Bundesverband Investment
und Asset Management e.V.

M. Fabrice Demarigny
Secretary General
CESR The Committee of European
Securities Regulators
11 – 13 avenue de Friedland
75008 Paris

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CESR's revised draft Technical Advice on Possible Implementing Measures of the Transparency Directive (Ref: CESR / 05-267)

Dear Mr. Demarigny,

BVI[1] welcomes the opportunity to comment on CESR's Second Consultation Paper on possible implementing measures of the Transparency Directive. In our response, we have focused our attention on the draft technical advice relating to the notification of major holdings of voting rights, as this part of the Consultation Paper will have the most direct effect on our member companies and the corporate groups they are affiliated to.

General Remarks

In our view, measures on Level 2 of the Lamfalussy Process should be primarily devoted to achieving the major aim of the Transparency Directive, which is to enhance investor protection and market efficiency by disclosure of accurate, comprehensive and timely information about security issuers (cf. recital 1 of the Transparency Directive). In order to allow investors for a well-founded assessment of a company's voting structure (cf. recital 18), this information has to be built upon the genuine conditions of the market and must reflect the real allocation of voting powers. However, some of CESR's proposals on notification duties in relation to voting rights bear the risk of obscuring the actual voting powers of major shareholdings by overly demanding disclosure requirements. This outcome could gravely impair the ability of investors to reach informed decisions and hence contradict the explicit objectives of the Transparency Directive. Therefore, we urge CESR

[1] BVI Bundesverband Investment und Asset Management e.V. represents the interest of the German investment fund and asset management industry. Its 75 members currently manage more than 7,200 investment funds with assets under management in excess of € 1,000 bn. The units of these funds are held by some 15 million unit holders.

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to revise its technical advice in this area with regard to the potential detriment it might cause to the interests of investors.

Specific Comments

On behalf of the German investment management industry, BVI would like to comment on the following issues:

I. Determination of the person required to make the notification under Article 10 of the Transparency Directive (Chapter II Section 4)

We have serious concerns about the approach taken by CESR in order to determine the person responsible for performance of the notification duties under Article 10 of the Transparency Directive.

First of all, we do not share the notion that the obligation of shareholders to notify the issuer of changes in their voting rights according to Article 9 (1) of the Directive should also apply in situations when voting rights are acquired or disposed of even though the property in shares remains with the original shareholder. This interpretation appears inconsistent with the clear wording of the Directive setting up the **acquisition or disposal of shares** as an indispensable precondition of the notification duty. Therefore, any approach reading the acquisition or disposal of voting rights into the provision of Article 9 appears to be an illegitimate extension of Level 1 regulation by means of Level 2 measures.

In conjunction with the approach taken by CESR to Article 10 of the Directive, this interpretation might lead to serious legal uncertainties and cause a profound confusion in the market. Particularly, in relation to proxy voting, the Consultation Paper requires that any time a shareholder is giving a proxy over his voting rights to an authorised person ahead of the general meeting – and thus without specific instructions –, this would be treated as a disposal of voting rights and triggers a notification duty under Article 9 if a threshold is crossed and a respective obligation of the proxy holder under Article 10 (h) if a threshold is crossed. These notifications must be accordingly rectified if, in course of the preparation of general meeting, the shareholder decides to make use of his power to give specific instructions to the proxy holder.

Unless expressly defined by Level 2 measures, the term “specific instructions” is, in our opinion, too vague to constitute a decisive criterion for triggering notification duties. In most cases, shareholders do not instruct their proxies how to cast votes in respect of each item

of the agenda, but rather assign them with voting “along the line of the board” or in accordance with the recommendations of certain independent bodies. In these circumstances, it remains unclear whether the concerned parties are obliged to inform the issuer of a shifting in voting rights if the relevant thresholds are crossed. Furthermore, there is a palpable danger of blurring the real power structure within a company if shareholders are required to make a notification with regard to disposal of voting rights even though they retain their position as owner of shares and remain fully capable of determining how the voting rights attached to those are to be exercised.

For these reasons, we consider the approach appointed by CESR to determine the addressee of the regulation in Article 10 not suitable to provide investors with accurate and comprehensive information about the virtual allocation of voting rights. In our view, the Transparency Directive purports a different treatment of the notification duties. Whereas disclosure under Article 9 reflects proprietary holdings of voting rights, the notification obligations under Article 10 refer to persons deriving their voting power from a (contractual) relationship with the shareholder. In order to draw a correct picture of the decision-making powers within a company, the two notification duties should be applied not exclusively, but cumulatively, each of them informing the market of a different aspect of influence on the execution of voting rights.

II. Circumstances under which a shareholder, or the natural person or legal entity referred to in Article 10, should have learned of the acquisition of shares (Chapter II Section 5)

We share CESR’s view that legal certainty on the point of time at which a notification obligation is triggered is desirable. In this respect, however, we do not see a general advantage in the notion that the starting point of time for the purposes of determining when a natural person or legal entity “should have learned” of the relevant event should be the transaction date. This is especially difficult with respect to off-exchange transactions: a “meeting of minds” can hardly serve as an unambiguous point of time.

But also from a systematic point of view, we feel that the notification duty cannot be triggered before the shareholder reaches the position to exert influence by way of holding the shares, which happens only when the transfer of legal ownership takes place. A notification submitted before the actual acquisition of voting rights could turn out misleading since the notifying person may never gain or loose voting rights due to some unpredictable events between the execution of transaction and the transfer of holdings. Also, determining the point of time at which the transfer of legal ownership occurs in different

member states must not be deemed an insurmountable obstacle, as parties to an agreement usually know under which regime a transaction is concluded.

III. Conditions of independence for management companies or investment firms and their parent undertakings willing to benefit from the exemptions in Articles 12 (4) and 12 (5) (Chapter II, Section 6)

In BVI's opinion, the approach taken by CESR to determine the scope and application of the exemption in Article 12 (4) of the Transparency Directive is well suitable to satisfy the need for clarity in respect of the allocation of voting powers within a corporate group without imposing overburdening administrative requirements on the respective companies.

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

A reference to the name of the competent authority by which the non-UCITS management companies are supervised constitutes a reasonable measure to ensure that the affiliated undertakings conduct their management activities under the conditions of the UCITS-Directive. Therefore, we consent to CESR's view that it should be included in the declaration of independence submitted by the parent undertaking.

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?

In our opinion, a notification of the fact that the parent undertaking ceases to meet the test of independence is not necessary because, in this case, the parent undertaking is no longer eligible to benefit from the exemption and hence anyway obliged to reassess its notification duties on the basis of aggregated holdings of voting rights.

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

We believe that the new definition of indirect instructions can prevent the interest-specific influence of the parent undertaking in respect of the execution of voting rights. The wording of the definition, however, embraces situations which are not intended to be covered by the directive, such as group-wide Corporate Governance standards. We

therefore suggest changing the wording of the definition from “specific interests” to “specific *business* interests”.

We hope that our comments are of use for CESR’s work on implementing measures of the Transparency Directive and remain at your disposal for any further discussion.

Yours sincerely

BVI Bundesverband Investment und Asset Management e.V.

Stefan Seip

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