



EUROPEAN SAVINGS BANKS GROUP
GROUPEMENT EUROPEEN DES CAISSES D'EPARGNE
EUROPÄISCHE SPARKASSENVEREINIGUNG

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European Savings Banks Group (ESBG)

Response to CESR's Advice on Possible Implementing Measures of the Transparency Directive (Part II)

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Profile European Savings Banks Group

The European Savings Banks Group (ESBG) represents 24 members from 24 European countries representing 968 individual savings banks with around 65 000 branches and nearly 757,000 employees. At the start of 2003, total assets reached almost EUR 4355 billion, non-bank deposits were standing at over EUR 2080 billion and non-bank loans at just under EUR 2195 billion. Its members are retail banks that generally have a significant share in their national domestic banking markets and enjoy a common customer oriented savings banks tradition, acting in a socially responsible manner. Their market focus includes amongst others individuals, households, SMEs and local authorities.

Founded in 1963, the ESBG has established a reputation as the advocate of savings banks interests and an active promoter of business cooperation in Europe. Since 1994, the ESBG operates together with the World Savings Banks Institute (WSBI, with 109 member banks from 92 countries) under a common structure in Brussels.



1. GENERAL REMARKS

The European Savings Banks Group (ESBG) would like to commend CESR for the practical approach that it followed in the drafting of its advice for implementing measures for the Transparency Directive. In general, the advice submitted is well-balanced, proportionate and in line with the Level 1 Directive.

Chapter I: notification 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

Answer to Q1: we support CESR’s view that establishing a set of definitions of “clearing” and “settlement” is not necessary, in view of the existing definitions, which are quite similar for the purposes of the Transparency Directive.

Answer to Q2: as a general principle, we support T+3 as the short settlement cycle. However, it should not be established as a standard for settlement. In particular, as regards securities admitted to trading on a regulated market that are traded outside a regulated market, we would rather favour a T+10 settlement cycle, as longer settlement cycles are usually agreed upon outside regulated markets. As the person holding these securities for the sole purpose of clearing and settlement does not intend to intervene in the management of the issuer, a notification entails the risk of misleading the public.

Answer to Q3: We agree that the meaning of “short settlement cycle” should be the same for shares and other financial instruments, as the same market rules apply in both cases.

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

Answer to Q4: the ESBG generally supports the approach proposed by CESR. Nevertheless, we would urge CESR to make it clear that the requirement under paragraph 39 (a) that “these different activities need to be kept separate” should not mean that Chinese walls should be established between activities conducted as a market maker and those conducted when acting on own account. The market making activity as such is not economically viable and is therefore always combined – although separated as a matter of accountancy – with the dealing on own account and for own purposes. Against this background, the requirement to keep different activities separate should be restricted to a clear separate accountancy.

Answer to Q5: No.

Answer to Q6: Yes.

Section 3: the determination of a calendar of “trading days” for the notification and publication of major shareholdings



Answer to Q7: Yes. ESBG Members agree with CESR that using the calendar of trading days of the issuer's home Member State is the most viable solution. They accordingly support the views expressed in the sections 76 and 77. Along the same lines, ESBG Members fully support CESR's proposal in section 78 to require the competent authorities to publish on their websites the calendar which applies to their regulated markets.

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

Answer to Q8 to Q10: Yes.

Answer to Q11: ESBG Members are of the opinion that Approach A is the most appropriate way to determine who under Article 10 is to make the notification, as Article 10 refers solely to the natural person or the legal entity that is entitled to acquire, dispose of, or exercise the voting rights. As such, the additional natural persons or legal entities that would have to notify in line with Approach B are not – on the basis of Article 10 – obliged to notify the issuer of any of the circumstances enumerated under Article 10.

Answer to Q12: yes, we agree that a subsequent notification is triggered, but only under the condition that the changes to the circumstances described in Article 10(a)-(g) have as a consequence that one of the thresholds mentioned in Article 9 paragraph 1 is crossed or reached. Otherwise, CESR's advice would go beyond the Level 1 Directive (i.e. Article 9). We are of the opinion that this approach has been followed in paragraph 134 and 139, but paragraph 130 is less clear in this respect. We would accordingly welcome a clarification to the effect that subsequent changes to the circumstances mentioned under article 10 should trigger a notification obligation only if a threshold under Article 9 is crossed or reached.

Answer to Q13: without prejudice to our comments to Q12, we agree with the advice.

Section 5: the circumstances under which the shareholder, or the natural person or legal entity referred to in Article 10, should have learned about the acquisition or disposal of shares to which voting rights are attached

Answer to Q14: ESBG Members do not agree with either of the proposals submitted under paragraph 172. As regards the start of the notification time limit, Article 12 paragraph 2(a) refers to the point in time by which the shareholder learns or should have learned "of the acquisition or disposal or of the possibility of exercising voting rights". As the notification obligation consists in informing the issuer and the public about the influence of shareholders with regard to the issuer, the notification obligation cannot be triggered before the shareholder can exert that influence by way of holding the shares. This does not happen at the point in time where the order is executed but rather when the settlement has taken place. In particular, shareholders with vast portfolios might face difficulties to check daily whether their orders have been executed. In the case of limit orders for example, with a limited validity of for example 1 month, it is neither common practice nor a standard to check daily if the order has been executed. Against this background, we propose referring to the point in time at which the settlement has taken place, and as such the time limit would start at or after the date by which the settlement takes place.

In any event, the moment when the shareholder is deemed to have learned of the acquisition or disposal should not be set before the day after the transaction was actually executed.



Answer to Q15: Yes, see response to Q14.

Answer to Q16: see response to Q14.

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 11.3a and 11.3b

Answer to Q17: ESBG Members are of the opinion that the second view is more appropriate.

It should be reminded in this context that the purpose of the notification requirements on changes in major holdings is to inform market participants about the actual distribution of voting rights. In addition, as far as management companies of collective investment vehicles are concerned, they are obliged to act in the sole interest of the investors, in line with the management standards of the UCITS Directive. This does not depend on the management company, or on whether its products were legally authorized under the UCITS Directive or not.

Against this background, we strongly invite CESR to extend the application of Article 11(3a) of the level 1 Directive to all management companies that conduct their management activities under the conditions laid down in the UCITS Directive, whether they are authorised under that Directive or not, provided that the management company exercises the voting rights independently from the parent undertaking.

Answer to Q18: ESBG Members reject the additional confirmation envisaged in paragraph 245, as the statement of independence made by the parent undertaking is sufficient. Along the same lines, we do not understand the purpose of paragraph 244(b), and accordingly share the view that this provision should be removed.

Answer to Q19: we do not consider that there should be other methods by which the parent undertaking demonstrates independence to those set out in sections 246 and 247.

Answer to Q20: we consider that the suggestions included in section 248 are not fundamental for the demonstration of independence. We consider that an annual report containing the policy and procedures established to maintain independence when exercising the voting rights could be of help but in the end, would not ensure independence if these policies and procedures are not duly observed.

Answer to Q21: the ESBG generally supports CESR's approach in connection with direct and indirect instructions. Nevertheless, the definition of indirect instructions should be further restricted, so that only instructions that are given with the intention of influencing the way in which the voting rights are exercised are covered.

Answer to Q22: yes, we do agree with the advice set out in the sections 261 to 271.

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

Answer to Q23: no, ESBG Members do not deem it necessary to disclose information about the total number of voting rights. First, this information is not required under level 1. Second,



this information is not useful for the public; the market participants and the issuer are only interested in being informed about the threshold which has been reached or crossed.

Answer to Q24: no, ESBG Members do not consider it important to require disclosure of information about the previous notification. Previous notifications have anyway to be filed in a central storage mechanism, which makes this information irrelevant as part of the notification in question.

Answer to Q25: no, ESBG Members do not regard the information in paragraph 290 as of importance to market participants.

Answer to Q26: no, we do not think that information about the number of shares should be required, since it is the proportion of voting rights that is of relevance for determining who is able to exert any influence on the issuer. This is the reason why, as rightly pointed out in paragraph 291, the Level 1 Directive expressly only refers to voting rights.

Answer to Q27: ESBG Members support CESR's approach and thus that it is not necessary to have a breakdown of each party to the agreements holding. Rather, what is of importance is the fact that a number of persons agreed on a common policy to exert a certain proportion of voting rights and thus cross or reach one of the thresholds set under Article 9.

Answer to Q28: no, a subsequent notification is necessary only if upon termination of the agreement the parties' individual holdings reach or cross a triggering threshold. A subsequent notification obligation regardless of the thresholds would not be in accordance with Articles 9 and 10.

Answer to Q29: yes, we support the approach followed in the paragraphs 315 to 320.

Answer to Q30: the ESBG expressly welcomes the pragmatic approach followed by CESR in paragraph 341. However, this approach should be brought in line with the Directive. As such, the identity of the shareholder should be revealed only if he holds more than 5% of the voting rights. Only this approach would be consistent with the Level 1 text, which sets 5% as the relevant minimum threshold. The reference in paragraph 341 to a threshold of 1% would as a matter of fact lower the minimum threshold.

The problem of having to reveal a great number of shareholders also arises under Art. 10(f) when a depositor can exercise at his discretion the voting rights attaching to shares deposited with him. In this case as well a pragmatic approach should be pursued: only those shareholders whose shares deposited with the depositor represent a proportion of voting rights of 5% or more should be revealed in the notification.

Answer to Q31: yes.

Section 8: financial instruments

Answer to Q32: the ESBG strongly believes that the first approach is the most appropriate one.

First, we regard as arbitrary the choice of the period of time (in the second approach) by which the notification should take place (3 months before conversion or exercise, in CESR's consultation paper). Along the same lines, a notification at the time of the acquisition or



disposal of the financial instrument would be much easier to handle. In the case of the second approach, given the fact that financial instruments can be devised differently, it might be unclear to determine when and how the underlying shares could be acquired or disposed of. This thus means that the point in time when the notification has to be made would vary according to the financial instrument. Finally, it should be mentioned that the first approach is the one currently applied in a number of Member States.

Answer to Q33: no.

Answer to Q34 to Q36: see answer to Q32.

Answer to Q37 and 38: yes, we support CESR's approach in paragraphs 408 to 417.

Answer to Q39: no, we support CESR's view that the definition of financial instrument in the MiFID is sufficient and should be referred to. This would also make it easier to ensure the consistency of the Transparency Directive and the MiFID in the future. However, a list of financial instruments in respect to which a notification obligation may be geared would enhance legal certainty for market participants as to whether a notification has to be made.

Answer to Q40: yes.

Answer to Q41: yes, see question 39.

Answer to Q42: yes.

Answer to Q44: no, we consider the proposals presented in paragraph 460 to be dispensable. They should not be part of the notification.

Answer to Q45: the ESBG regards the proposals under paragraph 460 as dispensable. They should accordingly not be part of the notification.

Answer to Q46: no, for the reasons set out in paragraph 459.

Answer to Q47: no, we do not regard the ISIN code as relevant information in this context.

Answer to Q48 and 49: yes.

Chapter II: half-yearly financial reports

The ESBG supports the approach followed by CESR in the sections 1 and 2 of this chapter.

Concerning question 52, the ESBG understands that the concept of materiality is the same for annual and half yearly reports and that the concept of "major" transactions does not introduce a different definition of material transactions between annual and half yearly reports. Differences between annual and half yearly reports will thus arise only as far as disclosure requirements are concerned and in case material transactions have been carried out between the preparation of the half yearly reports and the annual reports.

As far as question 53 is concerned, the ESBG would like to welcome the reference to the International Standard on Review Engagements (ISRE) 2400 on "Engagements to review financial statements". In this way the use of internationally accepted minimum standards is



ensured and the objectives and general principles of auditors' reviews are made comparable throughout Europe.

Regarding question 54, we do not believe that there is a need for the adoption, at the national level, of a single standard to which audit reviews should be conducted. Rather, we are of the opinion that this decision should be left to the relevant national competent authorities.

Chapter III: equivalence of third country information requirements

Referring to the questions 55 and 56, the ESBG welcomes the proposed approach for determining "equivalence" as regards transparency requirements for third country issuers. Moreover, the ESBG considers appropriate and sensible CESR's advice related to Article 19 (1) of the Transparency Directive.

Answer to Q57: In principle the ESBG supports the interpretation of Article 19 (1) of the Transparency Directive as regards time limits. In this context, the ESBG would like to provide the following comments on some of the items listed in the Commission's mandate ((a) – (h)):

- **(a) Annual management reports:** The ESBG welcomes that the requirements regarding the content of annual reports according to the Fourth Council Directive 78/660/EEC of 25 July 1978 and the Directive 2003/51/EC on the annual and consolidated accounts of certain types of companies, banks and other financial institutions and insurance undertakings have been integrated. This is an appropriate response to concerns raised in previous consultations to ensure consistency of the requirements with existing EU provisions.

For third country issuers the same provisions have to be in place as for EU issuers based on the assumption that the annual reports are considered as "equivalent" in terms of the Transparency Directive. The ESBG, however, does not understand the additional reference to requirements for issuers whose shares are listed based on the Commission Regulation (CE) 809/2004 of 29 April 2004 implementing Directive 2003/71/EC. The provisions for annual reports in the Commission Regulation (CE) 809/2004 substantially comply with the provisions for annual reports according to the Fourth Council Directive 78/660/EEC. By adding these additional requirements to the consultation paper the impression could be given that these provisions are more far reaching than those requirements in place for all issuers.

- **(b) half-yearly (interim) management reports:** The requirements according to Article 5 paragraph 4 are repeated verbatim. It is consistent that the same provisions apply for the half-yearly management reports of third country issuers. The ESBG, however, believes that a cross-reference to the respective article of the Transparency Directive would be sufficient.
- **(c) statements to be made by the responsible person under Articles 4 and 5:** The requirements for the statements to be made by the responsible person arise directly from Art. 4 (2) (c) as well as Art. 5 (2) (c) of the Transparency Directive. The cross-reference is correct and sufficient.
- **(d) interim management statements under Article 6:** The ESBG supports the proposed provisions.



- **(e) in the case where provision of individual accounts by a parent company is not required by a third country, information provided in consolidated accounts only:** The ESBG welcomes the definition of the term “parent undertaking” in line with the Seventh Council Directive 83/349/EEC on consolidated accounts.

Regarding the objective of the requirement under section (e), the ESBG would like to address the following concern. On the one hand, it seems appropriate not to require individual accounts from third country issuers solely for the purpose of the Transparency Directive. On the other hand, it is not appropriate to subject some third country issuers (those not having to present individual accounts) and EU issuers (which have to present individual accounts) to different reporting requirements. This unequal treatment can be avoided by imposing additional reporting requirements on third country issuers that do not have to present individual accounts. In line with CESR’s suggestion in paragraph 551, these additional reporting requirements should consist of the information, issuers would have had to disclose in their individual accounts and which is not directly available through the consolidated financial statements.

Answer to Q58: CESR proposed that in line with Article 11 (4) of the Transparency Directive, the notification be made to the public within a maximum total of 7 trading days. Furthermore, CESR concludes that provided this 7 trading day notification deadline is met by a third country issuer, the issuer itself may be able to make its notification to the market within a different number of trading days to that set out in Article 11 (4). The ESBG does not agree with CESR’s proposal to set a fixed time frame. There is no need for introducing a definite time frame, which reproduces the time frame foreseen under the Transparency Directive. It should rather be sufficient to indicate that the investor receives the information within a reasonable time period. In this respect, the ESBG would like to remind that CESR indicates in paragraph 531 that “equivalence” can be declared when the requirement under a third country issuer’s laws, regulations or administrative provisions enables investors to make a similar decision or reach a similar conclusion in terms of investment and disinvestment as if they were provided with the requirement under the Transparency Directive. The ESBG is of the opinion that this concept of equivalence does not justify the introduction of a fixed time frame and should therefore not be pursued.

Answer to Q59: For the reason given in the previous paragraph, the ESBG does not agree with CESR’s proposed draft advice.

Answer to Q60: In line with questions 58 and 59, the ESBG believes that CESR should adhere to its concept of equivalence as described under paragraph 531. If the requirements for equivalence are met and the third country issuer’s law or regulation permits the holding of more than 10% of own shares, this should be also permitted under the Transparency Directive.

Chapter IV: procedural arrangements whereby issuers may elect their “home Member State”

Answer to Q65: the ESBG understands that under CESR’s proposal, the issuer would be obliged to make the information required under the Prospectus Directive available to the central storage mechanism. The ESBG expressly opposes this proposal. Neither the Transparency Directive nor the Prospectus Directive imposes the obligation on issuers to



make the information required under the Prospectus Directive available to a central storage mechanism. More precisely, Articles 21 and 22 of the Transparency Directive do not prescribe such an obligation. On the contrary, these provisions show that there should be no such requirement. Whilst Article 22 of the Transparency Directive expressly includes the information that has to be disclosed under the Prospectus Directive, Article 21 (1) of the Transparency Directive relates only to regulated information, i.e. excluding the Prospectus Directive information. This clear decision taken by Council and European Parliament (i.e. that issuers are not obliged to make available information under the Prospectus Directive) should not be overruled by the Commission at Level 2 or by guidelines as prescribed in Article 22.

At the same time, the ESBG is in favour of a one stop shop for the investor, but believes that it can be achieved by other means. More precisely, as explained in the response to the first set of advice (January 2005), ESBG Members share the view that the most appropriate way to fulfil the requirements under Article 21.2 (ex Article 17.1a) is for the competent authority of each Member State to run the officially appointed mechanism for the central storage of regulated information. Should this solution be adopted, then the objective of expanding the scope of Article 21 (ex Article 17) to also disclose information under the Prospectus Directive could be met, as the information required under the Prospectus Directive has to be filed to the competent authority.

Answer to Q66: yes.