

3 March 2005

IMA RESPONSE TO CESR'S CONSULTATION ON POSSIBLE IMPLEMENTING MEASURES OF THE TRANSPARENCY DIRECTIVE

The IMA represents the UK-based investment management industry. IMA members include independent fund managers, the asset management arms of banks, life insurers and investment banks, and occupational pension scheme managers and are responsible for the management of over £2 trillion of funds (based in the UK, other parts of Europe and elsewhere).

The IMA welcomes the opportunity to respond to CESR's consultation on possible implementing measures of the Transparency Directive. We have primarily focussed our attention on Chapter I of CESR's paper which deals with the notification of major shareholdings and related parts in Chapter 3 on the equivalence of third country information requirements. This issue is of particular concern to our members who in managing the assets of significant institutional investors such as pension funds and insurance companies as well as the assets of retail clients, charities and other bodies are normally given the control over the exercise of the voting rights attached to shares traded on EU regulated markets.

We believe the inclusion of an exemption in terms of disclosure from aggregating the holdings of a parent company with its asset or UCITS management subsidiary when the two exercise voting rights independently was an extremely important amendment to the level 1 text and believe that if sensibly implemented will provide benefits to our members, their parent undertakings as well as to issuers and the market as a whole.

We broadly welcome CESR proposals in this area which provide a workable approach to the level 1 text. In particular, we strongly support

- CESR's proposal to apply the exemption to all management companies meeting the conditions laid out in the UCITS directive, irrespective of whether they are "authorised" under that directive;
- CESR's proposal that MiFID authorisation provides sufficient safeguards to be applied for investment firms to demonstrate that they are conducting portfolio management independently from other services; and
- CESR's proposal to apply the same basic conditions of independence to both EU and non-EU management companies or investment firms.

We, nevertheless, have a number of specific concerns in relation to CESR's draft advice on the conditions of independence which are highlighted in our responses to CESR's questions. In particular, we believe that the reference in the draft advice to "investment decisions" and the need to demonstrate independence in this regard

65 Kingsway London WC2B 6TD
Tel: +44(0)20 7831 0898 Fax: +44(0)20 7831 9975

www.investmentuk.org

goes beyond the level 1 text and should be deleted from CESR's advice. In addition, we also believe the language on indirect instructions is too vague and potentially too wide, and could unintentionally capture general proxy voting guidelines or basic principles of ownership. We also appreciate that under the Transparency Directive Member States have the discretion to impose more stringent requirements than those laid down in the directive. We strongly believe that it is critical for Member States to agree that the level 2 test of independence should be the "maximum" test for determining independence and no additional requirements should be imposed.

We also have a number of comments on the other sections of Chapter I of CESR's paper, particularly in relation to the use of the standard form. We believe that the CESR advice should reflect the fact that the disclosure of the identity of the shareholder is only necessary in making notifications under Article 9; it is the identity of the natural or legal entity that has control over the exercise of the voting rights which must be disclosed in a notification made under Article 10.

Finally, while the directive does not seem to include an equivalence provision with respect to notification of shareholdings in non-EU issuers per se, it would be particularly helpful if CESR could as part of its level 2 advice on the standard form make clear that where a notification to a non-EU issuer has been made under equivalent requirements under the law of that third country where the issuer has its registered office, no additional notification under the Transparency Directive is necessary. The lack of such an equivalence provision would mean filing two different notifications, increasing significantly the burden of compliance for shareholders with respect to non-EU issuers and resulting in a potentially very confusing situation for the issuer.

We hope these comments and our attached responses to CESR's questions are helpful. We look forward to working closely with CESR as it develops its advice. Should you like to discuss any of these points or other issues relating to the mandates, please do not hesitate to contact me or Sheila Nicoll.

Yours sincerely,

A handwritten signature in dark ink, appearing to read 'Ilene Hersher', written in a cursive style.

Ilene Hersher
Adviser – EU Legislation

IMA RESPONSES TO QUESTIONS ON CESR'S PROPOSED ADVICE ON POSSIBLE IMPLEMENTING MEASURES OF THE TRANSPARENCY DIRECTIVE

CHAPTER 1 – NOTIFICATIONS OF MAJOR SHAREHOLDING OF VOTING RIGHTS

SECTION 4 – THE DETERMINATION OF WHO SHOULD BE REQUIRED TO MAKE THE NOTIFICATION IN THE CIRCUMSTANCES SET OUT IN ARTICLE 10 OF TRANSPARENCY DIRECTIVE

Q8: Do you agree that aggregation is required in the three main situations? Please give your reasons if you do not agree.

Response to Q8: Yes.

Q9: Do you agree with the possibility to appoint another person to comply with the notification duty? Please give your reasons if you do not agree.

Response to Q9: Yes.

Q10: Do you agree with the possibility of making a single notification in case of joint notification duty? Please give your reasons if you do not agree.

Response to Q10: Yes.

Q11: With which of the approaches set out above in relation to each of the circumstances set out in articles 10(a)-(g) above do you agree? Please give reasons.

Response to Q11: We support Approach A over Approach B in determining which entity should be responsible for making notifications under Article 10. Approach A is based on the principle that it is the person or entity entitled to exercise the voting rights that has to make the notification. We believe that this reflects what was intended in the level 1 text and that Approach B, in an attempt to provide “full transparency” would in fact flood issuers and the market with too much confusing information and would therefore provide less transparency on relevant changes to major holdings.

Q12: Do you agree that a subsequent notification requirement is triggered when there are changes to the circumstances described in Article 10(a)-(g)? Please give your reasons.

Response to Q12: We believe that a notification requirement should be triggered for a change in circumstances under Article 10 only if the change results in the crossing of a threshold and not merely if the number of voting rights changes. We believe that to require notifications whenever changes to the circumstances described in article 10(a)-(g) occur irrespective of whether or not a threshold has been crossed would, like Approach B, be too broad and provide unnecessary and unhelpful information.

Q13: Do you agree with the draft technical advice?

Response to Q13: We basically agree with the draft technical advice under Approach A, subject to a change to paragraph 150 to reflect our comment above, i.e., that a notification requirement for changes to the circumstances described in article 10(a)–(g) should be triggered only if the change results in the crossing of a threshold.

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

Q14: Which of the options set out above do you consider should be recommended to the European Commission? Please give reasons for your answer.

Response to Q14: We believe that the day after the transaction was actually executed should be considered the point at which a natural person or legal entity is deemed to have knowledge of the acquisition or disposal or the possibility to exercise the voting rights. Global firms often have complex systems for tracking investments worldwide and need sufficient time for the production and aggregation of reports indicating the passing of a threshold.

Q15: Are there any other options that CESR should consider and why?

Response to Q15: No.

Q16: Do consultees agree with the proposals set out in the paper? Please give your reasons if you do not agree.

Response to Q16: We agree with the proposals which relate to the day after the transactions was actually executed.

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

Q17: Which of the above approaches do you think most appropriate? Please give reasons for your answer.

Response to Q17: We believe the second view, that the exemption should apply to all management companies that conduct management activities under the conditions laid down under the UCITS directive, whether they are authorised under that directive or not, is the most appropriate. The level 1 text does not state that a management company needs to be authorised under the UCITS directive; it states that a parent undertaking shall not be required to aggregate its holdings with the holdings managed by a management company “under the conditions laid down” in the UCITS directive, provided such management company exercises the voting rights independently.

We also believe as a practical matter this interpretation is more logical because UCITS management companies authorised under the UCITS directive can manage both UCITS and non-UCITS. It could therefore be misleading if holdings in non-UCITS managed by a UCITS “authorised” management company fell within the scope of the exemption but did not if held by a management company not authorised under the directive. We would note that even when UCITS 3 is fully implemented there will be funds authorised at a national level but which do not fall within the terms of the product directive.

Q18: Do consultees consider that the additional confirmation envisaged in paragraph 245 to be necessary?

Response to Q18: No, we do not believe that it is necessary for the management company or investment firm to confirm in writing the statement of independence made by the parent undertaking. As noted in the consultation paper, it is the parent undertaking that benefits from the exemption and any declaration from the parent should be adequate. We also agree that in terms of the reference to independence between portfolio management and other services, MiFID is sufficient and no other additional conditions of independence are necessary.

Q19: Do you consider that there should be other methods by which the parent undertaking demonstrates independence to those set out above? Please give your reasons and set out what these should be.

Response to Q19: No, we believe that those methods set out above address the key issues.

Q20: What is your view about these suggestions, and do you consider any of them to be fundamental for the demonstration of independence? Please give your reasons.

Response to Q20: No, we do not believe any of them are fundamental. We believe they are possible methods that a parent or management company or investment firm may choose to employ. What is fundamental is that the parent undertaking is able to demonstrate on request that the organisational structures are such that voting rights are exercised independently. How it does that should be a matter for the individual firms.

Q21: What are your views in relation to the meaning given to indirect and direct instructions?

Response to Q21: We believe the notion of indirect instructions is too vague and too broad and could unhelpfully, and inappropriately, capture general proxy voting guidelines or basic principles of ownership. For example, a general policy that might be adopted at parent level is a policy supporting best practice under the Combined Code of Corporate Governance in the UK. It would be inappropriate for this to be considered indirect instructions.

Q22: Do you agree with the technical advice? If not, please give your reasons. Are there any circumstances that CESR should take into consideration that would necessitate different conditions being established for management companies and investment firms? Please give details and provide reasons.

Response to Q22: We broadly agree with the draft advice subject to the following essential changes:

- delete the reference in paragraph 262 to the need to demonstrate independence in relation to the "investment decisions over securities traded". This reference goes beyond level 1 text; does not (rightfully) appear in the actual draft advice in relation to third country management companies and investment firms (though it does creep into the discussion on those provisions as well).
- make it clear in paragraph 262, at the end of the first sentence that the voting rights are exercised independently "of the parent".

- for the reasons set out above, amend the last sentence of paragraph 269 to read "Indirect instructions are those that otherwise control the management company or investment firm in the exercise of voting rights."
- in terms of the level of independence the draft advice needs to consistently refer to the exercise of voting rights and not to all rights attached to the assets managed by a management company or investment firm (which would include the right to take legal action, for example). Paragraph 618 (a) needs to be amended to reflect this and should read "the management company or investment firm is free to exercise the voting rights attached to the assets it manages in all situations."
- clarify that the declaration to the competent authority need only be submitted either at the start of implementation of the Transparency Directive or the first time a firm holds stock in a particular jurisdiction and crosses an Article 9 threshold (as set out in paragraph 267) and not every time a filing of a holding is made (as might be inferred because of the way paragraph 266 is drafted).

We cannot see any circumstances that would necessitate different conditions (subject to the above comments) being established for management companies and investment firms.

SECTION 7 - STANDARD FORM TO BE USED BY AN INVESTOR THROUGHOUT THE COMMUNITY WHEN NOTIFYING THE REQUIRED INFORMATION

Q23: Do you agree that it is necessary to disclose information about the total number of voting rights? Please give your reasons.

Response to Q23: We do not believe it should be necessary on the basis that CESR is already proposing that the class/ type of share held is provided (from which the total number of voting shares can be determined).

Q24: Do you agree that it is important to require the disclosure of information about the previous notification? Please give your reasons.

Response to Q24: We do not believe it is important because this information is effectively already provided. CESR already requires the number of voting rights acquired/ disposed of and the overall % voting rights held, which indicates already when / if a previous notification was / should have been made. In those cases where a notification might be missed inadvertently, such a requirement could cause confusion.

Q25: Do you agree with this proposal? Please give your reasons.

Response to Q25: Information about how the holder has acquired or disposed of the shares and /or voting rights is not required by level 1 and does not seem to assist market transparency. This proposal is overly burdensome for large financial institutions, especially since the directive provides for one disclosure by the parent undertaking on behalf of all undertakings that have crossed a threshold. For any one notification a large firm may have many reasons for the acquisition / disposal and to have to itemise each trade would be very onerous.

On a related issue, it would be helpful for CESR to clarify that disclosure of the chain of undertakings through which interests are held does not in fact require disclosure of a chain of wholly-owned subsidiaries between the ultimate parent that is making the notification and the entities that are disclosing. There is no value to the market in knowing the names of a series of intermediate holding companies which are all under one ultimate control.

Q26: do you think that information about the number of shares should be required? Please give your reasons.

Response to Q26: This is something that can already be calculated based on the details that CESR already proposes in the form and is therefore unnecessary.

Q27: Do you agree with this proposal or do you consider it necessary to have a breakdown of each party to the agreements holding? Please give your reasons.

Response to Q27: We agree for the reasons set out in the CESR paper.

Q28: Do you think that upon termination of the agreement there should be a requirement to disclose each party to the agreements individual holdings after the termination? Please give your reasons.

Response to Q28: No, we do not think there should be such a requirement. Notification should only be required when a threshold is crossed.

Q29: Do you agree with the above? Please give your reasons.

Response to Q29: The same comments in relation to Article 9 notifications apply. Moreover, we do not believe that a notification made under Article 10 should necessarily include a requirement to identify the shareholder in addition to the natural person or legal entity entitled to exercise the voting rights (see our response below).

Q30: Do you agree with this approach? Would you suggest different figures? Please provide reasons for your answers.

Response to Q30: In our view, the level 1 text requires the disclosure of the identity of the shareholder in making notifications under Article 9 and the disclosure of the identity of the natural or legal entity that has control over the exercise of the voting rights in a notification made under Article 10. We do not agree with what appears to be CESR's interpretation of the level 1 text that under an Article 10 disclosure the identity of the shareholder is also required. Moreover, in practical terms, in the case of investment management for example, it is the manager who has control over the decisions to acquire and dispose of the shares as well as control over the exercise of the voting rights and no useful information about ownership or control is gained by revealing the identity of the "shareholder".

There are also differing views on who is meant by shareholder, because of the somewhat ambiguous definition in the level 1 text, and whether "shareholder" means the legal (registered, in the case of registered shares) shareholder, e.g. custodian, or whether it means the person who has the economic interest in the shares). Certainly, where the "shareholder" is exempted from making a disclosure under Article 9, as is the case for custodians, it is only logical that notification of the identity of that shareholder should similarly not be required under Article 10. Requiring the disclosure of the custodian's identity would not provide the issuer/market with any useful information and would be very costly for some firms to do. Custodians in

many European jurisdictions have either been exempt from disclosing major shareholdings or otherwise not been aggregated with other holdings. Considerable expense would need to be incurred by multi-service firms to build systems that link every holding to its relevant custodian. Notifications would also be considerably more onerous for little or no gain in market transparency as there may well be many custodians that comprise the aggregated position.

Q31: Do you agree with the draft technical advice? Please provide reasons if you do not agree.

Response to Q31: See our comments above. In summary, we believe information in relation to the number of voting rights need only be the actual percentage held (if the notification is of the fact of falling below 5% the requirement should only be to state that fact and not to have to give the resulting percentage); there should be no need to disclose the numbers of shares acquired or disposed of, the threshold crossed (which will be obvious) or the number of shares in issue. There should also be no obligation to give the reason for the threshold being crossed (including where this is a passive breach) as highlighted in the response to Q25. Moreover, we would suggest that rather than contact information for all persons mentioned, it should only be the actual person making the notification who has to give contact details – it can then provide the competent authority with further information if necessary for regulatory purposes. Limiting the information to be disclosed in this way would be consistent with the requirements set out in the directive, would not result in any significant loss of market transparency and would considerably simplify the notifications, to the benefit of those having to make them and establish the systems for doing so. Finally, we also believe that the CESR advice should make clear that notification is acceptable in English, i.e. a language customary in the sphere of international finance.

SECTION 8 – FINANCIAL INSTRUMENTS

Q32: With which approach do you agree with? Please give your reason.

Response to Q32: We support the second approach based on notification at a set point in time before the underlying shares can be acquired rather than upon acquisition/ disposal of the financial instrument. For firms with many long dated derivative positions, the disclosure of their acquisition or disposal is not much use in terms of market transparency given many exercise/ expiry dates are in say, 5 years' time or more, yet the notification of all of these would be onerous.

Q33: Are there circumstances where you consider any of these approaches not to be appropriate? If so, please give details and propose an alternative.

Response to Q33: Please see response to Q32 above.

Q34: In relation to the second view, do you agree that 3 months is the appropriate timeframe before exercise or conversion takes place for when a notification requirement is triggered? Please give your reasons. If you do not, please specify the timeframe that you consider appropriate and why.

Response to Q34: We agree with the proposed timeframe because it is reasonable to assume the relevant holder of the financial instrument will be considering whether to exercise / convert within that period.

Q35: In relation to the second view do you agree that instruments that include an "American exercise period" feature should be notifiable upon acquisition, disposal or relevant change in holding of these instruments? Please give your reasons.

Response to Q35: Yes, for the reasons CESR points out, i.e., that they can be exercised at any time by the holder.

Q36: In relation to the second view, do you consider it appropriate to distinguish between those instruments with an American Exercise period and those that have a "structured but fixed exercise period"? Please give your reasons.

Response to Q36: We believe that the CESR proposal under this second approach is reasonable.

Q37: Do you agree with this approach? Please give your reasons.

Response to Q37: This approach seems reasonable because it will ensure consistency and make it simpler for the market to understand and fulfill its obligations.

Q38: Do you agree with the above proposal? Please provide reasons for your answer if you do not agree.

Response to Q38: Yes, this proposal seems reasonable.

Q39: Do you consider it necessary to define what the meaning of financial instruments is for the purposes of the Transparency Directive? Please give your reasons.

Response to Q39: No, the reference to the MiFID definition and the level 2 explanation of the features of the financial instruments to be included are sufficient.

Q40: Do you agree with the above? Please, provide reasons for your answer if you do not agree.

Response to Q40: Yes, we agree with the list of the types of financial instruments to be included.

Q41: Do you consider it to be necessary or possible to establish a list of instruments that qualify as financial instruments for Transparency Directive purposes? Please give reasons.

Response to Q41: No, it is not necessary to establish a list and there is a danger that such a list may exclude new products that should be included.

Q42: Do you agree with the above proposal? Please, provide reasons for your answer if you do not agree.

Response to Q42: Yes.

Q43: Are there reasons why certain financial instruments should not be aggregated? Please give reasons.

Response to Q43: No.

Q44: Do you agree with the above proposal? Please provide reasons for your answer if you do not agree.

Response to Q44: The key issue in relation to this proposal concerns the level of detail required as to when the shares can be acquired (exercise period)

and the date of expiry/ maturity of the financial instrument. Our members would find it difficult to have to detail this for each instrument, rather than provide an aggregation of all financial instruments for which the exercise/ maturity is within the next 3 months.

Q45: Do you think that CESR should require more or less information than what is proposed above? Please give your reasons and specify what information you would delete or add.

Response to Q45: See response to Q44 above.

Q46: Do you consider that information on the total number of voting rights in issue and on the previous situation should be included? Please provide reasons for your answer.

Response to Q46: See responses to Q23 and Q24 above.

Q47: Do you consider the ISIN code of the underlying share to be relevant information to be included in the standard form? Please provide reasons for your answer.

Response to Q47: No, particularly if it means having to itemise financial instruments, assuming they may relate to different classes of underlying share.

Q48: Do you agree with the above? Please state your reasons if you do not and explain why you do not agree.

Response to Q48: It makes sense for the holder of financial instruments to send the notification to the issuer of the shares to which the financial instrument relates and not to the issuer of the financial instrument in question.

Q49 Do you agree with the draft technical advice? Please provide reasons if you do not agree.

Response to Q49: See responses to questions above.

CHAPTER 3 – EQUIVALENCE OF THIRD COUNTRIES INFORMATION REQUIREMENTS

SECTION 2 - EQUIVALENCE IN RELATION TO THE TEST OF INDEPENDENCE FOR PARENT UNDERTAKINGS OF INVESTMENT FIRMS AND MANAGEMENT COMPANIES

Q62: Do you agree with the proposed approach? Do you consider the alternative approach provides added value? Please give your reasons.

Response to Q62: We agree with the proposed approach that it is not necessary to create a list since the test of independence is not based on an assessment of equivalence of third country frameworks. For these reasons we do not see any added value from the alternative approach since the firms involved would still be required to meet the test of independence on a case-by-case basis.

Q63: Do you agree with this proposal? Please give your reasons.

Response to Q63: We agree that the level 1 text does not require the third-country management company or investment firm to be authorised.

Q64: Do you agree with the above proposals? Please give your reasons.

Response to Q64: Yes, we agree that they should mirror the requirements for EU management companies and investment firms. It would be helpful for CESR to clarify the following points in relation to the draft advice:

- the management company or investment firm is free to exercise “voting” rights (and not all rights) independently in all situations.
- the exemption applies, as it does for parents of EU management companies and investment firms, where the exercise of voting rights is delegated by the management company or investment firm to a third party provided the third party exercises the voting rights independently from the parent of the management company or investment firm.
- the disaggregation provision also applies for parents on non-EU management companies and investment firms in relation to financial instruments under Article 11a.