

Direction

COMMITTEE OF EUROPEAN SECURITIES
REGULATORS

Attn. : Monsieur Fabrice DEMARIGNY

Secrétaire général

11-13, avenue de Friedland

F-75008 PARIS

Notre référence

11634 HGD/AWE

Votre référence

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Subject: **Comments from the Luxembourg Stock Exchange on CESR
Consultation paper
Ref: CESR/05/-267 on possible implementing measures of the
Transparency Directive.**

Dear Mr Demarigny,

We are pleased to provide our comments on CESR's draft technical advice on possible implementing measures of the Transparency Directive.

First, we would like to acknowledge that some of our suggestions made in our comments to the first consultation document were shared by CESR and thus retained in this new consultation document. However, we are concerned by the modifications on the dissemination model which seem tailored made for few for profit entities in order to maintain a de facto monopoly granted at national level in some Member States, at European level.

Question 1:

CESR has added paragraph 18 compared to the previous consultation document. We are not sure that imposing mandatory connections with at least the key national and European newspapers will help to fulfill the criterion of fast access. This reference should be précised and modified with connections to online services of national and European newspapers.

We would welcome a clarification indicating that the chosen connections should be adapted to the nature of the issuer and the type of securities. CESR's approach is more in line with the context of a blue chip equity shares and should be more consistent with the indications given in the mandate. Therefore, some media are much more suited for

disseminating regulated information coming from debt and derivative securities and emphasis should be made on these media.

Question 2:

As mentioned above, we consider that distribution channels should not be mandated because it needs to be broad enough to accommodate different type of situations depending on the nature of the issuer and the nature of the securities.

However, we consider that an explicit reference to electronic dissemination by such distribution channels is necessary in order to comply with the principle of fast access included in the Directive.

Question 3:

Yes, we consider that connection between issuers and media should always be of electronic form but these electronics systems should not be limited to dedicated lines.

Question 4:

We do not favor a specific method as long as the connection is made by an electronic mean in order to keep the chain of distribution as fast as possible, in line with the Directive itself.

Question 5:

No, we consider that it is still not adapted to the need of investors. It is common for large credit institutions to have hundred of different securities listed. Therefore, the only real practical and common tool in order to identify the issuer is in fact identifying the securities through the ISIN code.

Question 6:

The identification number in the companies' registrar is ill adapted for several reasons. Issuers of securities are not always companies (sovereign, supranational, funds, trust...). These systems are heterogeneous and functioned in various manners in Member States. It does not take into account the situation in third countries. Therefore, the ISIN code is the only homogenous, international and common standard.

Question 7:

No. First, we consider that an announcement should be linked to a given security and only after to the issuer. For instance, directors' dealings information is irrelevant for a holder of covered warrants issued by a credit institution with shares listed. The

modification of the underlying basket for this covered warrant is also irrelevant for the holder of shares of such issuing credit institution and relevant for holders of such covered warrants.

CESR has clarified the understanding of the unique announcement identification number but it is still unclear. Who is attributing this number? Does a service provider need to use the number set by an issuer or by another service provider? What is the link between the sequence number and the unique announcement identification number?

We do not favor that CESR proposes to establish a method by which there would be a single and unique number of identifying each announcement without a proper explanation on this concept used by some local service providers. In any case, if standardization is proposed, CESR should reflect on proper retrieval tools. We have doubts that the unique announcement identification number is an appropriate tool for retrieving information on a given security (and not issuer because it will give a flow of not relevant announcements for frequent issuers). As an example, the world leader database of announcements through filing of forms (US Edgar) seems not using this concept.

Question 8:

We would suggest a more elaborate solution in order to provide the basis for the functioning of a database of corporate information and provide solutions for the officially appointed mechanism for storage. As mentioned above, we have doubts that the unique announcement identification number is an appropriate tool for retrieving information on a given security.

Question 9:

We do not agree with the above proposals because paragraphs 28 and 29 are so vague that it is not possible for a service provider to understand its potential obligations. Extensive clarification is needed on the obligation of separation of functions (does it mean that you need to have different IT tools and different data base in order to increase the overall cost for issuers and investors at the end?)

Question 10:

Luxembourg stock exchange is in favor of market led solutions. However, we think that the principle of free competition should not end up with a paradox, by giving a monopoly on an activity to one or several service providers, which are not mentioned or foreseen nor regulated in the Directive (there is no obligation to outsource something that can be done by yourself). An issuer has the obligation to make available to the public its regulated information through an effective dissemination to media. He has not the right to charge investors for the access to this information.

Therefore, we consider that nothing prevents a competent authority to do the same thing. However, we consider that three conditions should be put in place:

- Such competent authorities should be subject to the same standards as the commercial entities offering such services;
- They cannot have at national level an exclusive right for disseminating information, impose issuers to use their services and consider that an issuer has fulfill its obligations by using exclusively this service;
- Such competent authorities cannot be at the same time supervisor and regulator of entities performing such activity when they are also disseminating information to media and investors.

Question 11:

We consider this approach is not compatible with Community legislation. Admission to trading criteria is in the scope of Directive 2004/39/EC (Article 40). Therefore implementing measures related to such rules should be adopted in the context of this legislation. We also consider that Directive 2004/39/EC is not covering such activities (disseminating regulated information is not an investment service in annex 1).

We also consider that such activity is not mentioned in Directive 2004/109/CE and the proposed rule cannot discriminate between different types of for profit organizations. No one is forced to list its securities on an exchange or on a market. There are more than 40 EU exchanges or MTF in competition for listing securities in the EU with different types of admission to trading criteria (you can choose your exchange but not your securities supervisor). The number of different exchanges or trading platforms is much higher compared to the number of specialized service providers. It should be noted that most of these service providers benefit from a de facto monopoly for performing such activities (because US exchanges are mandating the use of such service providers or because it is a regulated activity in some EU Member States and the other types of dissemination are not deemed to be acceptable under national legislation).

We also consider that competition principles should be seen at the media level. The initial obligation is about making information to the public, not about outsourcing the fulfillment of this obligation to someone else. Exchanges are also a classic medium for disclosure of corporate information and for reporting of transactions. This is the initial concept of an official list (a newspaper with such information). Moreover, it will conflict with the various obligations at Community and national levels that mandate the exchanges to publish and/or monitor the publication of such information.

Question 12:

No. We consider that this is a matter of contractual relationship between two for profit organizations, a given medium and a given service provider. We have doubts that this

Directive can offer a legal basis for such kind of obligation. We also do not understand why a for profit organization cannot sell a service to another for profit organization (subject to the conditions set in the contract between the issuer and the service provider). Again, outsourcing a disclosure obligation service should not be organized by Community legislation (common standards for processing the information). We do not think that this requirement will help in anyway the functioning of the Internal Market.

Question 13:

As mentioned, we think it is a matter of contractual relationship between a given medium and a given service provider.

Question 14:

Again, we do not favor discriminating approach based on the type of entities, with different rules for the same function. If such document is required, it should be required to all issuers, exchanges and competent authorities performing the same functions.

Question 15:

No. Level 3 cannot be an additional layer of obligations for activities, which are not regulated at Community level. It might conflict with national legislation, which is expressly authorized by the Directive. Therefore, we consider that potential level three measures should only be addressed to Member States that have already or might opt when transposing the Transparency Directive to regulate the activities of such entities.

We still important legal concerns on the draft technical advice, mentioned in our comments for the first consultation document.

Comments on the draft technical advice:

Comment of the timing for making public information (paragraph 40):

Even though, the Luxembourg Stock Exchange shares the view that price sensitive information should be disclosed 'without delay', we consider, for legal reasons, that CESR should stick to the Community terminology and not impose different requirements from the Community ones.

First, the terminology for the different timing requirements is consistent in the three Directives (Article 6 (1) of MAD: as soon as possible; Article 5 (1) of TOD: as soon as possible and Article 14 (1) in the Prospectus Directive: as soon as practicable).

Second, 'as soon as possible' cannot be defined or understood as 'without delay', not because of the difference of wording, rather because the words 'without delay' were not

adopted and rejected in two out of three of the mentioned Directives. The words ‘without delay’ in the Commission proposal for the Prospectus Directive were rejected by the European Parliament and Council and modified with the words ‘as soon as practicable’ less demanding. During a meeting on the feasibility study for the TOD based on a questionnaire, representatives of Member States rejected the words ‘without delay’ and the Commission changed its mind with a proposal using the ‘as soon as possible’ terminology as agreed for the MAD (terminology coming from Directive 79/279/EC now repealed).

Furthermore, the TOD implicitly indicates that it is possible to delay the information but maximum deadlines for publication of financial statements and thresholds on major holdings are imposed. Therefore, the words ‘without delay’ should be used only for the transmission of information between a service provider and media.

In paragraph 43, we would welcome a clarification indicating that the chosen connections should be adapted to the nature of the issuer and the type of securities. CESR’s approach is more in line with the context of a blue chip equity shares and should be more consistent with the indications given in the mandate. Therefore, some media are much more suited for disseminating regulated information coming from debt and derivative securities and emphasis should be made on these media.

In paragraph 47, we do not consider that newspapers will always fail to meet the criterion of fast access contained in the Directive. This reference should be précised and modified with connections to online services of newspapers. We do not support the mandatory connections mentioned because the minimum chosen connections cannot be chosen depending on the nature of the issuer and the type of securities.

In paragraph 73, we consider that charges related to a service are a matter of contractual relationship between two for profit organizations (a given medium and a given service provider). We have doubts that this Directive can offer a legal basis for imposing that a commercial service should be given for free. We also do not understand why a for profit organization cannot sell a service to another for profit organization (subject to the conditions set in the contract between the issuer and the service provider). We do not understand how CESR can propose that media will have the right to sell a service to end users by using another service that they would get for free.

In paragraph 75, as mentioned above and in our previous comments, we consider that CESR cannot propose to modify article 6 (1) of the Market Abuse Directive.

Comments on Chapter II

In paragraph 90, CESR has decided not to incorporate a definition or a clarification of which entities will be caught by this provision. We consider that non-Community definitions of such activities coming from IOSCO, CESR/ECB and Giovanni group are

broad enough to accommodate any type of interpretation of the scope of entities covered by this provision of the Transparency Directive (functional approach). We support this approach.

Paragraph 100, question 16: We support this clarification.

Paragraph 111, question 17: We support this change.

Paragraph 121, question 18: We support the proposed changes.

Paragraphs 124 and 144: As a matter of legal principle, we do not support the two mentioned administrative measures even if we consider that they are sensible. Nothing in the Directive prescribes the consequences of not disclosing and notifying a major holding because it is left to national discretion. A level 2 measure should not overrule options left to Member States and decided by the European Parliament and Council at level one.

A clear cut should be made between additional measures imposed to market makers and sanctions for breaches of Community provisions, which are two different issues.

Section 3

Paragraphs 166 and 167: We support the changes compared to the initial draft.

Section 4:

We support the approach B retained by CESR.

Section 5:

We support the proposed approach. However, we would propose a limit until 12 am (GMT) to avoid distortions between those notifying before the opening of the market and those waiting until the close of the market.

Section 6:

Paragraph 290, question 9:

We do not support the addition of additional information in the declaration that the parent undertaking because this additional requirement is useless for investors, will add nothing in the understanding of notification of major shareholdings and is of extraterritorial nature.

Paragraph 332, question 20:

In line with our comments for the first consultation document, we do not consider there is a benefit to require a subsequent notification.

Paragraph 340, question 21:

We have no strong views on this issue.

Question 22: We agree with this approach.

Question 23: We consider that no information below the minimum threshold (5% or less depending on the national options at Member States level) is required at Community level.

Question 24: We have strong views on this issue.

Question 25: If the securities identification is required, we strongly support the ISIN code, as it is the only common standard at international level.

On the half-yearly financial report, we would like to recall that we agree that the information requirements should be defined by reference to the principles of IAS 34, but it should be clear that they should be at a less demanding level in order to stay in line with the Directive and cannot be at the level of the national requirements because it was proposed in the level 1 by the Commission and not accepted by European Parliament and Council.

Therefore, a right balance should be made but we consider that the proposed approach is too stringent by setting a level of details too close with IAS 34 content.

Second, we are concerned on the use of some terms in this draft technical advice. It is unclear what is the meaning of a 'misleading' half-yearly report and would welcome significant clarification on this word in order to avoid subjective judgment on this issue, notably on the applicable background for the use of this word (meaning accurate? true and fair view?). We have the same concern of the use of the word 'material' which is

generic and has not the same meaning in the context of accounting legislation (materiality test) or securities European legislation (and even a different meaning between Directives such as the one for prospectuses and the one on market abuse) or in CESR definition of 'material information' in standard FESCO 99 B (which seems also not consistent with current and new EU legislation). We wonder whether, in fact, the intended meaning was 'important', 'significant' or 'major' because it is associated to the words 'event' and 'transactions'. It should also be noted that the word 'important' followed by the word 'events' is used in Article 5 (4) of the Directive on half-yearly reporting.

On the auditor's review of half yearly report, we consider that the draft advice is simply not operational for third countries issuers subject to the obligations of this Directive. There is no indication on which national standards could use the word 'review' in the context of this Directive and therefore qualify for the obligation of disclosure set out in article 5 (5).

Question 27:

We consider the draft technical advice is not flexible enough. We propose to introduce a general principle indicating that when the fulfillment of the equivalence principle will generate a conflict and or a contradiction with the issuer's national legislation, the national legislation will prevail. The aim of the equivalence principle is not to impose EU legislation on an extra territorial basis, rather to maintain an appropriate level of information taking into account their particular situation compared to EU issuers (they cannot be asked the same provisions as EU issuers, notably when it leads to absurd situations compared to their national regime). CESR should always seek to avoid conflict of law and avoid proposing an additional requirement not in line or contradictory with the issuer's national legislation.

On financial statements, we would like to recall that the Luxembourg Stock Exchange answered to CESR consultation paper ref: CESR/04/-509 on equivalence of certain third country GAAP and expressed strong concerns on the approach proposed for assessing equivalence of third countries accounting standards with IAS. We rejected possible remedies based on a case-by-case approach that would definitely drive out third countries issuers from European markets.

We would favor a more relaxed approach authorizing extension of time limits in order to permit third countries issuers to keep in line with their national legislation.

We would also welcome a clarification indicating that for third country legislation ignoring this concept of individual accounts because dividends are calculated and distributed on a consolidated basis and/or there is no minimum capital or equity requirements (at all or at individual level), there is no obligation to give an equivalent information on individual accounts. We consider it is not reasonable to impose equivalence rules for third countries when it is meaningless and conflicting with the

national legislation of these issuers. We consider that the Commission's specific request intends to address this issue.

Question 28:

Yes, we agree.

Yours sincerely,

Société de la Bourse de Luxembourg
Société Anonyme

Axel FORSTER
Membre du Comité de direction

Hubert GRIGNON DUMOULIN
Conseiller de direction