

**RESPONSE TO CESR ON ITS CONSULTATION PAPER OF
APRIL 2005 ON THE TRANSPARENCY DIRECTIVE FROM THE
FINANCIAL SERVICES WORKING PARTY OF THE COMPANY LAW
COMMITTEE OF THE LAW SOCIETY OF ENGLAND AND WALES**

The Law Society is the professional body which regulates and represents the 100,000 solicitors practising in England and Wales. The Company Law Committee is comprised of 32 practitioners from a cross section of the legal profession, solicitors in private practice both in London and the main commercial centres, in house lawyers, barristers and academics. The Financial Services Working Party is a specialist working party of that committee with particular expertise in the regulation of investment firms and other financial services businesses.

1. Scope

This response is limited to the proposals and questions in Chapter II (notifications of major holdings of voting rights) of CESR's consultation paper of April 2005 (the **Second Consultation Paper**). References below to articles, without more, are to articles with the numbers of the Transparency Directive (the **Directive**) published in the Official Journal. References below to paragraph numbers, without more, are to paragraph numbers of the Second Consultation Paper. References below to the **First Response** are to our response dated 4 March to CESR's consultation paper of December 2004 on the Transparency Directive (the **First Consultation Paper**).

We are disappointed to note that a number of the comments we made in the First Response have not been taken into account. Generally, we have not repeated these comments below, but continue to support them.

2. Key points

Our most important comments are:

- (a) we do not agree that a notification by a market-maker is required on an issuer-by-issuer basis. This is unnecessarily bureaucratic;
- (b) the proposed approach in section 4 is burdensome, and will result in additional notifications which do not really give very useful information. We do not believe it is the correct interpretation of the Directive;
- (e) we think that "should have learned" should be interpreted consistently with the obligations of an investment firm under MiFID to dispatch contract notes;
- (f) we do not agree with CESR's interpretation of when a disposal occurs;
- (g) for practical reasons, and ease of use, the standard form notifications should be kept as simple as possible and, in particular, should not be required to include (i) extraneous information which will make them unduly burdensome, especially for those active in the securities markets, or (ii) information for which the issuer is the appropriate source (such as that there has been a corporate event, which is likely to result in notifications). We attach our alternative proposed form as an Annex which

we believe can be used both for an interest in a share and an indirect interest through a financial instrument and which we have amended slightly from that included in our First Response.

Section 1 – the maximum length of the short settlement cycle for shares and financial instruments etc

No comments; we assume the London Investment Banking Association will address the appropriateness of the conclusions at paragraphs 90 and 91.

Section 2 – Control mechanisms to be used by competent authorities with regard to market maker etc

Q16 Do you agree with this change? Please give reasons for your answer

We agree with this change, which is consistent with our comment in our First Response. We do not, however, think that the phrase “use the shares to influence the management of the issuer concerned” (paragraph 100) is particularly clear or consistent with the wording of the Directive.

Q17 Do you agree with this change? Please explain

We agree with this change, which is consistent with our comment in our First Response. We are not sure we agree that separate identification avoids conflicts (compare paragraph 109).

Q18 Do you agree with the proposed change to this advice? Please explain

We do not. We are not convinced by paragraphs 114 and 115 and continue to believe that if a notification is desirable (and this is not self-evidently correct) the benefit outweighs the burden unless a single notification can be given in relation to a particular relevant market. Realistically, monitoring will have to happen at market-maker level (and not at issuer level). This is why we made the suggestion we did in response to question 6 in the First Consultation Paper about who is the appropriate recipient of the notification. On this basis, we do not see why a single notification would not be sufficient.

Although we disagree with the need for an issuer-by-issuer notification, we welcome the flexibility in paragraph 120. It should be made clearer that the market maker can choose at which point to notify.

We agree with the other changes to the draft technical advice in this section.

Section 3 – the determination of the calendar of “trading days” etc

We think CESR should recommend that an issuer is required to identify its home competent authority in its annual report and on its website (if any).

Section 4 – the determination of who should be required to make the notification in the circumstances set out in article 10 of the Transparency Directive

We disagree with the interpretation in paragraph 178. Article 9(1) provides (emphasis added) “where a shareholder *acquires or disposes of shares.....to which voting rights are attached, such shareholder notifies....the proportion of voting rights..held by the shareholder as a result of such acquisition or disposal*”. The effect of Article 10 is to treat a person as becoming a shareholder in certain specified circumstances which, if that interest relates to a sufficient proportion of the issuer’s voting rights, requires a notification under article 9 as if the person in question owned those shares. Article 10 does not, in our view, have the effect that an owner of shares is required to make a notification when it disposes of the voting rights in one of the circumstances set out in that article. The reference in the chapeau to Article 10 to “entitle to acquire, dispose of or to exercise voting rights” indicates that a person must have at least one of those three entitlements in the circumstances listed in the article in order to be treated as acquiring an interest in shares which is to be taken into account for Article 9 purposes. In other words, it is sufficient for this purpose, to be granted the power to dispose of voting rights.

Where a person has a notifiable interest solely by virtue of Article 10, a notification obligation will arise under Article 9 when that person disposes of their interest, as they will no longer be treated as a shareholder.

As regards paragraphs 186 and 188, we believe this analysis is over-simplistic. Please see our comments at (a) of our response to question 11 in the First Consultation Paper.

We disagree with the conclusions in paragraph 192 and 193, to the extent they indicate that a person who remains a shareholder is required to make a notification on making a temporary transfer of voting rights and on regaining them.

We disagree with the conclusion in paragraphs 197 and 198, to the extent they indicate that a person who remains a shareholder is required to make notifications.

We disagree with the conclusion in paragraphs 202 and 203, to the extent they indicate that a person who remains a shareholder is required to make notifications.

We disagree with the conclusion in paragraphs 217 and 218, to the extent they indicate that a person who remains a shareholder is required to make notifications.

We disagree with the conclusion in paragraph 222, to the extent it indicates that a person who remains a shareholder is required to make a notification.

We disagree with the conclusion in paragraphs 227 and 228, to the extent they indicate that a person who remains a shareholder is required to make notifications. See also our comments at (c) of our response to question 11 in the First Consultation Paper.

Accordingly, we disagree with these aspects of the draft technical advice in this section.

Section 5 – the circumstances under which the shareholder or the natural person or legal entity referred to in Article 10, should have learned etc

We agree with the conclusion in paragraph 252. The rationale in paragraphs 258 to 264 does identify a difficult practical point about conditions, which we addressed in answer to question 16 in our First Response. We also remain of the view expressed in answer to that question that disposal occurs on settlement/completion of a transaction, not when it is agreed.

We disagree with the draft technical advice in this section in a number of respects:

- (a) we remain of the view expressed in answer to question 15 in the First Consultation Paper, which cross-referred to the obligation to dispatch contract notes under MiFID. We do not believe that CESR's current proposals take proper account of the position of those who have delegated management of their portfolios to a fund manager. In these cases, it is unreasonable to expect a person to contact his fund manager on what would have to be a daily basis to discover whether the fund manager has purchased a disclosable stake.
- (b) if the one day limit is retained, it should be a one trading or business day limit and not simply one calendar day.
- (c) we do not believe that paragraph 271 is realistic or factually accurate and it should be deleted. As CESR pointed out in the First Consultation Paper, it did not believe it had been asked to address this question and it does not now appear to have done so with appropriate care or consideration.

Section 6 – the conditions of independence to be complied with by management companies etc

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

As we made clear in the First Response, we are not in favour of a declaration. The comments made in paragraphs 317 to 325 do not change our views which were not based on a misunderstanding of the proposals. We are also not in favour of this proposal which essentially cuts back a useful exemption.

Q20 Do you consider these 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 do not.

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

We think that it is much better than the earlier one. CESR has responded to the criticisms in our First Response.

Save as indicated above, we agree with the changes to the draft technical advice in this section.

Section 7 – standard form etc

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

We agree with the approach as it is pragmatic.

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

As we indicated in our First Response, this should simply state that the notifier's interest is below 5%.

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

This is not obviously necessary and will be impractical unless such numbers are easily accessible to investors.

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

If a number is thought necessary (as to which see our answer to the previous question) CESR should mandate it. We have no views about what it should be.

We disagree with the view expressed in paragraph 386 that any information is required about a triggering transaction to give a clear picture of “the resulting situation in terms of voting rights”. In our view, this simply requires the market to be notified of the number of shares held/votes controlled by the notifier and the percentage this represents. The triggering transaction may be tiny and unimportant or, in the case of an active trader where say, the shareholding dips above and below a notification level during a day, very difficult to identify. See also lettered comment (a) in section 5 in our First Response. Other information, such as the reason for the notification (see 2 of CESR's proposed standard form) is, in our view, extraneous. We have also explained in our comments in relation to Section 4 (above) that we do not consider that a shareholder disposing of, or re-acquiring, voting rights is obliged to make a notification.

As regards paragraphs 390 and 406, we think these are saying (and we agree) that, where a company has different classes of share, the notifier must give a per class percentage figure, as well as a total. This makes the “Total” row in the draft standard notification rather misleading. The way the form is set up would suggest that the total is merely an addition of the amounts in the rows above, which is incorrect. A person could own 100% of the voting rights attached to a particular (small) class of share, but a much smaller percentage of the overall voting rights. Our suggested standard form, which we continue to prefer, has been amended to clarify the position and is attached as an annex.

As explained in relation to section 5, we do not agree with paragraph 396 as regards disposals.

We agree with paragraph 401 (save that it should refer to notifier), but are concerned that member states will assume that what they consider to be identity evidence is consistent across the EU which, based on experience in relation to the Market Abuse Directive, it is not. Member states should be required to specify what is needed in addition to the notifier's full name.

Section 8 – financial instruments

We agree with paragraph 474.

Item (4) under paragraph paragraph 481 is ambiguous; we suggest putting brackets around “other than shares”.

We believe that information proposed for the standard form notification is excessive and continue to prefer our proposed standard form, which is attached as an annex.

Please contact Annabel Sykes of Freshfields Bruckhaus Deringer, the Chairman of the Financial Services Working Party, if you have any queries on this response. Her contact details are tel: + 20 7832 7078 and email: annabel.sykes@freshfields.com.

27 May 2005

STANDARD FORM¹

1.	Name of the issuer:	
2.	Name of person subject to the notification obligation:	
3.	Name of shareholder(s) (if different from 2) ² :	
4.	Chain of controlled undertakings, if relevant:	
5.	Names of parties to agreement relating to concerted exercise of voting rights (other than notifier), if relevant:	
6.	Date on which the threshold was crossed or reached:	
7.	Date of notification:	

8. Notified details³

Class/Type of shares	Number of voting rights ⁴		% of voting rights	
	Direct	Indirect	Direct	Indirect
TOTAL (BASED ON AGGREGATE VOTING RIGHTS)				

¹ Please note that interests in shares and interests in financial instruments cannot be aggregated into the same form.

² To be included where notification relates to a financial instrument only if known

³ If notification is because notifier's interest has fallen below 5%, delete table. Otherwise, complete table and delete "notifier's interest is below 5%".

⁴ In case of combined holdings of shares with voting rights attached "direct holding" and voting rights "indirect holdings", please split the voting rights number and percentage into the direct and indirect columns – if there are no combined holdings, please leave the relevant box blank. Where the notification is made in relation to a financial instrument, include the figures in the indirect holdings column

or

Notifier's interest is below 5%.

9. Interest is through a financial instrument: YES/NO⁵

10. Nature of financial instrument:

Additional voluntary information, e.g.:

- reason for the notification

⁵ Delete as applicable.

ANNEX TO STANDARD FORM

1. Contact details for person subject to the notification obligation:
Name:
Individual contact: ⁶
Address:
Telephone:
Fax:
Email:

⁶ Complete only where notifier is not an individual

