



Brussels, 24th May 2005

**Comments by the EACB regarding
CESR's revised draft Technical Advice on possible
implementing measures of the Transparency Directive**

The European Association of Cooperative Banks (EACB)¹ is pleased to provide CESR with its reactions to some of the questions raised in the second consultation round regarding CESR's revised draft Technical Advice on possible implementing measures of the Transparency Directive:

GENERAL REMARKS:

The EACB welcomes the fact that CESR has taken into consideration many comments to the previous consultation paper and has made consequent amendments to the draft Technical Advice for level-2 measures. Thus, it is positive that under the new proposal, Market Makers that want to use the exemption provided under Article 9 Paragraph 5 do not have to set up Chinese Walls in order to be considered as being independent in their market-maker-activity (see paragraphs 108 and 109). Also, apparently there is no longer a notification requirement below the 5%-threshold foreseen in Article 9 (see paragraph 370). Moreover, the amendments of the implementing measures with regard to Investment Banks seem to go into the right direction. We have the following general remarks:

Half-yearly financial reports (Chapter III)

As a general comment the EACB underlines that there should not be disclosure requirements exceeding those already foreseen in the existing IAS/IFRS, in order to avoid inconsistencies and unnecessary duplication.

¹ The European Association of Co-operative Banks represents over 4.500 co-operative credit institutions active in all the EU Member states and serving over 100 Million customers. Its member organisations are decentralised national networks of small-sized Co-operative banks' networks, which have a strong presence on a local or regional level. They account for a large part of the SME and private household credit market (17%) and thus play a crucial role within the Internal Market.



Who should make the notification under Article 10 (see paragraphs 174 to 181)

In its previous consultation paper dated December 2004, a variety of approaches with regard to determining who should be subject to notification requirement under Article 10 had been proposed. The EACB supported approach A, as it is the only approach covered by the wording of the Directive. Moreover, approach B would occasion a non-negligible number of additional and hardly relevant notifications. The current consultation document no longer proposes two options but basically interprets Article 9 and 10 along approach B as suggested in the December consultation paper (pages 43 – 44). In the following, we would like to emphasize the reasons for our disagreement with this approach:

Estimates have been made that in practice, this approach would lead to twice as many notifications than if approach A was chosen, most of which would be either misleading or irrelevant. This appears clearly from paragraph 181, where a dissenting view by a CESR member is illustrated. Due to the interpretation of Article 9, as proposed by CESR, the owner of voting rights intending to give proxy would be treated as if he sold his shares. This would lead de facto to a notification of voting right proxies and to distorting information to market participants in the run-up to general assemblies. Clearly, the multiplication of notifications would in this case not contribute to more transparency. Furthermore, such a notification requirement could render proxy voting additionally unattractive, as there will be legal uncertainty in individual cases whether the proxy falls under Article 10.h or has to be notified.

Moreover, there are legal considerations against the interpretation under paragraphs 174-178. The wording of Articles 9 and 10 are clear, consequently there is no need for interpretation. Article 10 is concerned with the exercise of voting rights. Thus, only those persons are to be notified who are entitled to purchase, sell or exercise the voting rights. According to Article 9, in turn, only those persons are subject to notification, who reaches, exceeds or falls below one of the specified thresholds by acquisition or disposal of shares. If CESR interprets Article 9 in paragraph 178 in a way that persons according to Article should also be subject to notification if he acquires or disposes of voting rights without acquiring or disposing of shares, this would not in accordance the wording of Article 9.1. A similar situation regards Article 9.2, since the wording “events changing the breakdown of voting rights” is restricted to such events as an increase of share capital, as only in such cases, there would be a change of percentage of voting rights per share and this of the “breakdown of voting rights”.

But even an interpretation of Articles 9 and 10 would only confirm their wording. In Article 89.1, which regulates the notification requirements of major holdings, of the previous Directive 2001/34/EC, the acquisition or disposal of “holdings” are mentioned, rather than the “holdings of voting rights”. Therefore, it does not appear “clearly”, as mentioned by CESR, that Article 9 of the Transparency Directive intends to regulate not only the acquisition and disposal of shares, but also that of voting rights. In conclusion, it would appear that CESR goes beyond its Level-1-mandate in its Revised Draft Technical Advice on pages 43 - 44.



The circumstances under which the shareholder, or the natural person or legal person referred to in article 10 should have learnt of the acquisition or disposal of shares to which voting rights are attached (Sec. 5)

We continue not to be convinced by the Advice given under paragraph 269, according to which that a natural person is deemed to have knowledge of the acquisition or disposal or the possibility to exercise voting rights on the day after the transaction was actually executed. In this respect, we entirely support the dissenting opinion of one CESR member, which is expressed in paragraphs 258-260. We refer to our answer to question 14 of the December consultation paper in our last position paper, in which we underlined that the value date rather than the order execution date should be retained as a realistic point in time at which the investor should have learnt of his acquisition or disposal of shares. Sticking to the order execution date would mean in substance that the notification period would begin before the requirement, to which the period refers, would actually have materialized.

Moreover, it appears questionable, whether the definitions for execution of transactions, now proposed by CESR, provide the necessary legal certainty. This is certainly the case with regard as far matching on regulated markets is concerned. It is however questionable that the notion of „Meeting of the minds“ for transactions outside regulated markets will provide a concrete timing reference for notifications of persons subject to notification requirements. The notion is vague and gives all parties great discretion and, in the end, might not contribute to reaching the harmonization target. Therefore it would be useful for legal certainty if for transactions outside of regulated markets the transaction would only be considered as being executed when the acquirer has actually become the owner of the share.

Information according to the Prospectus Directive

It is unclear whether CESR continues to uphold its proposal for issuers to supply the central storage mechanisms with information to be published under the prospectus Directive (see paragraph 652), in which case we would continue to disagree with the proposal (see our position paper regarding CESR's second consultation paper). There is no obligation arising for the issuer either of the Transparency or the Prospectus Directive to supply the central storage mechanisms with the information required by the Prospectus Directive. On the contrary, Articles 21 and 22 of the Transparency Directive would rather stipulate that such an obligation does not exist. While Article 22 of the Transparency Directive expressly includes the information to be published under the Prospectus Directive for the purpose of setting up an information network, Article 21.1 first sentence only focuses on regulated information and precisely not on information under the Prospectus Directive. This decision by the legislator on Level 1 of the Lamfalussy-Procedure for the Transparency Directive, and which corresponds to the Commission's proposal, should not be ignored by the Commission on Level 2 or by guidelines regarding Article 22. We therefore emphasize that it should not be up to the issuers to shoulder the costly process of providing the central storage mechanisms with information required by the Prospectus Directive, when this does not constitute an obligation under Level 1, especially since a “one-stop-shop” for investors could also be set up with other means.



DETAILED REMARKS:

Chapter I: Dissemination of regulated information by issuers

Q1: Do consultees agree with the above proposal?

We disagree. The decisive criterion is the pan-European dissemination of regulated information. As long as this is ensured, it does not matter which particular media receive the information, and it would not seem acceptable, to curtail the flexibility of the issuer and the service provider through such a proposal.

Q2: What distribution channels do consultees consider should be mandated? Please provide reasons for the answer.

CESR should not prescribe any distribution channels (see answer to question 1).

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?

We disagree. In particular, CESR should not require that dedicated lines be maintained between media and issuers. Such a cost-intensive solution is not necessary, as nowadays information can be sent quickly and safely over the Internet. It should however be ensured that there is sufficient protection for price-sensitive information to be sent over the Internet. The practical arrangements should be left to the respective parties and will be largely self-regulated due to market forces. We are nevertheless in favour of the possibility to make use of this option as a means of electronic data transmission to media and operators.

Q4: Do consultees consider that a specific method should be mandated? Which one? Please provide reasons for your answers.

We disagree, see answer to question 3.

Q5: Do consultees agree with the approach of redrafting the required field of information, as proposed above?

We agree.



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

We disagree.

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.

CESR should not regulate who would have to carry which expenses. The negotiation of such aspects should be left to the contract parties, in other words the issuers, the service providers (if applicable) and the media.

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.

See answer to question 12.

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.

Such a document could be useful for the issuer, if it could prove with regard to any potential supervisory procedure that the issuer has undertaken necessary steps to transmit regulated information to the media. If this purpose is not fulfilled, any arrangements for such a document should be left up to the contract parties.

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.

We agree that it would be useful to have an understanding among CESR-Members at Level 3, that a service provider approved in one Member State would also be recognized in the remaining Member States. This would contribute to the legal certainty of both the service provider and the issuer making use of the service provider.



Chapter II Notifications of Major Holdings of Voting Rights

Section I: The maximum length of the short settlement cycle for shares and financial instruments if traded on a regulated market or outside a regulated market and the appropriateness of the „t+3 Principle“ in the field of clearing and settlement

We are not convinced of the advice under paragraph 91, according to which t+3 should also be applicable outside of regulated markets. Due to freedom of contract, parties to such transactions usually fix settlement periods on a case-by-case basis. Therefore, the exemption under Article 9.4 should have validity for the whole settlement period agreed between the parties or for a longer period of e.g. 10 days. Otherwise, misleading notifications would occur, as the person acquiring the shares for the purpose of clearing and settling does not have any interest in exerting influence on the issuer's management.

We hope that our comment will be taken into consideration when CESR drafts its final advice. In any case, t+3 should not just be retained for shares traded outside of regulated markets on the grounds of lack of consistency of alternative proposals (see paragraph 78).

Section II: Control mechanisms to be used by competent authorities with regard to market maker and appropriate measures to be taken against a market maker when these are not respected.

Q16: Do you agree with this change? Please provide reasons for your answer.

We agree. The wording “any of the rights attached two shares” can be related to many other rights than voting rights, which have nothing to do with exercising influence on the issuer. Therefore, it does make sense to specify these rights as being “voting rights”. Other ways of exerting influence on the issuer than through the exercise of voting rights are covered by the wording “to use the shares to influence the management of the issuer concerned”.

Q17: Do you agree with this change? Please explain.

We particularly welcome the clarification that Market Makers wishing to take advantage of the exemption under Article 9.5 do not have to establish Chinese Walls. Under paragraph 110, it is stipulated that proof that there are no conflicts of interest is to be brought by identifying the different activities. Since this proof has to be established in the framework of an audit or on request by the respective authorities, we would suggest reformulating “identified” as “identifiable” or “identifiable on request”. This would be a better reflection of the Market Maker's obligations.

Q18: Do you agree with the proposed changes to this advice? Please explain.

We agree.



Section 6: The conditions of independence to be complied with by management companies, or by investment firms, and their parent undertakings to benefit from the exemptions in articles 12(4) and 12(5).

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?

We disagree. We entirely agree with the considerations in paragraph 331 and support the proposal made by CESR in paragraph 332. The respective supervisory authorities would already be informed through notification, that undertaking is no longer taking advantage of the exemption. An additional “positive” notification would not represent added value.

Q21: What are your views on this new definition of indirect instruction?

The new, narrower definition of indirect instructions would appear to be practicable.

Section 7: Standard form to be used by an investor throughout the community when notifying the required information

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

We agree with CESR’s proposal, since a notification requirement under the Transparency Directive would only be triggered once the 5%-threshold would be reached, exceeded or fallen below of.

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?

The required information disclosure in these cases should only be restricted to the fact that the holding has fallen below the 5%-threshold. Any requirement to disclose the resulting percentage would represent a notification requirement below the 5%-threshold, which is not foreseen by the Directive. The Directive considers that holdings below the 5-% threshold are not relevant to the market. Therefore, this information is not necessary.



Chapter IV: Equivalence of Third Countries Information Requirements

Q26: Do you agree with these principles?

According to the approach chosen by CESR, the central criterion for assessing equivalence of company information is the investors need for information. Information provided by third countries, which are to be considered as being equivalent, would have to provide the investor a basis for decision, which fulfills standards comparable to EU transparency requirements. We approve of this approach. It is consistent with the principles laid out in the „Draft Technical Advice on Equivalence of Certain Third Country GAAP“².

² See CESR/05-230: www.CESR-EU-org .