LIBA

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M. Fabrice Demarigny
Secretary General, CESR
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France

Sent via website: www.cesr-eu.org

Our Ref: ian/cesrtransparency2/ACC3/ACC20

Dear M Demarigny

CESR's revised draft Technical Advice on Possible Implementing Measures of the Transparency Directive

We are writing in response to your consultation on CESR's revised draft Technical Advice on Possible Implementing Measures of the Transparency Directive. LIBA is the trade association for investment banks with operations in London. Its objective is to ensure that London continues to be an attractive location for the conduct of international investment banking business. A list of our members is attached (and is also available on our website: www.liba.org.uk).

We are most supportive of the aims of the Transparency Directive and the efforts of CESR to provide useful and enabling advice to the Commission on the mandated questions and issues of implementation of the directive. We much appreciate CESR's consideration of many of the views of respondents to the previous consultation which is evidenced in the changes to the draft advice which have been decided.

We have attached specific answers to many of the questions asked in the latest consultation paper. The most important issues from our members' perspective relate to the scope of the reporting requirements and to the requirements to be met by market makers claiming an exemption from the disclosure requirements of Articles 9/10 (See our answer to Question 17).

With respect to the scope of disclosure concerning large concentrations.of voting rights which is described in draft CESR advice, we are of the view that it is super equivalent to Level 1 to require more than is required in Article 9. There is not a requirement to disclose specific transactions. The directive rather is focussed on a

disclosure of the level of an investor's control of voting rights with reference to specific notification points. It would only be necessary for an investor to disclosure when he has gone through a given prescribed level and his resulting level of control. Further disclosure is not expressly required by the directive.

We have serious concerns regarding the requirements for market makers claiming an exemption which we feel are very likely to complicate the trading and settlement process significantly and to introduce significant additional costs for settlement/liquidity. We believe that there are alternative ways for regulators to overseas compliance with the directive. A more detailed view is given in response to Question 17.

We thank you for your consideration of our views and remain ready to discuss any relevant matter with you, if you would find that useful.

Yours sincerely

William J Ferrari
Director

CESR's revised draft Technical Advice on Possible Implementing Measures of the Transparency Directive

Q1 Do consultees agree with the above proposal? (Page 10)

We have some reservations regarding the proposal as stipulated in paragraph 18 of the consultation paper regarding mandatory media connections. Part of our concern is that the advice, if adopted, will also apply to those – other than issuers – who may obtain an issue's admission to trading without the consent of the issuer. We believe that issuers should be mandated to disseminate required information to the major newspapers in those member states where admission to trading has been arranged by other parties because an issuer's duty extends to all shareholders equally, regardless of the market on which an investor may have acquired the security. Any third party who had arranged the admission to trading should only be responsible for ensuring that the issuer is aware of that fact. It would also be advisable for the CESR advice to require issuers to make the information available to any exchange upon which an issuer is listed on a parity basis with media and newspapers, etc.

Q2 What distribution channels do consultees consider should be mandated? Please provide reasons for the answer (Page 10)

In our view, the major newspapers in those member states where the issuer's securities are admitted to trading should be mandated as dissemination routes for issuers in CESR's advice. Where an issuer makes the regulatory information available on its website, we do not feel that other dissemination routes need be mandated. If the issuer does not undertake to provide own website access, then we would agree that CESR's advice stipulate a choice of alternatives. The natural operation of the markets will tend to create necessary channels of distribution.

Q3 Do consultees consider that CESR should mandate that the connections between issuers (either directly or through a service provider) and media be based on electronic systems, such as dedicated lines? (Page 10)

No. We do not believe that CESR's advice should be to mandate electronic distribution. Such will evolve according to demand.

Q4 Do consultees consider that a specific method should be mandated? Which one? Please provide reasons for your answers (Page 10)

No comment.

Q5 *Do consultees agree with the approach of redrafting the required field of information, as proposed above? (Page 11)*

No comment.

Q6 *Do consultees consider that a specific method of issuer identification should, in addition, be mandated (such as the identification number in the companies registrar or the ISIN? Which of these? Please provide reasons for the answer. (Page 11)*

No comment.

Q7 *Do consultees consider that CESR should establish a method, or some sort of a code, by which there would be a single and unique number of identifying each announcement that an issuer makes, that is valid on a European basis and that could be used also for storage? (Page 11)*

We support this proposal.

Q8 *What methods do consultees suggest CESR should establish? Please provide reasons for the answer. (Page 11)*

No comment.

Q9 *Do consultees agree with the above proposals? Please provide reasons for the answer. (Page 13)*

No comment.

Q10 *When the competent authority is acting as service provider, CESR considers that these competent authorities may not, as stated in the Directive, impede free competition by requiring issuers to make use of their services. Do consultees agree with this approach? Please provide reasons for the answer. (Page 13)*

We agree.

Q11 *When stock exchanges act as service providers, CESR considers that their admission to trading criteria on any of their markets can not mandate the use of their service as a service provider. Do consultees agree with this approach? Please provide reasons for the answer. (Page 13)*

We agree.

Q12 Do consultees agree that media should not be charged by service providers to receive regulated information to be disseminated by them? Please provide reasons for the answer. (Page 13)

No, we do not agree that service providers should be prevented from charging media for providing regulatory information. That would remove any basis for a service provider to profitably conduct its business. A service provider cannot be expected to be a cost-free conductor of information.

Q13 Do consultees consider that it is possible, on a commercial basis, to mandate that media receive regulated information for free from service providers? Please provide reasons for the answer. (Page 13)

See answer to Q12

Q14 Do consultees consider it useful and practicable to require a document from service providers showing how they meet the dissemination standards and requirements? Please provide reasons for the answer. (Page 14)

We do agree that a statement by a service provider which sets forth the means by which it will accomplish a specified dissemination plan would be useful, but such would normally be part of any contract negotiation between the issuer and the service provider. The terms of the contract itself or a summary of the contract's terms done by the issuer would also suffice for regulatory purposes. Issuers should be given a choice as to how to document their compliance with their dissemination duty and be in a position to provide underlying details and documents.

Q15 Do consultees consider that CESR should undertake, at level 3, future work on how to address the concerns raised on how approval of operators is to work, even if approval is not mandatory? Please provide reasons for your answer. (Page 14)

Since approval of service providers will not be mandated, it should not be necessary for service providers to ensure that the approval of one member state be accepted in another member state. Another way of stating this is to say that no competent authority should be in the business of assessing the acceptability of any service provider unless it is the home competent authority of the issuer (or in certain cases the host competent authority). In our view other competent authorities should be discouraged from approving service providers because such non essential approval will then be a competition/selling point. Moreover, any approval would have to specify which service package of the provider is approved, and changes to that package would have to be notified to the competent authority. It would entail a complicated process which would add little to competition among service

providers but which would possibly ossify dissemination rather than promote new and more efficient means of dissemination.

Q16 Do you agree with this change? Please give reasons for your answer.(Page 26)

We do strongly agree with the change that clarifies and narrows the concept of intervention in the management of the company. The effect would properly allow market makers to exercise other rights of ownership which do not directly breach the requirement not to intervene in the company's management.

Q17 Do you agree with this change? Please explain. (Page 27)

Based on the statements made by CESR representatives at the public hearing on 19 May, we agree that an investment firm acting as a market maker needs to identify activities which it is conducting with an issuer which are different from its market making activities with that issuer. We would suggest that "different activities" be restated as "different non-trading activities" e.g. corporate advisory work', investment banking, lending etc. Such were cited by CESR's representative at the public meeting in Paris on 19 May. In this way it will not be necessary to separate types of trading activities which is CESR's intent according to paragraph 108. This would also be complementary to the authority of a Member State to allow a general trading exclusion of up to 5% of outstanding shares/voting rights.

With respect to paragraph 133 c) of the draft advice, we consider that the requirement to hold shares "subject to" market making in a separate account from other shares which may be used for other trading activities would greatly complicate the clearing and settlement of transactions and result in a significant increase in the costs of settlement. The benefit to such a measure in terms of regulatory oversight would not be substantial.

More specifically, an investment firm would be required to bifurcate trading activities in each issue into market-making and "other" trading in order to separate "market making" shares from others. Most firms do not separate trading activities in that way now and would consider it to be an artificial distinction. In fact, market making often leads directly to other types of trading. Keeping separate trading accounts would complicate trading records. Further there would have to be interaction between the accounts at times. As these trading activities were done in the separate trading accounts, there would be parallel clearing and settlement activities in the accounts reflecting share movements. The process of clearing and settlement would also have to be bifurcated. The result would be duplication of accounts, processes, and interaction between the trading and clearing/settlement accounts for market making and other trading. Lastly, the reconciliation of accounts will be more onerous and more complicated because of the necessary duplication of accounts for trading and clearing/settlement.

We propose that the requirement for holding market making shares separately be withdrawn. Market makers will be required to identify non-trading activities undertaken with respect to any issuer for which an exemption is claimed. Market makers cannot vote shares if they wish to claim the exemption, and issuers will be in a position to identify and report any market maker attempting to influence the management of a relevant issuer by asserting its holdings in that issuer. A competent authority will be able to independently review trading activities and relate inventory positions to the voting of shares, if any, and to other activities with an issuer where over 5% of votes are controlled by a market maker.

Our view is that the complicated and costly proposal to hold shares separately is not necessary for regulators to oversee compliance with the directive.

Q18 Do you agree with the proposed changes to this advice? Please explain.(Page 28)

No, we do not agree that a market maker should have to notify the competent authority with respect to each security for which it holds itself out or may hold itself out as a market maker. A declaration of general status as a market maker should suffice. By definition a market maker may not vote shares it holds as a market maker or otherwise influence management of the issuer. Any holder of 5% or more who wishes to vote shares or influence management will have to show that it has reported its control of voting powers, failing which it will have violated the transparency directive.

Trading desks and market makers are opportunistic by definition. The decision to be a market maker is often taken as a result of a customer order or position and may not involve any special relationship with an issuer. In view of the failsafe method of identifying breaches by focussing on the voting of large shareholders, it seems unnecessary to require specific notices by issue to obtain an exemption.

Q19 Do you agree with this change in the content of the declaration that the parent undertaking has to make? Please explain. (Page 53)

No comment.

Q20 Do you consider there to be any benefit by CESR retaining its original proposals and requiring a subsequent notification from the parent undertaking when it ceases to meet the test of independence? (Page 57)

We concur with CESR's decision not to require parent undertakings of investment firms or management firms to formally declare when they cease to

qualify under the test of independence vis a vis their subsidiary investment firm or management firm.

Q21 What are your views on this new definition of indirect instruction? (Page 58)

At CESR's public hearing on 19 May 2005 in Paris, CESR's representative indicated that the proposed change is intended to clarify that an "indirect instruction" must by its literal terms limit the discretion of a management company or investment firm to vote shares. The words "regardless of form" refer to format or distribution type e.g. letter, policy, e-mail, etc. We accept the new definition with the understanding that the literal wording must restrict/limit the subordinate company's discretion in voting the shares – and may not be vague or unclear – in order to be considered an indirect instruction which negates the independence of the management firm or investment firm. As paragraph 340 of the consultation paper states, an indirect instruction by definition must serve a specific interest of the parent undertaking in order to negate the independence of the subsidiary firm.

Q22 Do you agree with this approach in relation to Article 12 (1) (d)? Please give reasons. (Page 62)

We agree that only those shareholders with 5% or more of voting rights of an issue need to be identified by name.

Q23 What do you think the resulting situation information disclosure should be when the notification is of a holding below that of the minimum threshold? (Page 63)

Our view is that the disclosure of movement below the 5% level of voting rights need only be stated as a fact and that there is no need to state the exact level of voting rights held or controlled below the 3% level.

Q24 Should the standard form for all notification requirements include some form of issuer identification number? Please give your reasons. (Page 63)

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Q25 Should CESR mandate what form this security identification should be in? If so, please state what the standard should be and why. (Page 63)

No comment.

Q26 Do you agree with these principles?(Page 93)

No comment.

Q27 *Are you satisfied with the draft technical advice considering both the need for flexibility and the requirements of the text of the Directive? (Page 101)*

No comment.

Q28 *Do you agree with the proposal that an issuer should make a notification when it chooses its competent authority? (Page 110)*

Yes, we agree with the proposal that an issuer should publish a notification when it chooses a competent authority for purposes of the Transparency Directive.

LONDON INVESTMENT BANKING ASSOCIATION

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