

Direction

Committee of European Securities Regulators
Att. Mr. Fabrice DEMARIGNY
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Notre référence

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**Subject: Comments from the Luxembourg Stock Exchange on CESR/04-512c
Consultation paper December 2004 Part II on possible implementing
measures of the Transparency Directive**

Dear Mr. Demarigny,

We welcome the opportunity to comment on the CESR consultation document related to important issues such as notifications of major holdings of voting rights and equivalence of third countries information requirements.

The Luxembourg Stock Exchange is a major listing centre of international bonds, equities and investment funds. On 31 December 2004, 33,022 different securities were listed on the Luxembourg Stock Exchange with more than 4,100 issuers from about 100 jurisdictions. 56% of these are not European issuers (1% from Canada, 15% from USA, 11% from Asia, 14% from Central America and 4% from South America). This provides evidence that the Luxembourg Stock Exchange has one of the most relevant experiences in the listing activities related to third countries issuers on a EU regulated market, notably in the field of supervision. Like in half of EU Member states, the Luxembourg Stock Exchange is currently the competent authority for approving prospectuses and supervising compliance of issuers listing obligations.

As a preamble, we hope that CESR will consider at a latter stage to undergo a cost and benefit analysis and a proportionality test before the adoption of its advice by its members. This wish is in line with European Parliament and European Securities Committee reiterated demands when adopting level 2 measures. We consider that it is useless, time consuming and confusing to propose an advice to the European Commission if its contents might not fulfil these two tests.

General comments on chapter 1:

We would favor a clarification from CESR whether the word 'shareholder' used in its document should be understood as 'shareowner' or 'ultimate beneficial owner' or covers the other holders of shares which are not necessarily owners or beneficial owners of such shares in line with Directive (like for instance, those entities mentioned in Article 9 (4)).

This issue is also linked to the identity of the shareholder described in paragraphs 302 and 303 that might be not the owner or the beneficial owner of such shares. The applicable regime of identity for a trust should also be explained.

Question 1:

We consider that definitions coming from IOSCO, CESR/ECB and the Giovanni group are broad enough to accommodate any type of interpretation of this provision of the Transparency Directive. They are of little help in practice for identifying which entities will benefit from the exemption of notification. We would favor a clarification on the type of entities concerned (banks for instance when they are internally clearing and settling securities or only ICSD and CSD?).

Furthermore, these bodies are not legally competent for interpretation of Community law. Therefore, the question is more a matter of opportunity: either, an explicit definition is adopted in a level 2 measure or it is not explicitly defined and left to national discretion as long as there is no European case law on this issue.

The Luxembourg Stock Exchange considers there is no need to have an explicit definition and cannot recognize that the other definitions mentioned in the CESR document are applicable because this approach is not in line with the current legal framework at Community level and would hamper the institutional balance.

Question 2: We agree with the T+3 period of time.

Question 3: We consider that there is no reason to differentiate between shares and financial instruments on this issue.

Section 2:

We would favor an explicit wording on paragraphs 28 and 29 indicating that market-making activity is recognized as a subcategory of 'dealing on own account' activities but cannot be mixed with other types of 'dealing on own account' activities.

Question 4: We support the approach described.

Question 5: No

Question 6:

We do not support CESR proposals for the following reasons. On paragraph 46, we do not support CESR's interpretation. Breaches of the Transparency Directive should be sanctioned according to the national provisions transposing Article 28 of the said Directive. The same reasoning is valid for the other Securities Directives.

Therefore, the proposed approach in Paragraph 47 is not legally relevant even if we agree on the principles indicated. Nothing in the Directive prescribes the consequences of not disclosing and notifying a major holding because it is left to national discretion.

A clear cut should be made between additional measures imposed to market makers and sanctions for breaches of Community provisions, which are two different issues.

We could support the cooperation principle between the competent authority of the issuer and the competent authority of the market maker upon the condition that it is in line with Article 26 of the Transparency Directive and with the transposition in the home Member State of the issuer.

Section 3:

Question 7:

First, we consider that CESR discussion is going far beyond the requested advice by the European Commission and is not in line with the provision set out in paragraph 8 point b of Article 12 in the Directive itself. We consider that such discussion would not have taken place if CESR had envisaged a common calendar of trading days for all Member States in line with the related comitology provision of the Directive.

We understand the contents of paragraphs 61 to 67, however, we do not support the idea that the Directive gives four options; rather there may be four different interpretations of this provision of the Directive, if the approach is not to adopt a common calendar for the EU.

Against this background, we can support the CESR interpretation described in paragraph 79 (the fourth one) and would encourage the European Commission to adopt an official interpretation in order to have legal certainty on this issue.

We consider that the CESR proposal in paragraph 80 is not relevant for a level 2 measure and might be part of a level 3 measure.

We do not support the proposals made in paragraph 81 because it would duplicate disclosure of trading days calendar and of the list of securities admitted to trading on a

regulated market already done by exchanges. Furthermore, we do not consider that point b is in line with the scope of the comitology provision set out in paragraph 8 point b of Article 12 of the Transparency Directive and is simply not relevant even for a level 3 measure.

Section 4:

General comments:

In paragraph 82, we would favor a clarification on the scope of this section from CESR whether they consider that the entitlement for acquiring, disposing of, or exercising voting rights can be obtained either through an agreement giving the entitlement to acquire or disposing of shares with voting rights attached and also through an agreement giving the entitlement to acquire, dispose of, or exercise the sole voting rights (with no share involved in the agreement), or can be obtained only in the latter case.

Furthermore, we are not sure there is so clear a distinction between Article 9 and 10 in the case of custodian activities and the possibility of exercising voting rights (possible link between in Article 9(4) and 10(f) of the Directive).

The understanding of the discussion is highly dependent on this clarification.

In paragraphs 105, 106, 107 and 114, we wonder whether there is a confusion in the approach proposed by CESR and the wording of Article 10 of the Directive (natural person or legal entity that acquires instead of 'entitled to acquire, to dispose of, or to exercise voting rights') or the difference of wording introduced in CESR document is made on purpose. If so, we would be happy to receive clarification on this issue. This difference of wording is also included in the table page 29 (that 'acquires' instead of 'may acquire' or is 'entitled to acquire'. There is a clear difference between having an option, a possibility to receive, sell or exercise voting rights and the effective ownership or holding of voting rights (or the shares with voting rights attached). There is not necessarily a transfer of voting rights in the latter case.

In paragraph 111, explanations on the procedure to declare intention to exercise voting rights will be welcome for practical reasons and legal certainty.

In paragraph 143, we do not understand the restriction imposed by CESR and wonder whether there is confusion on the wording used. Each person required to notify the crossing of a threshold is responsible for the obligations set out in this Directive. There are only limited cases, where this responsibility can be shifted to another person (Article 12(3) for instance). But, there is no reason to restrict the possibility for using third party services when a shareholder is fulfilling its obligations. A third party should also be authorized to make notification on behalf a shareholder (or the others persons mentioned in Article 10) and not only another shareholder.

Question 8:

Yes, we consider the existing acquis communautaire and the new Directive require aggregation notably because of the exemption set in paragraph 4 of Article 12. We consider that aggregation rule is implicitly described by making reference to both Articles 9 and 10, and therefore covers the three main situations described in CESR document.

Question 9:

Yes, we agree but we think that the possibility is too limitative and should be open to any third party acting on behalf of a shareholder or on behalf of a person mentioned in Article 10. We do not understand this limitation to the right of having advisors helping shareholders to fulfill legal obligations as long as the notification made is correct (see above comment on paragraph 143).

Question 10:

Yes, we agree as long as the notification made is complete with the information required to all parties involved.

Question 11:

We consider that approach B is more in line with the wording and the spirit of the Directive itself. However, we have some concerns on the description made by CESR of the different circumstances for Article 10. We would welcome significant clarification on the issues raised above in our general comments on section 4.

Question 12:

Yes we agree because this requirement seems directly in line with the wording and the spirit of the Directive itself.

Question 13:

No, we do not agree at this stage because we are not in a position to have an opinion on whether or not, CESR has correctly described the circumstances described in Article 10(a)-(g) (see above our answer to question 11 and our general comments on section 4).

Section 5:

Questions 14, 15 and 16:

We favor option b) for practical reasons, notably in order to avoid mistakes. However, we would propose a limit until 12 am (GMT) to avoid distortions between those notifying before the opening of the market and those waiting until the close of the market.

Section 6:

Question 17:

We favor the second view because we think this is in line with the wording and the spirit of the Directive itself. We consider the first view mentioned would lead to discrimination that could be legally challenged. However, we also consider that the solution adopted should be identical for collective portfolio management and individual portfolio management (where specific authorization according to the Directive 2004/39/EC is required).

Against this background, we would encourage the European Commission to adopt an official interpretation in order to have legal certainty on this issue of interpretation of the Transparency Directive.

Question 18:

Yes we agree. We would welcome a clarification saying that the wording in paragraph 266 is sufficient for a standard statement of independence.

Question 19:

No

Question 20:

We consider that these proposals are only adding a new burden with poor added value. Therefore we consider they are not useful for the demonstration of independence.

Question 21:

We have no precise view on paragraphs 254 and 255 because they are not detailed enough in order to express an opinion. However, we are more concerned on the use of the words 'Level 3 regulators'. First, it should be clear that Level 3 is not at all about regulation, rather guidance and recommendations in order to modify institutional arrangements at European or national level for adopting regulations. Second, we do not think 'establishing a mechanism' can be considered as guidance or a recommendation.

Question 22:

Yes, we agree. However we have doubts that there is a need for a parent undertaking to declare to the competent authority that it will no more be eligible to benefit from the exemption. We think the notification and the public disclosure of crossing a threshold with aggregate holdings are self-sufficient. This additional notification will add nothing. We consider that the Directive gives a permanent exemption as long as you fulfill the conditions set out in levels 1 and 2 and this is in no way optional.

Section 7:

Question 23:

We do not think the disclosure of the total number of voting rights is useful if the information mentioned in paragraph 286 is disclosed because you may approximate this number by a simple calculation (depending on the number of figures after the point).

Question 24:

A simple reference to the latest notification made should be sufficient.

Question 25:

We consider that the Directive does not mandate to explain the reasons for crossing or reaching a threshold. This is left to national discretion under the option provided in Article 3 of the Directive. Therefore, we consider it is not possible to adopt a common approach on this issue. However, it might be useful in the standard form to anticipate a space for those who will give information on this issue (voluntary disclosure or mandatory at national level).

On passive crossing, we consider this is not a reason for crossing a threshold but a circumstance explaining the crossing and this information requirement could be part of the standard form by ticking an adequate box.

Question 26:

We consider that this issue as already been dealt and negotiated for the adoption of the level 1 Directive. The Commission proposal for a transparency Directive did include a requirement on the number of shares but Council and Parliament did not accept it. Any additional measure at level 2 on this issue would conflict with the level 1.

Question 27:

Yes, we do not consider there is a requirement to have a break down of each party to the agreement holding unless one or more exceeds on an individual basis the first threshold of 5%.

Question 28:

After the termination of the agreement, there is no obligation for each party to disclose its individual holdings unless he reaches or crosses a threshold. Such additional requirements would conflict with the Directive itself.

Question 29:

Yes, we agree.

Question 30:

We wonder whether this approach is operational in all circumstances (see above our comment on paragraph 82). There may circumstances where you can obtain the right to exercise voting rights with no shares attached because there is a split between the voting rights and the shares. Therefore, there is no identified shareholder.

Question 31:

Yes we could agree, save our above comment on question 30.

Section 8:

Questions 32, 33, 34, 35 and 36:

We consider that neither approach a nor b are in line with the Directive because the holder of the financial instruments concerned needs to have the effective possibility to acquire the underlying shares, and thus the voting rights attached. Approach a is simply conflicting with the wording and the spirit of the Directive (possibility to exercise the voting rights) and approach b is only partially taking into account the different type of exercise and conversion periods attached to these financial instruments by proposing a standardized three months period prior to this possibility of exercise or conversion. Therefore, approach b should be modified in order to take into account the characteristics of all types of financial instruments concerned and consider a notification at the precise moment when the holder of the financial instruments obtains the possibility to exercise or convert the said financial instruments (and thus obtain an exclusive right on the voting rights attached to the underlying shares).

We would welcome that CESR reflects also on the pricing characteristics of such financial instruments. We wonder whether such notification is necessary when it is not reasonable on an economic basis to exercise or convert such financial instruments. There is no obvious reason to declare crossing a threshold when there is no or very little hope

that such underlying shares will end up in the hands of the investor of such financial instruments

Question 37:

Yes, we agree.

Question 38:

Yes we agree, however we have another concern related to the number of voting rights. The financial instruments mentioned in Article 13 (1) could cover a number of call options (with no cash settlement, option in the hand of the investor) representing underlying shares much more numerous compared to the ones composing the capital of the issuer of these underlying shares. Therefore, there is a possibility that notifications to be made represent more voting rights compared to the existing ones attached to the listed company.

Question 39:

No. We consider that it would not be suited to have a different definition of financial instruments compared to the one included in the Directive 2004/39/EC.

Questions 40 and 41:

Yes, we agree. However we would welcome an illustrative list of the type of financial instruments concerned in order to avoid ambiguities (for instance, an exchangeable bond and not a convertible bond because the underlying shares are not yet issued (not always); a covered warrant but not an equity or a subscription warrant, a call option, etc). We would also welcome that it covers OTC instruments.

Questions 42 and 43:

Yes, we agree.

Questions 44 and 45:

Yes we agree.

Questions 46:

We do not think the disclosure of the total number of voting rights is useful if the information mentioned in paragraph 454 is disclosed because you may approximate this number by a simple calculation (depending on the number of figures after the point). A simple reference to the latest notification made should be sufficient, if applicable.

Question 47:

Yes we consider the ISIN code as a really valuable information in all cases because it will be one of the starting points for searching information on a given security or issuer. We have strong doubts that it is possible to operate an efficient regulated information storage system without such information and already mentioned this issue in our answer to the first CESR consultation document on the Transparency Directive.

Question 48:

Yes we agree.

Question 49:

Yes we agree.

Chapter 2 on half-yearly annual reports:

Section 1:

Question 50:

First, we agree that the information requirements should be defined by reference to the principles of IAS 34, but it should be clear that they should be at a less demanding level in order to stay in line with the Directive and cannot be at the level of the national requirements because it was proposed in the level 1 by the Commission and not accepted by European Parliament and Council.

Therefore, a right balance should be made but we consider that the proposed approach is too stringent by setting a level of details too close with IAS 34 content.

Second, we are concerned on the use of some terms in this draft technical advice. The meaning of a 'misleading' half-yearly report is unclear and would welcome significant clarification on this word in order to avoid subjective judgment on this issue, notably on the applicable background for the use of this word (meaning accurate? true and fair view?). We have the same concern about the use of the word 'material' which is generic and has not the same meaning in the context of accounting legislation (materiality test) or securities European legislation (and even a different meaning between Directives such as the one for prospectuses and the one on market abuse) or in CESR definition of 'material information' in standard FESCO 99 B (which seems also not consistent with current and new EU legislation). We wonder whether, in fact, the intended meaning was 'important', 'significant' or 'major' because it is associated to the words 'event' and 'transactions'. It should also be noted that the word 'important' followed by the word 'events' is used in Article 5 (4) of the Directive on half-yearly reporting.

Section 2:

Question 51:

Yes we agree.

Question 52:

We would welcome full consistency between the CESR advice and the final text to be adopted after negotiations on the Commission proposal of a Directive made in October 2004 amending the 4th and the 7th company law Directives, which also deals with related party transactions.

As mentioned in the answer to question 50, we have a concern on the use of the word 'material' if not explained and would welcome significant clarification on this issue. In this case, we have the feeling that CESR's intended meaning is closer to the concept of materiality test used in the auditing world (notably in paragraph 511). This confusion is even reinforced in Paragraph 512 by stating that 'major' and 'material' mean the same thing for related party transactions and seem to have a different meaning in the draft advice given in paragraph 499.

Section 3:

Questions 53 and 54:

We wonder whether we have the same understanding as CESR on the requested advice by the European Commission. We consider that the request is to draw a list of international standards and national standards that could use the word 'review' in the context of this Directive and therefore qualify for the obligation of disclosure set out in article 5 (5).

Therefore, we consider that the draft advice is simply not operational for the issuers subject to the obligations of this Directive.

We do not consider that CESR was requested to advice on the need for adoption of a common standard for audit review and anyway, the European Commission has no delegated power to do so.

Chapter 3:

Section 1:

Question 55:

Yes we agree upon the following condition. We propose to introduce a general principle indicating that when the fulfillment of the equivalence principle will generate a conflict and/ or a contradiction with the issuer's national legislation, the national legislation will prevail. The aim of the equivalence principle is not to impose EU legislation on an extra territorial basis, rather to maintain an appropriate level of information taking into account the particular situation of non EU issuers compared to EU issuers (they cannot be asked the same provisions as EU issuers, notably when it leads to absurd situations compared to their national regime). CESR should always seek to avoid conflict of law and avoid proposing an additional requirement not in line or contradictory with the issuer's national legislation.

On financial statements, we would like to recall that the Luxembourg Stock Exchange answered to CESR consultation paper ref: CESR/04/-509 on equivalence of certain third country GAAP and expressed strong concerns on the approach proposed for assessing equivalence of third countries accounting standards with IAS. We rejected possible remedies based on a case-by-case approach that would definitely drive out third countries issuers from European markets.

We consider that the approach now proposed for the non financial information requirements is more suitable because the following principles described in CESR document seems more operational for third countries issuers.

Question 56:

We would welcome a non-limitative list of countries already identified by CESR with national provisions deemed to be equivalent to the EU ones.

Question 57:

We would favor a more relaxed approach authorizing extension of time limits in order to permit third countries issuers to keep in line with their national legislation.

Question 58:

We would favor a more relaxed approach in order to permit third countries issuers to keep in line with their national legislation. Furthermore, as mentioned in our answers to questions 50 and 52, we have a concern on the use of the word 'material' if not explained and would welcome significant clarification on this issue (we have the feeling that CESR's intended meaning is close to the concept of materiality test used in the auditing world, different from the same word used in Securities Directives).

We would also welcome a clarification indicating that for third country legislation ignoring this concept of individual accounts because dividends are calculated and distributed on a consolidated basis and/or there is no minimum capital or equity requirements (at all or at individual level), there is no obligation to give an equivalent information on individual accounts. We consider it is not reasonable to impose equivalence rules for third countries when it is meaningless and conflicting with the national legislation of these issuers. We consider that the Commission's specific request intends to address this issue.

Questions 59, 60 and 61:

We would favor a more relaxed approach authorizing extension of time limits in order to permit third countries issuers to keep in line with their national legislation.

Section 2:

Question 62:

We consider that focusing on US, Canada and Japan is not logical and not sufficient because major fund management activities are located in other states such as Switzerland, Cayman Islands, Bermudas, etc. The main participants in the fund management world should at least been taken into account.

Questions 63 and 64:

Yes we agree. We would welcome a clarification saying that the wording in paragraph 621 is sufficient for a standard statement of independence. Furthermore we have doubts that there is a need for a parent undertaking to declare to the competent authority that it will no more be eligible to benefit from the exemption (paragraph 623). We think the notification and the public disclosure of crossing a threshold with aggregate holdings is self-sufficient. This notification will add nothing. We consider that the Directive gives a

permanent exemption as long as you fulfill the conditions set out in levels 1 and 2 and is in no way optional.

Question 65:

We are not in a position to understand the proposal made in paragraph 65. It seems that CESR proposes a duplication of filings with all the competent authorities involved (one for the purpose of the transparency Directive and maybe several other competent authorities for the purpose of the prospectus Directive). We are not sure if this approach was the underlying idea in the European Commission request and the Commission services might have thought that it was possible to reflect on measures avoiding duplication of filings. Moreover, the prospectus (and supplements) and the annual document provided in Article of Directive 2003/71/EC are not contained in the definition of regulated information in the Transparency Directive. The same definition is included in the Commission Regulation 809/2004 (Article 2 (12)). Coordination is mentioned in Article 19 (4) only for the annual document provided in Article of Directive 2003/71/EC and the annual financial report.

We would welcome solutions based on a simple principle: reducing the burden for the issuer by avoiding duplication of filings.

Question 66:

Yes, we agree.

Yours sincerely

Société de la Bourse de Luxembourg
Société Anonyme

Michel MAQUIL
Président du Comité de direction

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Conseiller de direction