Response to CESR's Revised Draft Technical Advice on Possible Implementing Measures of the Transparency Directive

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Introduction

Deutsches Aktieninstitut e.V. is the association of German exchange-listed stock corporations and other companies and institutions which are interested in the capital markets with a particular focus on equity. Its most important task is to promote the acceptance for equity among investors and companies.

The BDI is the umbrella organisation for a total of 35 industrial sector associations and groups of associations in Germany. It represents the interests of 107,000 enterprises employing 7.7 million people.

We welcome that CESR's draft advice reflects a number of comments made by market participants in connection with CESR's Consultation Paper of December 2004 on level 2 measures under the Transparency Directive and that, in respect of some items, CESR has chosen a pragmatic approach. However, there are still some crucial points which we would like to ask CESR to consider when drafting its final advice. This includes in particular the following aspects:

- CESR's interpretation of Articles 9 and 10 of the Transparency Directive should be revised. The Transparency Directive will need to be implemented into national law and, in our view, CESR has no mandate to favour a certain interpretation of Articles 9 and 10 of the Transparency Directive. This is in particular important since, in our view, the interpretation favoured by CESR in paragraphs 174 et seq. of the Consultation Paper are not in line with the systematic relation between Articles 9 and 10 of the Transparency Directive and the legal

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functions of these articles (see our comments to Chapter II, Section 4 below).

- We still believe that market participants should not be required to make any notifications in relation to the disposal or acquisition of shareholdings before the transfer of ownership has actually taken place. A market participant should not have learnt about a holding before it has actually become a holder of the shares.

Our comments to CESR's Consultation Paper on revised draft technical advice on possible implementing measures of the Transparency Directive are as follows:

Chapter 1 Dissemination of Regulated Information by Issuers

Question 1: Do consultees agree with the above proposal?

No, we strongly disagree with the proposal that any possible media which are active in the area of disseminating information are made mandatory. Issuers should be free in determining which media they choose.

If CESR insists on making certain specific media mandatory, then it should create a "safe harbour" by clearly specifying a limited (!) number of media, the use of which relieves issuers from their dissemination obligation. The current proposal is however too broad and unclear to serve as "safe harbour".

Question 2: What distribution channels do consultees consider should be mandated? Please provide reasons for the answer.

We do not envisage any distribution channels being mandatory. This should be subject to competition and the issuers' choice (see our response to question 1). If a very limited number of distribution channels is made mandatory or can be made mandatory at national level, then the use of such distribution channel is acceptable, and would make sense, only if, by using such mandatory distribution channel, issuers will be relieved from their dissemination obligation ("safe harbour").

Question 3: 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?

No, maintaining dedicated lines should not be mandatory. See also our responses to questions 1 and 2.

Question 4: Do consultees consider that a specific method should be mandated? Which one? Please provide your answers.

No, see our response to questions 1 to 3.

Question 5: Do consultees agree with the approach of redrafting the required field of information, as proposed above?

Yes.

Question 6: 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.

No. While we believe that the securities identification number will in many cases (in particular where the shares of the issuer are listed on a stock exchange) be the adequate identification method, we agree with CESR that parties involved are in the best position to decide which means of identification are most appropriate for the relevant company.

Question 7: 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?

No, the name of the issuer, the type of announcement and its date should be sufficient to identify and store the announcement. Any additional numbering or codes would create additional bureaucracy which, in our view, is not needed.

Question 8: What methods do consultees suggest CESR should establish? Please provide reasons for the answer.

See our response to question 7 above.

Question 9: Do consultees agree with the above proposals? Please provide reasons for the answer.

Yes. It is in the interest of both issuers and the transparency of the market that regulated information is disseminated by all relevant media at the same time and that there are no media which receive regulated information for dissemination in advance of competing media.

Question 10: 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.

As indicated in our responses to questions 1 to 3, the mandatory use of one official service provider (as contemplated by the German Ministry of Justice for regulated information other than ad hoc announcement) might be an option from an issuer's perspective provided that issuers are relieved from their dissemination obligation by making the relevant information available to such mandatory service provider. However, while such concept might be in line with the wording of Article 21(1) of the Transparency Directive if pan-European dissemination by such official service provider is ensured, the last sentence of Recital 25 of the Transparency Directive seems to constitute an argument in favour of the approach taken by CESR.

In any event, whatever approach is taken, it has to be ensured that issuers are not obliged to use both a mandatory governmental service provider and, in addition, competing media/service providers as contemplated by CESR.

Question 11: 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.

Stock exchanges should not be able to require the use of their services as a service provider as a condition for admission to trading.

Question 12: 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 propose any rules in relation to the cost allocation between the parties involved. This should be subject to negotiation between issuers, service providers and media.

Question 13: 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 our response to question 12.

Question 14: 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.

We understand that the intention of having such document is that issuers should be in the position to provide evidence to the competent authorities that they have chosen an eligible service provider for the required dissemination of information and that therefore they are not liable in administrative proceedings in case that such dissemination did, for reasons in the sphere of the service provider, actually not take place. If this understanding is correct, such mandatory document would be useful. Otherwise, this matter should be left to the arrangements between issuers and service providers.

Question 15: 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.

Yes, we agree. Mutual acceptance of approvals of service providers among different Member States should be addressed at level 3.

Paragraph 58:

As indicated in our response to the Consultation Paper of October 2004, issuers should not be subject to the same dissemination standards as operators. The standards applicable to issuers should be clearly defined and not be made subject to an "in particular"-list. A number of the standards applicable to operators are not appropriate for issuers. Most importantly, if this matter is left to level 3, it should be ensured that, at level 3, issuers are not made subject to all standards applicable to operators and that the list of requirements for issuers specified as "in particular"-requirements is exhaustive.

Chapter II Notifications of Major Holdings of Voting Rights

Section 1: 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

CESR proposes that the T+3 settlement cycle not only apply to trades executed on a regulated market but also apply to OTC transactions. The main reason for not adopting a different time period for OTC transactions seems to be that there was no consistency in the responses (paragraph 78 of the Consultation Paper) which should however not be a decisive argument. In fact, CESR's proposal would result in either misleading notifications by banks

which act as settlement agent without any interest in a holding of shares or in an inflexibility of market participants in structuring an OTC transaction because of the T+3 criterion.

Therefore, we strongly suggest that CESR revise their proposal in their final advice to the effect that either the settlement period between the parties in accordance with market practice or, if CESR prefers a specific figure for a maximum settlement cycle, a longer time period of, for instance, 10 days should apply.

Section 2: 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

Question 16: Do you agree with this change? Please give reasons for your answer.

Yes, we agree with this change. For transparency purposes and the notification requirements under Article 9 and Article 10 of the Transparency Directive, solely the voting rights are of relevance. The exercise of other rights attached to shares should therefore not affect the exemption for market makers. Any other form of influence on the company is covered by the requirement that the shares may not be used to influence the management of the issuer concerned.

Question 17: Do you agree with this change? Please explain?

Yes, we agree with this change.

Question 18: Do you agree with the proposed changes to this advice? Please explain.

Yes, we agree with the proposed changes.

Section 4: The Determination of who should be Required to Make the Notification in the Circumstances set out in Article 10 of Transparency Directive

In our response to the Consultation Paper of December 2004, we expressed the view that, in line with the heading of Article 10 of the Transparency Directive, we cannot exclude that a disposal of voting rights might, in certain circumstances, trigger a notification requirement (based on the assumption that, in certain scenarios, an actual disposal of voting rights might, in fact, occur). However, we in particular emphasised that, as an overriding principle, CESR should ensure that no misleading notifications are to be made by issuers .

Given the example set out in paragraph 181 and upon further reflection, we strongly disagree with the prevailing view within CESR that a shareholder who gives a proxy in relation to the exercise of voting rights should be subject to a notification requirement although such shareholder does not dispose of the shares. In this case, the shareholder only gives a proxy which can be changed or withdrawn at any time but he does not dispose of his shares nor of his voting rights. If this triggered a notification requirement for the relevant shareholder, this would obviously violate the overriding principle emphasised by us that no misleading notifications should be triggered and clearly shows that the interpretation and the objective of Article 10 of the Transparency Directive still require further thoughts.

Articles 9 and 10 of the Transparency of Directive are designed to ensure transparency in relation to holdings which involve the power to influence the business of the issuer and to ensure that the market receives "early warnings" if anybody is in the process of "collecting" shares and voting rights with the aim to take control over a company. Given this specific objectives, Article 9 covers the "normal" acquisition and sale of voting rights by way of buying or selling shares to which such rights are attached. Article 9 therefore deals with the standard scenario. By contrast, Article 10 is clearly designed to protect the market against the building-up of "voting power" outside Article 9. Article 10 is designed to ensure transparency with respect to persons who acquire or dispose of voting rights in certain manners without being a shareholder. Thus, Article 10 constitutes additional notification requirements beyond Article 9 to fill gaps of transparency which would otherwise exist. However, Article 10 does NOT disapply Article 9 to the effect that, if a shareholder has, as such, voting rights, such shareholder may be deemed to dispose of his voting rights although he has not sold the shares and to acquire new voting rights if the relevant proxy is terminated.

These separate functions of Article 9 and Article 10 of the Transparency Directive is fully reflected in their respective wording. Article 9(1) expressly refers to the acquisition and sale of shares and holdings (and NOT to voting rights as implied in the last sentence of paragraph 178 of the current Consultation Paper). There is no room for amending, for instance, level 1 at level 2 by replacing the term "shares" with the term "voting rights". Of course, voting rights and the corresponding power are typically attached to shares and this is the reason why their acquisition and sale is subject to a notification requirement. This power does, however, not cease to exist if a shareholder temporarily allows a third person to exercise the relevant voting rights in certain cases.

It would, therefore, be misleading and trigger in practice an enormous number of odd notifications (in Germany, it is expected that the number of notifications would increase from 4,000 to 8,000) if CESR followed its currently prevailing view that Articles 9 and 10 of the Transparency Directive should,

in substance, be merged rather than be distinguished in light of their specific purposes.

Section 5: The Circumstances under which the Shareholder, or the Natural Person or Legal Entity Referred to in Article 10, should have Learned of the Acquisition or Disposal of Shares to Which Voting Rights are Attached.

As set out in our response to the Consultation Paper of December 2004, the notification requirement set out in Article 9 of the Transparency Directive relates to shares held (!) by a shareholder. Hence, he cannot have learnt of such holding before he in fact is the holder, i.e. owner of the shares. Therefore, Articles 9 and 12(2)(a) of the Transparency Directive imply that the transfer of ownership should be decisive. As a general rule, the time period for making a notification should not commence before the point of time when ownership of the shares has been acquired. Otherwise, there will, in many case, be a lack of legal certainty as to when a shareholder should have learnt about the acquisition or disposal of shares.

While we believe that, for obvious logical reasons, the transfer of ownership is the earliest point of time at when a shareholder may learn about its holding of the shares, we agree that, from a practical point of view, in case of share transactions executed through an exchange, the execution of a trade may also provide sufficient legal certainty provided that, as in paragraph 252 of the current Consultation Paper, the execution time is expressly defined as the point of time when the matching of the orders occurs. The transfer of ownership will normally take place within two or three business days so the time between execution and transfer of ownership is relatively short and in normal circumstances there is almost certainty that a transfer of ownership will occur.

This is however different in case of transactions executed outside the exchange. CESR therefore suggested that, in line with civil law concepts applicable in some jurisdictions, the time of the meeting of minds shall be decisive. This would, however, result in legal uncertainty in other jurisdictions where this concept may result in misleading and superfluous notification requirements where an actual transfer of shares never has taken place. Given the uncertain interpretation of the term "meeting of the minds" in different jurisdictions, neither harmonisation can be achieved nor legal certainty. These concerns are already described in detail in paragraphs 258 to 263 of the present Consultation Paper. Therefore, at least in the case of transactions executed outside the exchange, the point of time when a shareholder should have learnt about his holding should not be earlier than the point of time when the transfer of ownership has taken place. Otherwise, in particular where the acquisition or disposal of shares is subject to conditions, notifications would be triggered although no acquisition or disposal has ever occurred.

<u>Section 6:</u> 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)

Question 20: Do you consider there to be any benefit by CESR retaining its original proposals and requiring a subsequent notification form the parent undertaking when it ceases to meet the test of independence?

No, we agree that, if a parent undertaking ceases to benefit from an exemption, it becomes subject to the applicable notification requirements as any other shareholder. We therefore agree with CESR's proposal set out in paragraph 332.

Question 21: What are your views on this new definition of indirect instruction?

We in principle agree with the new definition of "indirect instruction". However, we think that it should be clarified in the wording of the definition that this term only covers instructions which limit the discretion of the management company in relation to the exercise of the voting rights in order to serve specific interest *in connection with the relevant shares or the issuer of such shares* ....". This ensures that, for instance, general guidelines of a financial group (including management companies) in relation to corporate governance would not fall within the definition of "indirect instructions".

<u>Section 7:</u> Standard Form to be Used by an Investor Throughout the Community when notifying Required Information

Question 22: Do you agree with this approach in relation to Article 12(1)(d)? Please give reasons.

Yes, we agree with this approach. A notification requirement will only be triggered if the 5 % threshold is met and only such holdings or voting rights are of relevance.

Question 23: 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 principle of transparency only requires the disclosure of holdings which exceed the minimum threshold. If a holding falls below the minimum threshold of 5 %, the resulting figure is of no relevance for the market and therefore the resulting situation information should be limited to the fact that the relevant holding is now below 5 % (and not the specific amount of its holding).

Question 24: Should the standard form for all notification requirements include some form of issuer identification number? Please give your reasons.

It is not necessary to create a specific identification number for notification purposes. However, it could be useful to include the securities code in the standard from to identify the relevant company.

Question 25: Should CESR mandate what form this security identification should be in? If so, please state what the standard be and why.

See our response to question 24 above.

Chapter IV Equivalence of Third Countries Information Requirements

Question 26: Do you agree with these principles?

Yes, we agree with these principles.

Chapter V Procedural Arrangements whereby Issuers may Elect their "Home Member State"

Paragraph 660:

As already mentioned in our comment to paragraph 632 of the Consultation Paper of December 2004 we strongly disagree with the proposal that issuers should be obliged to make all relevant information under the Prospectus Directive available to the central storage system. There is no legal basis in the Transparency Directive nor in the Prospectus Directive for such requirement the fulfilment of which would be burdensome and costly for issuers. Neither the Transparency Directive nor the Prospectus Directive provide that the scope of Article 21 of the Transparency Directive should be extended to information to be published under the Prospectus Directive. Issuers should not be required to disseminate information to be published under the Prospectus Directive on a pan-European basis and to send this to central storage mechanisms. CESR does not have any mandate to propose such requirement nor is there any authorisation at level 1 for such regulations at level 2 or for any guidelines to this effect pursuant to Article 22 of the Transparency Directive.

Level 1 cannot be amended through Level 2. Further, Article 22 of the Transparency Directive already contemplates such network of security regulators, operators of exchanges and commercial registers. In sum, there is therefore no legal basis nor any practical advantage for requiring issuers to make filings with the central storage system.

Question 28: Do you agree with the proposal that an issuer should make a notification when it chooses its competent authority?

Yes, we agree.