the same time, we suggest that CESR considers thoroughly the US experience with the operation of a storage mechanism and especially the problems experienced by its filers and users so as to avoid them when designing the EU solution. We understand that while the US system is in principle recognised as a very beneficial tool by the market participants, there are a number of concerns of technical nature relating, e.g. to the need to convert the filed information into a prescribed format, searching and downloading difficulties, unavailability of certain information real-time or difficulties caused by a merger or renaming of a filer. We would be happy to elaborate on these and other issues separately should you so consider such comments of value.

Electronic storage and filing (**Q6**)

We strongly support the principle of electronic storage and filing of regulated information. We are not convinced that it is necessary or desirable to provide for a transition period during which paper filings would be accepted by OAMs. The entities that are expected to be filers under the TOD or the MAD may be safely assumed to be sophisticated institutions with sufficient IT and technical expertise and resources. In case such a transition period is adopted, financial incentives for electronic filing could be put in place to support the eventual goal of a fully electronic system. We agree that OAMs should accept paper filings in case of a malfunction of the IT system of the filer or other narrowly defined similar emergency situations (as indicated in par. **51** and **66**). In both cases, OAMs should be responsible for promptly converting the paper filings into electronic format.

Interoperability (**Q19**)

We agree that the interoperability obligation of an OAM (as well as technical and IT aspects of the proposed system in general) should primarily be ensured by legislation. At the same time, we believe that it is not necessary for binding legislation to regulate technical details because of the necessary level of detail and likelihood of technical and market developments. These should be left to more flexible instruments, such as Level 3 co-operation between competent authorities and agreements with OAM operators.

Network models (**Q19**)

Although we do not comment on technical aspects of operation of OAMs, we believe that models C and D are inferior to models A and B from the viewpoint of easy access by users. That is because they require users to search lists of issuers and /or links to national OAMs. We agree with the Consultation Paper in rejecting model D. As a long-term goal, we support models A or B while at the same recognising that in the shorter term, the ideal of easy access may be compromised in the interest of technical feasibility and affordability of the newly developed system. A combination of models A and C is also perceivable, whereby the system would be able – rather then send all requests to each national OAM – to pre-select which national OAMs are relevant for the requested piece of regulated information and send requests only to such pre-selected OAMs. Technical details of this suggestion are contained in Part III of this Annex.

Costs and funding (**Q19**)

The section of the Consultation Paper on costs and funding of the proposed system is relatively brief and limited to certain general statements which are generally acceptable. We regret that it has not been possible to publish the separate analysis being prepared by CESR of this issue in time for this consultation. At the same time, we understand that the final decision on costs and funding will depend on the chosen model of the system and will be to a larger degree left to the discretion of Member States, subject to certain principles. We understand that there will be an opportunity to comment on this issue in detail at a later stage. We would, however, like to emphasise certain general comments already at this point.

While it is understandable that the Member States, responsible for setting up the system, will attempt to shift the costs to other involved parties, the financial impact on such parties should be proportionate.

We are aware of the growing support for an approach (not described in the Consultation Paper but presented at the CESR public hearing), whereby the regulated information is available to users free of charge. Should this approach be adopted, it is important to ensure that not all the costs are borne by filers. We note that a potential decision to replace the principle of costs affordable to users provided for in the TOD would be a political decision and those making it should bear the most of the resulting costs.

The analysis should therefore distinguish between the costs of the development of the system and of its operation. The filers should be expected to contribute only towards the latter costs. Where filers to some degree fund the system, competition between multiple national OAMs becomes a key tool to keep costs to filers down. Needless to say, the principle of affordability should apply to filers as well as users.

The users could be involved in funding the system namely by paying for any other commercial services (value-added services) provided by an OAM in addition to storage of regulated information. It might, however, not be wise for an OAM to rely only on value-added services to recoup all the costs as the market for these services is very competitive and profits to OAMs from these services cannot be expected to be substantial. Moreover, the US experience shows that commercial providers will quickly set up their systems which will use the regulated information stored in OAMs to provide such value-added services themselves. In principle, there could also be differentiated treatment of commercial and private users.

Further analysis should also take into account the fact that pricing policies of OAMs vis-à-vis filers may impact on the choice by the issuers of a regulated market for their securities, both within the EU and outside of it.

The funding of the system is a part of the wider competition issue discussed separately in this paper. In particular, there should be a level playing field between OAMs operated by private entities and those operated by competent authorities.

Role of competent authorities (**Q20**)

We agree that competent authorities need to be involved in appointment and ongoing supervision of OAMs. In this context, we would like to emphasise the competition aspects of the operation of OAMs. The pan-EU and national regimes must not cement existing monopolies or create new ones and should allow (as provided for in the TOD and rightly emphasised in the Consultation Paper) for multiple national OAMs, the integration of national OAMs and other possible future market developments. Numerous other competition aspects must be kept in mind both at the time of appointment of an OAM and in the course of its ongoing supervision to achieve effective competition between OAMs both from the perspective of users and filers.

Most importantly, access by filers and users to OAMs must not be subject to onerous requirements and any charges must not be disproportionate or discriminatory. Funding issues are discussed separately in this paper.

OAMs operated directly by competent authorities should be operated on commercial terms, e.g. without subsidies which are not available to their private competitors, and the conflict of interest inherent in such a competent authority's dual role as a regulator and operator of an OAM should be carefully managed.

Competent authorities should also ensure that where OAMs provide value-added services, these are clearly separated from their core statutory function of storage of regulated information. In particular, users should be able to easily distinguish regulated information from any other information available in an OAM and the filers should not bear costs of provision of value-added services unless they choose to do so.

We are concerned about the suggestion (not described in the Consultation Paper but presented at the CESR public hearing) that where there are several national OAMs, each of them should store all regulated information for the jurisdiction. We do not find the arguments presented in favour of this solution convincing. Such a requirement is unnecessary from the technical point of view. If the principles proposed in the Consultation Paper are implemented, the network of OAMs should be able to aggregate regulated information from all OAMs of all the jurisdictions involved. Such a solution would also remove benefits of competition for filers and, to the extent filers contribute to costs, increase costs to filers of meeting their statutory obligation. Consequently, there is no reason why OAMs specialising e.g. only on certain industry sectors, kinds of securities or kinds of regulated information should not be permitted.

Alignment between OAMs and filing with competent authorities (**Q32** and **Q33**)

We are concerned that the proposals in the Consultation Paper do not go far enough to achieve alignment between the OAMs and filing of regulated information with competent authority, which is required by Art. 21(2) of the TOD and emphasised by Recital 25 of the TOD. Quite to the contrary, it is proposed that the filing regime has separate requirements and procedures which will be to a large degree left to the discretion of Member States.

Currently, the TOD requires the filers to disclose the regulated information to the public, provide it to an OAM and file it with the competent authority. In addition, some filers may be providing this information to the regulated market (under the TOD or the rules of the market). It is in the interest of issuers, investors and the market as a whole that these procedures are as closely aligned as possible. Otherwise the resulting administrative strain and costs especially on frequent issuers will be considerable and could impact on the correctness and timelines of disclosure. This principle is expressly recognised in the Consultation Paper (par. **302**).

We agree that having a competent authority acting as an OAM is not a "natural" solution to this issue (par. **307**). We recognise that use of service providers in practice facilitates the process of distribution of information but cannot, by itself, overcome the possible obstacle of differing requirements and procedures for each method of distribution. The last method suggested in the Consultation Paper, i.e., the competent authority acting as an interface between the filer and an OAM might be a workable solution, but would in practice require active co-operation on the part of the competent authority. We would encourage CESR to support the competent authorities in undertaking this role.

We believe that the best way to achieve an alignment between OAMs and filing with competent authorities is to set forth that by providing regulated information to an OAM, the filer fulfils its obligation to file it with the competent authority. Taking into account the proposed structure of OAMs and powers of competent authorities, the competent authority will be able to access the regulated information stored in an OAM without complications, just as easily as if the information was stored in its own system. Such a solution would greatly simplify the disclosure procedures on the part of the filers and should also obviate the need for competent authorities having to set up and operate parallel systems for reception and storage of the regulated information. This proposal, however, does not imply that we support a solution whereby the competent authority directly operates an OAM.

If such a technical alignment is not feasible, alignment of formats would be an intermediate solution. It would require competent authorities to accept regulated information if it was filed in the same format as accepted by OAMs, e.g. without any changes or translation. This would still require separate filings with an OAM and with a competent authority, but it would eliminate the risks, costs and delays associated with the filer having to satisfy separate and possibly very different requirements of an OAM and the competent authority with respect to the same piece of regulated information.

In view of these suggestions, we do not comment on the specific requirements for filing with competent authorities proposed in the Consultation Paper. We would like to emphasise, however, that irrespective of the ultimately chosen model, a competent authority must always be able to receive the regulated information in electronic form (option (b) in par. **286**). We recognise that in some jurisdictions, administrative laws or practices may prevent competent authorities from receiving electronic filings. The regulators should make every effort to change such laws or practices by the implementation date of the TOD or as soon as possible thereafter.

Use of third parties (**Q32**)

In practice, filers use commercial service providers to distribute the regulated information to all required recipients. This is recognised, for dissemination of regulated information, in the proposed TOD Level 2 currently being prepared by the European Commission (last published as the Working Document ESC/34/2005). That draft, while emphasising the responsibility of the filer, recognises to some extent that in practice the filer relies on the service provider to discharge its responsibilities. In the interest of consistency, the same principles which will in the end apply to dissemination of regulated information through third parties should also apply to their provision to OAMs and competent authorities through such third parties.

Implementation of the system

In light of the number of difficult issues which remain to be resolved, technical challenges of implementation of the system and expected timelines for adoption and implementation of measures resulting from CESR advice, it is possible that some Member States will not have OAMs meeting the required standards in place on 20 January 2007. For the same reason, it is unlikely that the network will be operational by that date, which is however in this case expected under the TOD.

While responsibility would in such a situation rest with the Member State, the filers need to be made aware of any transitory regimes set up in such Member States and assured that they will not be obliged to file regulated information with OAMs and competent authorities in such Member States in a way which is more onerous that envisaged by the final implementing measures.

Part III: Technical Comments

Network Model (Q **19**)

In the Consultation Paper, CESR outlines its thinking regarding possible network models and content of an interoperability agreement amongst national OAMs.

Of the four network models (A to D) outlined in the paper, Model A using a Central Access Point (CAP) provides the most logical approach to accessing decentralised data on multiple OAM servers. However, we believe that this model could be improved substantially by implementing a web crawler (also know as a web spider) program on the CAP. This program would periodically search all the OAM servers looking for new or updated instances of web pages and where found it would update a centrally held database index.

When an investor searches for an issuer on the CAP, rather than the CAP issuing search requests to all OAM servers and receiving any appropriate replies, the CAP would only have to search its local database index as it had previously captured this information from the pages obtained by the web crawler program. The key benefit, as demonstrated by Google that uses and promulgates this technology, is that search results can be obtained immediately (<1 second) rather than several seconds and possibly several minutes depending on how each OAM has designed their storage databases and what timeouts will be implemented by the CAP for the timely receipt of responses from OAMs.

ICMA therefore proposes that CESR should strongly consider the use of this technology for the CAP.