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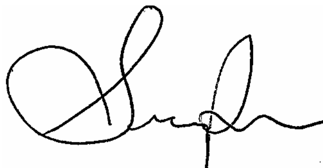
Dear Fabrice

CESR's draft advice on possible implementing measures of the Transparency Directive: Part II

The International Primary Market Association is pleased to submit its response to CESR's consultation on this draft advice.

We hope that these comments prove useful to CESR and please let me know if it would be helpful to have further discussion on any of these points.

Yours sincerely



Samantha Barrass
Head of Regulatory Policy

INTERNATIONAL PRIMARY MARKET ASSOCIATION

Response to CESR's draft advice on possible implementing measures of the Transparency Directive, Part II.

March 4, 2005

COMMENTS ON CESR's ADVICE

INTRODUCTION

IPMA is the trade association which represents the interests of the international banks and securities firms which underwrite and distribute international debt and equity securities in the primary market. It has 52 members representing the leading underwriters and dealers in all of the world's major financial centres.

IPMA is pleased to respond to the publication by CESR, in December 2004, of its draft advice for the consistent implementation of the European Commission's directive on the harmonization of transparency requirements in relation to information about issuers (2004/109/EC) (the **"Transparency Directive"**).

COMMENTS

CHAPTER 1: NOTIFICATIONS OF MAJOR HOLDINGS OF VOTING RIGHTS

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

Question 4: What do consultees think of the proposed methods of controlling the market maker activities with regards to the exemption provided? Question 5: Do consultees envisage other control mechanisms that could be appropriate for market makers who wish to make use of the exemption? Question 6: Do consultees agree with the proposals set out in this paper? Please give your reasons if you do not agree.

Notification: We believe it is reasonable for a market maker to be required to notify the relevant competent authority of its intention to act as such and that it wishes to get the benefit of the exemption.

Segregation: We do not believe that a firm's different activities need necessarily to be kept physically separate as long as it is possible to identify a particular trade as being for the purposes of market making. Regulatory provisions should focus on stipulating this as an outcome, and not on how this outcome should be achieved. (For example, through mandatory separate accounts.)

Point of Notification: We believe that it should be possible to deliver a more efficient outcome than multiple notifications. We believe that a mechanism by which a single notification is made to the regulator of the investment firm's home member state under MiFID (as defined in the consultation paper) should be feasible. That member state could keep a list of all market makers in its territory, which it could share with all other European competent authorities. We understand that this regulator would not regulate market making *per se*, but we believe this should not be a bar to a pragmatic and efficient solution. A mechanism using a single notification, as suggested above, would serve the intended purpose of giving notice to all competent authorities that a market maker intends to act as such.

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

Question 7: Do consultees agree with the proposals set out in this paper? Please give your reasons if you do not agree.

The approach set out in the paper seems a reasonable short-term solution. In the longer-term we think there might be merit in exploring the feasibility of establishing a single calendar of trading days across the EEA. In such a single calendar, if a day were not a trading day in any jurisdiction in the EEA, it would not be a trading day for notification purposes in any other jurisdiction. Such an approach would appear to be simple, give legal certainty, reduce the number of potential calendars that could be relevant and eliminate the possibility of calendar arbitrage.

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

Question 12: 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.

We believe that a subsequent notification requirement would be triggered only where there has been a shift in the voting rights from one person to another, which results in one of the thresholds in Article 9 being touched. In such circumstances, the notification should only be required to made (in line with Approach A discussed below) by the person whose holding of voting rights has touched such a threshold.

Question 13: Do you agree with the draft technical advice?

Approach A is a significantly more reasonable and proportionate approach than Approach B, which would, for example, require a person to make a notification even if his holding had not touched a threshold set out in Article 9. Approach A is also better supported by the language in Article 10 and more consistent with the scope of Article 9. In particular, Article 9 does not require notification by a disposer if the acquiror's holding touches an Article 9 threshold (or vice versa), so it does not make sense that level 2 provisions under Article 10 should have this impact.

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

Question 14: Which of the options set out above do you consider should be recommended to the European Commission. Please give reasons for your answer.

We believe that the appropriate date should be the day **after** the transaction was actually executed for the reasons set out in paragraphs 174 to 177 of the paper.

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

Question 17: Which of the above approaches do you think most appropriate? Please give reasons for your answer.

We believe that the second view is the correct one for the reasons set out in paragraphs 191 to 196 of the paper.

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

Question 25: Do you agree with this proposal? Please give your reasons.

We do not agree with this proposal. There may be many legitimate reasons why it would be inappropriate to disclose how the holder acquired or disposed of the shares or voting rights. For example, it is possible that such disclosure would effectively result in the disclosure of a firm's trading strategy. More generally, we believe that this information does not provide any particularly useful information about the "movements of voting rights" as suggested in paragraph 290, and sufficient transparency of movements of voting rights is achieved by simple compliance with the Transparency Directive as written. In addition, we believe that it would be an unnecessary burden for groups of companies where the parent company was undertaking the notification on behalf of all of its controlled undertakings.

Question 30/31: Do you agree with this approach? Would you suggest different figures? Please provide reasons for your answers. Do you agree with this draft technical advice? Please provide reasons if you do not agree.

We believe that an incorrect meaning may well have been attributed to Article 12.1(d) of the Transparency Directive in the consultation paper. It appears to have been interpreted to mean that the identity of the direct "shareholder" of the shares has to be identified in the notification. Given that Article 12 of the Transparency Directive does not otherwise require the identity of the notifier to be disclosed, we believe that Article 12.1(d) was simply intended to mean that the name of the notifier be disclosed, whether that notifier were notifying under Article 9 or Article 10. This is supported by the fact that in certain circumstances, a person is required to notify even if that person is not the "shareholder" (as defined in the Transparency Directive) and cannot exercise the voting rights; (by way of illustration, a person required to notify under Article 10(d)) would otherwise not be required to disclose its own identity under Article 12, which could not have been its intention). The suggested interpretation in this response is also supported by the fact that custodians are not required to notify their holdings as a result of Article 9.4. It would be incongruous and burdensome for the identity of custodians to nevertheless be required to be disclosed under the consultation paper's interpretation of Article 12.1(d). Given current clearing and settlement structures investors will frequently not know the identity of the direct holder of the shares; instead, they will simply know which participant in the ultimate clearing system (in the chain of potentially numerous clearing systems) they have an account with.

Section 8: financial instruments

Question 32: With which approach do you agree? Please give your reason.

We believe that an approach somewhere between the two suggested approaches should be adopted. Such an alternative approach would have the notification triggered upon either of two events: (1) acquisition and disposal of the financial instrument, but only if at that time, the underlying shares could be acquired (aggregating at that time with any other voting rights held and with the shares underlying any other financial instruments that could be acquired at that time); and (2) (if there has not already been a notification under (1)), a specified period **after** the shares becoming capable of being acquired (aggregating at that time with any other voting rights held and with the shares underlying any other financial instruments that could be acquired at that time). We believe such a format would be adequately transparent and would avoid unnecessary notifications (which would inevitably result from the first approach).

In the event that the approach suggested in this response is not adopted, CESR should explore the costs to investors of imposing the second approach suggested by CESR (notification a set time **before** the underlying shares can be acquired) since it would appear to rely on complex and sophisticated systems being in place to monitor exercise periods across multiple holdings with notification mechanisms substantially in advance of exercise periods. Paragraph 405 would, in our view, be better dealt with by the approach suggested in this response. It may well be the case, however, that the costs to investors of implementing such systems would be less than having to make the high volume of notifications that would result from the first approach (notification each time the financial instrument was acquired or disposed of, regardless of whether the underlying shares was capable of being acquired) being followed.

CHAPTER 2: HALF-YEARLY FINANCIAL REPORTS

Section 1: Minimum content of half-yearly financial information not prepared in accordance with IAS/IFRS

Question 50: Do you agree with this proposal? If not, please state your reasons.

Interim cash-flow statements - paragraph 499 (page 84)

We agree that issuers that have not disclosed cash-flow statements in their last annual report should not be required to produce such statements in their subsequent half-yearly report.

We would encourage CESR to explore whether it would be practicable for financial institutions to provide the information required by paragraph 499b(x). We believe firms may find it impracticable, and this point should be explored further when considering the cost-benefit balance of this particular provision.

Section 2: Major related party transactions

Question 51: Do you agree with this proposal or do you believe that other definitions could be followed?

Definition of related third parties under GAAP - paragraphs 504 – 508 (page 87)

The definition of related parties for annual and half-yearly reports should be by reference to IFRS or, importantly, any other GAAP used by the issuer that has been determined to be

equivalent to IFRS. Such an approach would be much more straightforward for issuers and consistent with the outcome that a GAAP has been deemed to be equivalent to IFRS.

Section 3: Auditors' review of half yearly reports

Question 53: Do you agree with the approach proposed by CESR?

Scope of reviews - paragraph 524 (pages 89-91)

This section of the request for advice doesn't appear to bear that much relation to Article 5 of the Directive, and it is not clear what practical outcome the Commission is seeking from CESR's response. Unsurprisingly, therefore, the discussion and recommendations in this section don't appear to achieve very much. More generally, we are not sure that anything further to Article 5 is required at level 2, although some level 3 clarification on when something is and is not a "review" could be quite useful. The purpose of this clarification would be to deliver some certainty over when activity undertaken by accountants for issuers would not be considered a "review" for the purposes of Article 5, and hence avoid the risk that issuers nadvertently could be in breach of these requirements.

The most sensible clarification would be to say that a "review" for the purposes of Article 5 of the Transparency Directive is a review undertaken in accordance with a set of standards or principles published by an accounting organization that customarily publishes accounting standards and/or principles. In particular, a "review" for this purpose would not in any circumstances be taken to mean the performance of any procedures that might contractually be agreed between the issuer and its accountants ("agreed upon procedures") that is not a review as described above.

CHAPTER 3: EQUIVALENCE OF THIRD COUNTRIES' INFORMATION REQUIREMENTS

Section 1: Equivalence as regards issuers

CESR understanding of the term "equivalence" (page 95)

While we might not necessarily agree with all the detailed discussion in this section, we think that CESR has reached a sensible philosophical conclusion that equivalence does not mean "identical"

We would note, however, that there is a significant disconnect between CESR's stated philosophy and some of its conclusions. In part, this reflects the drafting of both the relevant provisions of the Transparency Directive and the request for advice. In particular, the focus on specific reports in the request for advice rather than a focus on the underlying economic value to investors from the overall body of a third country's transparency requirements, inevitably drives one down a path of assessing the presence of identical rather than equivalent outcomes. However, CESR has in some cases not made the most of the limited flexibility available to it, and, in others has put forward greater requirements as being equivalent. We highlight these below. We should add that we would be very happy to work with CESR to determine what alternative approaches might work, within the terms of its mandate.

Finally, we think it would be very useful to create as much certainty as possible around any determination of equivalence. In particular, the determination of equivalence should at least be

accompanied by a clear statement that the determination will not be changed unless there is a fundamental change in the relevant third country requirements.

Question 55 – Do you agree with the proposed approach?

List of countries - paragraph 535 (page 96)

We support the evolution of a single list of countries with equivalent requirements.

Question 59 – Do consultees agree with this draft advice?

Annual management reports – paragraphs 538-539 (page 97)

The requirements for "equivalent" information seem to go substantially further than even the Transparency Directive requirements. For example, for third country requirements to be equivalent, they would appear to have to require a full "MD&A" or operating and financial review section analyzing period-on-period changes in financial information – even the Transparency Directive does not require this. Indeed, the Prospectus Directive does not require this sort of information except where the securities for which a prospectus is published are shares or GDRs. We suggest some re-thinking on this that moves back from prescriptive requirements and focuses more on the 'big picture' information value that investors take from these reports.

Half-yearly (interim) management reports – paragraph 540 (page 98)

The requirements for "equivalent" information seem to be identical to the Transparency Directive, contrary to CESR's philosophy of equivalence. Again, on this, we suggest some re-thinking of approach to move back from prescriptive requirements towards a greater principle focus on the 'big picture' information value that investors take from these reports.

Statements to be made by the responsible person under Articles 4 and 5 - paragraph 541 (page 98)

We would support a proposal to accept a single signature of a designated officer of the issuer for the accountability requirement for equivalence. This would, in our view, be a pragmatic approach. CESR's advice is very close to this, but specifically having a condition that the third country's legal framework makes that person clearly responsible for financial statements and reports is too strict - many legal frameworks make more than one person responsible for financial statements and reports, and not all of them typically sign the financial statements and reports. We believe that as long as the person that signs the report has been authorized to sign the report on behalf of the company or the person or persons responsible or is a person in a sufficiently responsible position with respect to financial reports (for example, a chief financial or accounting officer), that should be sufficiently equivalent to the Transparency Directive requirement.

Interim management statements - paragraphs 543-545 (page 98)

Article 6.2 of the Transparency Directive already permits an issuer to publish quarterly financial reports instead of an interim management statement. Consequently, it is not clear that anything is gained from paragraphs 543 to 545.

Parent company information - paragraph 546-552 (pages 98-99)

As a general matter, we support CESR's conclusions on parent company information.

The reference in paragraph 550 to "minimum capital equity requirements and liquidity issues", however, is not clear and needs further clarification. We believe it is intended to mean that if, under an issuer's local law, a company is capable of being wound up by reference to financial information in its unconsolidated accounts, then that specific financial information should be specified on a stand-alone basis so that investors can see that that company is not capable of being wound up on that specific basis. We believe this would be reasonable, and if this is the intended meaning, perhaps it could be set out in those terms.

We would suggest, however, that provision be made to allow such information to be provided separately from the IFRS or equivalent GAAP accounts and on an unaudited basis. In particular, it is likely that, as an accounting matter, permitting non-IFRS information to be included in IFRS accounts, may not represent good practice.

Other – equivalence of notification of major holdings

We should point out that the Transparency Directive regime for major shareholding notification is likely to be a significant additional burden for investors in third country issuers with EEA listings. The directive regime will be in addition to notifications required under any major holding notification regime imposed by the jurisdiction of incorporation of the third country issuer. We believe that CESR should work to see whether third-country notification regimes could be determined to be equivalent to ease this potential additional burden.

CHAPTER 4: HOME MEMBER STATE ELECTIONS

General comment

We believe that this Chapter provides helpful guidance and support its contents.

OTHER:

ARTICLE 3: INTEGRATION OF SECURITIES MARKETS

Ability of home member states to impose "superequivalent" requirements

Article 3 of the Transparency Directive permits home member states to make an issuer or holders of shares or other persons referred to in Articles 10 or 13 subject to "superequivalent" requirements (i.e. requirements that are more stringent than those laid down in the Transparency Directive). We believe that there are many instances where member states should not do this since it would undermine the key objectives of the Transparency Directive to create an efficient and integrated securities market in the Community. The following are examples of areas that should not be subjected to "superequivalence":

- Thresholds for notification of major holdings and aggregation principles
- Market maker and other exemptions from the obligation to disclose
- Notification procedures, including the amount of information required to be disclosed and who should disclose
- Independence criteria for management companies or investment firms

ARTICLE 4: ANNUAL FINANCIAL REPORTS

Treatment of overseas issuers

Article 4 of the Transparency Directive is unclear as to what GAAP a third country issuer would need to prepare its annual accounts under if it is not required to prepare (or, presumably, would not) be required to prepare consolidated accounts under Directive 83/349/EEC.

A member state issuer would, in those circumstances, be able to prepare accounts in accordance with its home country GAAP. A third country issuer should be treated equally and be permitted to prepare its unconsolidated accounts in accordance with its home country GAAP. If the issuer uses another third-country's GAAP, it should also be permitted to use that GAAP for its unconsolidated accounts.