International Swaps and Derivatives Association (ISDA)
International Capital Market Association (ICMA)
Asociación de Mercados Financieros (AMF)
Associazione Italiana Intermediari Mobiliari (ASSOSIM)
Bankers and Securities Dealers Association of Iceland (BSDAI)
Bundesverband der Wertpapierfirmen an den Deutschen Börsen e.V. (BWF)
Danish Securities Dealers Association (DSDA)
Euribor ACI European Commission Working Group
Finnish Association of Securities Dealers (FASD)
Futures and Options Association (FOA)
Norwegian Securities Dealers Association (NSDA)
London Investment Banking Association (LIBA)
Securities Industry and Financial Markets Association (SIFMA)
Swedish Securities Dealers Association (SSDA)

Response to CESR consultation on publication and consolidation of MIFID market transparency

The International Swaps and Derivatives Association (ISDA), International Capital Market Association (ICMA), Asociación de Mercados Financieros (AMF), Associazione Italiana Intermediari Mobiliari (ASSOSIM), Bankers and Securities Dealers Association of Iceland (BSDAI), Bundesverband der Wertpapierfirmen an den Deutschen Börsen e.V. (BWF), Danish Securities Dealers Association (DSDA), Euribor ACI European Commission Working Group, Finnish Association of Securities Dealers (FASD), Futures and Options Association (FOA), Norwegian Securities Dealers Association (NSDA), London Investment Banking Association (LIBA), Securities Industry and Financial Markets Association (SIFMA) and Swedish Securities Dealers Association (SSDA) welcome the opportunity to comment on CESR's Public Consultation on Publication and Consolidation of MIFID Market Transparency (October 2006, CESR/O6-551).

In paragraph 4.1 of the Consultation Paper, CESR appears to have counted the joint response of twelve of our associations - ISDA, ICMA, AMF, BSDAI, BWF, DSDA, Euribor ACI , FASD, FOA, NSDA, LIBA, and SSDA – to CESR's March 2006 call for evidence as a single response. We remind CESR that we respond jointly to assist CESR by reducing the volume of material that it has to absorb, and by providing it with a collective industry position. However, in doing so, our associations, which in aggregate represent a very substantial proportion of the European securities industry, nevertheless each make their own response to CESR's consultation. CESR should therefore count and weight our joint response as if it came from each association separately, and not count it singly. We note the example of the European Commission in its feedback statement on transparency in non-equity markets, which has taken care to identify the separate contributors to joint responses.

As a preliminary comment, we have very much appreciated the market-driven approach which CESR has taken in the earlier stages of its debate on publication and consolidation of transparency information under MIFID. Although we think that some of CESR's proposals would provide helpful clarity, we are concerned that some of CESR's suggestions in the Consultation Paper seem to move away from the

previous market-sensitive approach in directions that could take away flexibility which is given by the Directive, fail to take account of the market-opening effect of MIFID, or inadvertently favour particular market players and thereby disrupt competitive interactions. At earlier stages of the debate on these issues, we have stressed the need not to deal with these issues in an ad hoc and fragmented way, and we urge CESR to continue to follow a measured and holistic approach. We explain our concerns in detail in our comments on CESR's suggestions below, but it might be helpful first to remind CESR of some of the most important points that we made in response to the March 2006 call for evidence:

a) One of the primary objectives of MIFID was to introduce competition among trading venues and thereby reduce transaction costs for the benefit of both the final investors and issuers.
b) Any fragmentation of trading venues that may occur from the new regime and the abolition of concentration rules will not lead to a lower quality of execution, and any fragmentation of data that may occur can be controlled by market forces.
c) Market forces and commercial incentives to make trading information available are able to overcome the effects of a more diversified landscape for execution in the future. The competent authorities of the Member States where no concentration is currently mandated have never identified any market failure in terms of poor quality of execution.
d) Market intermediaries will need to collect the trading data necessary for them to identify the best trading opportunities consistently available on the market. At the same time, trading venues will need to advertise the terms at which they are willing to enter into transactions, and in order to gain market share will want to be included in the execution policies of as many executing firms as possible.
e) The requirement that market transparency data have to be published in a way that facilitates consolidation (Article 31) should be interpreted in a way that is consistent with and supports Recital 34 of the level 1 directive. Recital 34 merely introduces an obligation on Member States to remove obstacles which may prevent the consolidation at European level of the relevant information and its publication.
f) Before any regulatory action is contemplated, there should be reasonable certainty that any particular obstacle will arise, that market participants cannot solve it, and that regulatory intervention is better placed to remove it.
g) MIFID provisions on publication of information on a reasonable commercial basis should be considered in a balanced way, taking account of the need for providers of information to charge appropriate fees for it, and not just the ability of users of information to access it. Market participants should be able, through reasonable commercial means, to determine the optimal charging arrangements.
h) CESR has an important role in keeping itself and other data users informed about market-driven developments, for example by surveying, in consultation with market experts, the current range of arrangements, methodologies, and standards for making information available in a consolidated format, and by organising periodic hearings to review how new developments are progressing and publishing the proceedings. But CESR should not seek to lead market developments in particular directions, and should intervene only where there is

clear evidence of an obstacle which cannot be addressed by the market and which needs regulatory attention.

i) In the absence of a demonstrated market failure, we do not consider that there is any need for public intervention in this sector. In particular we believe that neither at national nor at EU level should competent authorities dictate standards in terms of the format of the trading data to be published, which would then be instrumental to their consolidation.

j) Inappropriate external intervention in this field would entail the risk that the costs of its implementation could overcome the consequent benefits for the market as a whole and favour particular participants in what MIFID intends should be a competitive market for information.

Status of CESR proposals

It is important for market participants to be able understand the status of any 'Level 3 guidance' or other CESR initiatives that may emerge from this consultation. Paragraph 1.7 refers to the 'action CESR members plan to take to reduce barriers to consolidation of transparency information'. Many of the specific proposals state that firms 'should' do particular things. On many of the points that CESR discusses, as described in detail below, we think that it would be premature to impose regulatory expectations at this stage. However, in all cases it will also be particularly important for CESR to focus on consistency of regulatory practice, to discourage restrictive interpretations among CESR members, to make clear that the absence of specific CESR recommendations should not be taken as an encouragement for competent authorities to introduce further requirements at national level, to avoid inadvertently 'gold-plating' the MIFID provisions that the legislators have agreed, and to work with the industry to remove existing barriers to the publication and consolidation of information. It is also important to bear in mind that firms need to start the relevant system development now so that their systems are properly functioning in a compliant way by the 1st November 2007 implementation date. In order to avoid disruption and delay to firms' system development, CESR and competent authorities should avoid introducing any specific new regulatory expectations in this area after the 31st January 2007 transposition date.

Costs

Even if, on the basis of evidence of the application of MIFID, market failure analysis suggested that there is a need for regulators to intervene, thorough market impact and cost-benefit analysis would need to be applied to determine what if any regulatory action was justified. Paragraph 2.26 is the only specific cost reference. Evidence from MIFID implementation consultations to date (for example the UK FSA's consultation paper CP06/14 on system cost implications of implementing MIFID provisions on transaction reporting and market transparency) suggests a tendency to underestimate the costs of system changes to accommodate new requirements. CESR should take particular care to ensure that it obtains a thorough understanding of the cost implications of any proposals.

Current landscape in Member States

CESR's summary of the current landscape in Member States in section 2 of the consultation paper is very helpful. In order to ensure that the debate on these issues is fully informed, we ask CESR to publish the results of its survey in full.

What is changing

3.9. As noted in our general introductory comments, it is particularly important for CESR to bear in mind that greater competition and choice between trading venues does not necessarily translate into greater probability of data fragmentation, given the extent of market-driven standardisation or use of conversion engines, and the fact that there will be market-driven consolidation of market data.

CESR's areas of clarification and proposed guidance

Independent verification

5.3 - 5.7 'CESR considers that it would be reasonable for publication arrangements [for pre- and post-trade information] … to include a verification process that is independent of the trading process', which would need to be 'reasonable and proportionate in relation to the business'. CESR recognises that 'the process may vary between different trading venues'.

Q1 In you opinion, will this additional guidance (inclusion of a verification process independent of the trading process) help to ensure high quality data monitoring practices?

We think that CESR's concerns are more theoretical than likely to be realised in practice. We do not think that the proposed additional process requirement would improve the processes and checks that already exist in the market and under MIFID provisions. Under better regulation principles, CESR would need to justify the need for any such additional expectation for an independent verification process by reference to an identified market failure, taking account of the following considerations:

a) Article 32 of the Level 2 Regulation places a clear obligation on firms, which does not need to be supplemented.
b) There is a strong commercial incentive for firms to publish accurate information.
c) At present, counterparties provide a reliable check on the accuracy of trade data, and quickly inform the firm if the details of the trade are wrong.
d) Even existing verification checks cannot detect all mistakes (for example if the firm accidentally enters the wrong size).
e) Requiring an additional checking process could impede straight-through processing of trades, and unnecessarily delay their publication.

Avoidance of duplication

5.8 – 5.22. CESR proposes three options to reduce the risk of duplicated trade reporting:

(1) firms allowed to use only one publication channel;
(2) requirement to report unique trade identifier;
(3) requirement to report time to the millisecond.
CESR does not envisage altering reporting mechanisms' existing anti-duplication arrangements, but states that other mechanisms 'should consider which best suits it and respond to CESR accordingly'.

We think that it would be premature for CESR to intervene at this level of detail before MIFID has been implemented. For CESR to take a realistic view, it would need to have a clear view of how firms are likely to behave, and to assess the implications accordingly. At present, there is no clear view as to the scale of any potential duplication problem, or, if such a problem were to arise, what would be the most appropriate way of tackling it. There may be economic and efficiency drivers that point the market towards an optimal outcome. We think that CESR should monitor the situation, but in the meantime, we think that CESR's conclusion on pre-trade information, set out in Footnote 10, that duplication is not a problem, is also likely to be applicable to post-trade information, subject to our comments under Q6 and Q7 below on the need for sufficient regulatory clarification with respect to the scope and extent of publication obligations. Under the better regulation approach, CESR should not seek to regulate on the basis of a potential market failure. It would be preferable for CESR to observe how MIFID implementation (including Level 2 Regulation Article 27.4) settles down before considering whether further guidance is needed. Given the variation between existing trade reporting systems in the definition of reported trades and means of counting volume, it cannot be presumed that there will be any more duplication of trade reports than at present. CESR should therefore not propose guidance on this issue at this stage.

Q2: Option 1 –
(a) Would publishing each trade to only one publication arrangement help to address our concerns about duplication?
(b) Would this option be sufficient on its own to address the issue, or should it be coupled with another solution?
(c) Rather than being an option, should this option be seen a prerequisite (supported by other requirements),
(d) Would this option limit unnecessarily the choice of publication channels for firms?

For the reasons noted above, we do not think that any regulatory action is needed at this stage to prevent trade report duplication. While publication through a single primary data publisher (either a third party or the firm itself) would enable data consolidators and secondary distribution channels to trace data back to its primary source to ensure that each trade appeared only once in their consolidation, and would not have the system drawbacks of Options 2 and 3 (see comments below), we think that a requirement to publish to only one publication arrangement would risk unnecessarily and harmfully limiting choice of publication channels, and inhibiting the market in transparency information, and should not be a prerequisite.

Q3: Option 2: -
(a) Would a unique trade identifier address our concerns about duplication?
(b) Do you think this is an appropriate solution?

(c) How would the industry achieve this?
(d) In your view, should this only apply to MTFs and investment firms trading OTC or should it also apply to RMs?
(e) What costs would be involved and who would bear them?
(f) Would this solution request a recommendation on a common and single format for the trade identifier?

For the reasons noted above, we do not think that any regulatory action is needed at this stage to prevent trade report duplication. Any system based on unique trade identifiers would need to address the question of how it would maintain uniqueness between firms, as well as within firms, at the same time as enabling firms to maintain their anonymity in the market. Although firms currently use internal unique trade identifiers, significant additional costs would be incurred if they were not able to use these internal numbers, or if there were any requirement to use prescribed formats, or as a result of any externally imposed system to ensure uniqueness between firms. Developing such an infrastructure would require a very substantial market-wide systems development project which would seriously interfere with the MIFID implementation timetable.

Q4: Option 3: -
(a) Would the use of time to milliseconds contribute to the identification of duplicate trades?
(b) Do you think this is an appropriate solution?
(c) How would the industry achieve this?
(d) Are there circumstances where legitimate multiple identical trades (to the detail of milliseconds) could exist?
(e) In your view, should this option only apply to MTFs and investment firms trading OTC or should it also apply to RMs?
(f) What costs would be involved and who would bear them?

For the reasons noted above, we do not think that any regulatory action is needed at this stage to prevent trade report duplication. Furthermore, we do not think that it would be possible to achieve millisecond synchronisation across thousands of computers in hundreds of investment firms across 30 Member States in several time zones. Even if it were possible, to do so, the possibility would remain that transactions of the same size in the same security could be legitimately entered at the same time. Option 3 would also not address double reporting of the two sides of a trade, which might well be entered at different times.

Q5: What is your preferred solution? Do you believe that a combination of these different options is viable? Are there alternative solutions?

For the reasons given in our introductory comments on this proposal above, we do not think that there is a problem that warrants any regulatory action at this stage, and we think that it would be premature for CESR to intervene at this level of detail before MIFID has been implemented. Each of the possible approaches that CESR suggests would have significant drawbacks.

Q6: In your opinion, is the list as set out by the article 27(4) of the regulation sufficient to alleviate confusion over whose responsibility it is to publish a trade

(where there has been no agreement over who should publish)? Is there a need for CESR guidance? If so, in your opinion, what should that guidance cover?

The list provides some clarity but does not fully take into account client reporting abilities or specific exchange requirements. There should be a default rule that an investment manager that executes a transaction with another counterparty may rely on the counterparty to make a trade report on the investment manager's behalf if the counterparty agrees to do so, although such a rule may be overridden by agreement. In addition, market participants may wish to establish arrangements that enable them to identify efficiently which entity has responsibility for making trade reports, although if such arrangements were needed, it would be necessary to examine carefully how to develop them in a cost-effective way.

Q7: Is there a need for CESR to put in place guidance to define more precisely what should be considered as a "single transaction" and a "matched transaction"? Additionally, is there a need to define the "reasonable steps" that firms should take in order to comply with their publication obligations?

There is no need to define "reasonable steps". The last paragraph of Level 2 Regulation Article 27.4 provides important clarity, but it will also be important, to avoid multiplication of trade reports, potentially misleading information, and unnecessary imposition of costs, to enable market participants to ensure that in the case of a chain of intermediations relating to the same end transaction, only the end transaction itself triggers a trade reporting obligation. It should also be clear that only transactions with the same quantity, as well as the same time and price, should be considered 'matched transactions' under Level 2 Regulation Article 27.4.

<u>Third parties</u>

5.27. CESR implies that a third party publication arrangement should identify a systematic internaliser if it has not published aggregate quarterly data on its trades. This is an incorrect interpretation of the Level 2 Regulation. Article 27.2 refers to venue identification (Item 21 in Annex I Table 1). Item 21 requires either the unique harmonised identification code of a trading venue, or the code "OTC". Article 13.2 and Item 20 in Annex I Table 1 require competent authorities to publish unique harmonised identification codes for RMs, MTFs, and central counterparties, not SIs, and specifically distinguishes investment firms, to which a 'unique code' is applied (and Annex 1 Table 2 Item 20 specifically distinguishes between a 'unique harmonised code' and a 'unique code'). Annex 1 Table 1 Item 1 (reporting firm identification) is relevant only for transaction reporting, not trade reporting. It therefore appears that Article 27.2 provides that a SI is entitled to use the acronym 'SI' instead of the code 'OTC', not that it requires the SI to be identified. CESR should therefore delete '(or the identity of the systematic internaliser if it has not published aggregate quarterly data on its trades)', which is inconsistent with the MIFID legislation. (It should also be noted that neither in the case of RMs nor MTFs is the identity of a dealing party identified.)

Contingency arrangements

5.28 CESR states that it 'considers that all entities with a transparency publication obligation should have adequate contingency arrangements…to cover publication and data quality monitoring.'

There is no need or justification for such a specific requirement. Firms already have general obligation for contingency planning. CESR should not impose specific new requirements.

Use of websites

5.29 – 5.33. CESR proposes that publication methods should 'be accessible by automated electronic means in a machine-readable way'; 'utilise technology that facilitates consolidation of data and permits commercially viable usage'; and 'be accompanied by instructions outlining how users can access the information'. CESR opines that a machine readable website would be only marginally more costly than a static website.

Q9. Do you agree with CESR's proposed approach for dealing with static websites?

We do not think that it is necessary to prescribe limitations at this level of detail. It is particularly important not to interfere with the freedoms that MIFID provides, and to take account of the fact that, while MIFID requires firms to make information public , it also provides a reasonable commercial terms condition to enable firms to realise the value of data. Firms also need to be able to take account of the competitive implications of giving access to information to the firms' competitors, and maintain appropriate controls over those who wish to use their systems.

'Push' publication

Q10. In your view is it necessary and reasonable to require firms to 'push' the information out to anyone who wants it via a feed? What additional costs would be involved? Who would bear the costs?

No. Such a requirement would be unnecessary, unreasonable, go beyond what MIFID requires, contradict freedoms that MIFID confers, and interfere inappropriately in the competitive market for information that MIFID provides for. It would also impose a significant increase in firms' costs and the complexity of implementation.

Timing of trade reports

5.34 – 5.35. CESR proposes a strict interpretation of 'exceptional cases'. 'Firms taking up to three minutes to publish…should be able to explain it'.

The approach to interpreting this requirement needs to be consistent across the EEA, because discrepancies between Member States' approaches could lead to abusive conduct. However, it is also necessary to recognise that in some markets publication within three minutes may be as close to real time as it is possible to achieve, and in these cases no explanation should be necessary.

Accessibility of pre- and post-trade information

5.36 – 5.39. CESR proposes an obligation for firms to adopt 'easily accessible publication arrangements'. See our comments on the use of websites (5.29ff above). In order to be consistent with MIFID's provisions on making information available on 'reasonable commercial terms', any such guidance would need to make clear that the firm has the right to demand that, before they have access, seekers of information must agree to the firm's policies, costs, and contractual terms, as defined in an agreement with the firm.

Time of execution of trades

5.40 – 5.44. CESR proposes that a 'trade is concluded/executed (and therefore should be published) as soon as the terms of the trade with regard to price and volume are agreed between the buyer and the seller', not when matched, confirmed, cleared or settled. We think that this is a correct interpretation. It is particularly important in the case of portfolio transactions to wait until the terms are concluded before any trade reporting obligation arises.

Bundling

5.45 – 5.47. CESR proposes that making transparency information conditional on other services 'would not be acceptable'. Any such guidance must not disturb the ability of firms to give rebates on the price of information for their clients: it is important to distinguish between making the provision of one service conditional on taking another service; and varying the price charged depending on other revenues that may be generated.

Publication through 'unknown' mechanisms

5.48 – 5.50. CESR proposes that firms that use 'proprietary publication arrangements or arrangements that are relatively unknown to the market should have a mechanism to inform the market of where to collect their pre- and post-trade transparency information'. CESR 'does not intend to prescribe how', but suggests a press release or other corporate media notification or informing data aggregators directly.' CESR says that firms 'should expect' to inform the competent authority where they publish transparency information.

Competent authorities do of course have the right to know how firms fulfil transparency obligations. However, we do not think that it would be appropriate to impose additional conditions on the right which MIFID gives to firms to use the publication mechanism of their choice. In particular, it would not be appropriate to imply that occasional users of OTC markets cannot execute a trade which is subject to post trade reporting unless they have informed the market where the transparency information is. Such a condition would clearly go beyond MIFID requirements. It would also be particularly important not to impose costly or burdensome expectations on smaller firms,

Q11: Do you foresee any difficulties in aggregators identifying key sources of data?

No.

Q12: Do you have a preferred means by which to identify sources of data/ collection points?

This is a matter which should be left to the market.

Q13: Do you agree with our approach to facilitate the identification of new sources of transparency data?

No. CESR's concerns are based on an expectation that firms will want to conceal data that they are required to publish. Firms, as users as well as providers of data, do not want to hide post-trade information that they are required to publish, so there is no need for such guidance. Furthermore, such an expectation would be more prescriptive than, and superequivalent to, MIFID provisions. It would be particularly inappropriate for pre-trade information, which is useless unless users have trading access to the firm publishing the data.

Publication standards

5.51 – 5.56. CESR doubts there will be commercial incentive for data aggregators to collect information in diverse formats and standards with a larger number of data publishers using different formats and standards. CESR does not intend to mandate specific formats or protocols, but thinks the industry should avoid new standards, and new entrants developing proprietary standards; new entrants should use open protocols and, where possible, ISO standard formats. CESR does not propose to require existing sources of information to change systems and data standards, but encourages them to consider open formats and protocols when making system changes. We think that a prescriptive approach would not be appropriate, and that CESR should leave it to the market to determine these matters. In particular, the proposed different treatment of incumbents and new entrants would risk seriously distorting competition.

Q14. Do you agree with our recommendation to use ISO formats (and reference data where applicable) to ensure consistent publication of transparency information?

ISO formats and reference data are a European convention and there is a strong market incentive to use them where applicable. However, we encourage CESR to leave it to the market to determine the most appropriate standards to use in any particular circumstance.

Q15: Do you agree with our suggested flagging (i.e. C, N and A)?

Yes, although the purpose of the Condition flag is unclear, since it would embrace a range of conditions, such as VWAP, period VWAP, portfolio trades under a single flag, and therefore might reduce the amount of information available.

Q16: Is there a need and appetite for additional guidance on what other trades should be regarded as being determined by factors other than the current market valuation of the share (e.g. cum dividend etc)?

No. This should be left open and flexible.

Structure of information

5.57 – 5.58. CESR proposes that published information 'should conform to a consistent and structured format based on industry standards'.

Q17: Do you agree with our assessment that there is a need for sources of data to have continuity in the structure of the transparency information they publish?

We consider that continuity of structure should be provided by market participants without the need for regulatory intervention. CESR should maintain a watching brief to ascertain whether this occurs.

Amendments to published data

5.59 – 5.62. CESR proposes republication with an 'A' flag as a standard means of signalling an amendment.

Q18: Is re-publication the best approach for dealing with amendments?
Q19: Is 'A' an appropriate flag for amendments?
Q20: This approach implies that publication arrangements would need a mechanism for uniquely identifying trades to allow data aggregators and data users to effectively discard the inaccurate trades. Is this necessary? In your view, would the unique identifier and millisecond options discussed under the 'data quality' section above be effective identifiers?

An 'A' flag would be appropriate for amendments, which should also be back-dated. The number of signals to the market should be as few as possible. There should be enough to alert market participants that they should not rely on such trades as they do on other trades, but no more.

15th December 2006