Z E N T R A L E R K R E D I T A U S S C H U S S

MITGLIEDER: BUNDESVERBAND DER DEUTSCHEN VOLKSBANKEN UND RAIFFEISENBANKEN E.V. BERLIN · BUNDESVERBAND DEUTSCHER BANKEN E.V. BERLIN
BUNDESVERBAND ÖFFENTLICHER BANKEN DEUTSCHLANDS E.V. BERLIN · DEUTSCHER SPARKASSEN- UND GIROVERBAND E.V. BERLIN-BONN
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Mr Fabrice Demarigny
Secretary General
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CESR's advice on possible implementing measures of the transparency directive part II: Notifications of mayor holdings of voting rights, half-yearly reports, etc.;
Ref.: CESR/04-512c

Dear Mr Demarigny,

The Zentraler Kreditausschuss welcomes the opportunity to comment on CESR's consultation paper on possible implementing measures under the transparency directive part II (Notifications of mayor holdings of voting rights, half-yearly reports, etc.). It is our pleasure to enclose a document outlining our joint position to this fact.

Should you have any queries regarding our comments, please do not hesitate to contact us.

Yours sincerely
On behalf of the Zentralen Kreditausschuss
Bundesverband deutscher Banken

Dr. Katrin Burkhardt Dr. Stefanie Heun

Enclosure

Z E N T R A L E R K R E D I T A U S S C H U S S

MEMBERS: BUNDESVERBAND DER DEUTSCHEN VOLKSBANKEN UND RAIFFEISENBANKEN E.V. BERLIN • BUNDESVERBAND DEUTSCHER BANKEN E. V. BERLIN • BUNDESVERBAND ÖFFENTLICHER BANKEN DEUTSCHLANDS E. V. BERLIN • DEUTSCHER SPARKASSEN- UND GIROVERBAND E. V. BERLIN-BONN • VERBAND DEUTSCHER HYPOTHEKENBANKEN E. V. BERLIN

Comments of the Zentraler Kreditausschuss[1] on CESR's advice on possible implementing measures of the Transparency Directive, Part II

Ref.: CESR/04-512c

2 March 2005

[1] The ZKA is the joint committee operated by the central associations of the German banking industry. These associations are the Bundesverband der Deutschen Volksbanken und Raiffeisenbanken (BVR), for the cooperative banks, the Bundesverband deutscher Banken (BdB), for the private commercial banks, the Bundesverband Öffentlicher Banken Deutschlands (VÖB), for the public-sector banks, the Deutscher Sparkassen- und Giroverband (DSGV), for the savings banks financial group, and the Verband deutscher Hypothekenbanken (VdH), for the mortgage banks. Collectively, they represent more than 2,300 banks.

I. General remarks

The Zentraler Kreditausschuss (ZKA) thanks CESR for the opportunity to comment on the second consultation paper and welcomes its largely balanced response to the European Commission's mandate. At the same time, we see a need for improvement on a number of points. Before we go into this in detail by answering the questions raised in the consultation paper, we should like to draw attention to one aspect in particular:

In paragraph 632 of the consultation paper, a proposal is made to coordinate the filing of information between the competent authorities under the Transparency Directive and the Prospectus Directive by requiring issuers to also make available the information that has to be disclosed under the Prospectus Directive to the mechanisms for the central storage of information. We categorically reject this proposal. Neither the Transparency Directive nor the Prospectus Directive establish a requirement for issuers to make available the information that has to be disclosed under the Prospectus Directive to the central storage mechanisms. On the contrary, Articles 21 and 22 of the Transparency Directive show that there is in fact no such requirement: Whilst Article 22 of the Transparency Directive, which deals with the creation of an electronic information network, expressly includes for this purpose the information that has to be disclosed under the Prospectus Directive, Article 21 (1), sentence 1, of the Transparency Directive refers only to so-called "regulated" information (excluding the Prospectus Directive information). This legislative decision at Level 1 of the Lamfalussy procedure for the Transparency Directive, which incidentally is in line with the Commission's proposal, cannot now be negated by the Commission at Level 2 or by guidelines within the meaning of Article 22 of the Transparency Directive. There is no reason why issuers should be required to make available, at some expense, the Prospectus Directive information to the central storage mechanisms if they are not required to do so at Level 1, particularly as the one-stop shop for investors can also be created by other means. Under Article 22 of the Transparency Directive, national securities regulators, operators of regulated markets and national company registers are to be linked by an electronic network and access by investors to the information is to be facilitated. We expressly welcome the latter, by the way. The aforementioned institutions have been chosen for this purpose since, because they are usually the competent authorities under the Transparency Directive and the Prospectus Directive, they have the relevant information (regulated information and Prospectus Directive information) at their disposal. There are thus other ways of creating a network within the meaning of Article 22 and a one-stop shop for investors than exceeding the limits set in the Level 1 text of the Transparency Directive and the Prospectus Directive.

I. Specific remarks

CHAPTER 1 – NOTIFICATIONS 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

Q1 Do you agree that, considering the definitions already set out by other bodies, CESR does not need to define what clearing and settlement means for the purpose of the exemption under Article 9(3a) of the Transparency Directive?

Yes. We also believe that the definitions set out by CESR in paragraph 11 should apply under the Transparency Directive too, so that no new definitions are needed in the Directive. At the same time, we wish to point out that the CESR/ECB definitions of clearing and settlement (paragraph 11a) are not a standard but merely glossary definitions. As these definitions are contained in a CESR/ECB report that is still under discussion at present, footnote 1 should not refer to a "*Final Report*" but only to a "*Report*".

Q2 Do you agree with the proposed technical advice? If not, please provide reasons for your answer and state what period of time you consider to be appropriate for these purposes and why.

Yes. We basically agree with the technical advice. However, it should be made clear that the T+3 referred to in the technical advice is merely a definition for the purposes of the exemption under Article 9 (4) of the Transparency Directive. Moreover, T+3 should not be established as a standard, as some member states already have short settlement cycles and a T+1 project is also in progress in the US.

The remarks in paragraphs 14 –16 fail to convince in our opinion, as shares traded outside regulated markets may well have much longer settlement cycles. These are agreed by the parties under existing freedom of contract rules. The exemption under Article 9 (4) should therefore be applicable in this area for the length of the settlement cycle agreed by the parties or at least for a longer period, such as 10 days for example. Otherwise the result would be misleading notifications, as the person acquiring the shares for the purpose of clearing and settlement has precisely no interest in exercising any influence on the management of the issuer. If this person nevertheless had to notify the acquisition of the shares because a longer settlement

cycle than T+3 was agreed outside a regulated market, the notification would not in accordance with the facts. To avoid this, a longer settlement cycle should apply to shares traded outside regulated markets.

Q3 Do you consider that "short settlement cycle" can mean the same in relation to shares or other financial instruments, or are there, in your view, circumstances that should make CESR differentiate shares from other financial instruments? Please provide reasons for your answer.

With regard to the usual settlement cycle, we are in favour of the same principles applying to other financial instruments as to shares. The settlement cycles for shares and for other financial instruments, if traded on a regulated market, are usually the same and the same market rules usually apply to both.

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.

Q4 What do consultees think of the proposed methods of controlling the market maker activities with regards the exemption provided?

We agree with CESR that, because of the prior authorisation of market makers under the provisions of the Directive on Markets in Financial Instruments (MiFID), it is not necessary to create a full set of controls for market makers under Article 9 (5) of the Transparency Directive.

However, we wish to point out with regard to the criteria proposed in this connection in paragraph 39 that the requirement under (a) for the activities of a bank and those of a market maker to be kept separate can on no account mean a separation in the form of "Chinese Walls", as a market maker usually operates as a proprietary trader at the same time. Due to low trading volumes, operating solely as a market maker is not economically viable. This is why there is at any rate no separation of market makers and proprietary traders in the sense that different staff or different offices are used. In many cases, market making is also machine-based. The proposed requirement under paragraph 39 for an investment firm to hold and mark securities resulting from market making, proprietary trading or other activities in separate accounts should therefore suffice.

Q5 Do consultees envisage other control mechanisms which could be appropriate for market makers who wish to make use of the exemption?

No.

Q6 Do consultees agree with the proposals set out in this paper? Please give your reasons if you do not agree.

Yes.

SECTION 3

THE DETERMINATION OF A CALENDAR OF "TRADING DAYS" FOR THE NOTIFICATION AND PUBLICATION OF MAJOR SHAREHOLDINGS.

Q7 Do consultees agree with the proposals set out in this paper? Please give your reasons if you do not agree.

Yes.

SECTION 4

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

Q7 Do consultees agree with the proposals set out in this paper? Please give your reasons if you do not agree.

Yes.

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 three main situations? Please give your reasons if you do not agree.

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.

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.

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 with. Please give reasons.

We believe that the approach described in paragraph 94 (approach A) is the only one appropriate for determining who has to make the notification required under Article 10 of the Transparency Directive. As Article 10 is geared to the exercise of voting rights, only persons who are entitled to acquire, dispose of, or exercise voting rights are required to make the notifycation. On the other hand, the Directive contains no authority to regulate along the lines of approach B (paragraph 95), under which any party involved in any of the cases covered by Article 10 (a) – (h) would be required to make the notification. For this reason, approach B, which would trigger a not inconsiderable additional amount of virtually meaningless notifycations, must be rejected.

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.

Yes, but only if the changes in the circumstances described in Article 10 mean that the proportion of voting rights held by the shareholder would reach, exceed or fall below any of the thresholds set under Article 9 (1) of the Transparency Directive. Only this information is of importance for the capital market. Moreover, any change solely in the circumstances triggering the notification requirement but not in the proportion of voting rights within the meaning of Article 9 (1) could not be identified in the course of regular computerised monitoring. In addition, any requirement to notify changes in the circumstances described in Article 10 without taking into account the notification thresholds set under Article 9 of the Transparency Directive would have to be rejected. The notification thresholds are taken more or less clearly into account in paragraphs 134 and 139. This is not true of paragraph 130, so an additional clarification would be desirable here.

See also our reply to Question 28.

Q13 Do you agree with the draft technical advice?

Yes, the technical advice following approach A is appropriate.

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.

None of the technical advice proposed in paragraph 172 is convincing. An approach geared to the execution of the transaction, as proposed in paragraph 172, is inappropriate both in general and with regard to the persons required to make the notification in particular. A shareholder with a small portfolio will certainly be able to gain knowledge of his notification requirement within the period proposed by CESR. This is not the case, however, with large, internationally operating banks. Because of their diverse shareholdings abroad and the special features relating to these (e.g. the notification period is based on the calendar of trading days of the issuer's home country), it is not always easily possible for them to have knowledge of a notification requirement on the date of execution of the transaction or one day later. The assumption that the execution of transactions is monitored daily is at odds with actual practice in many cases. In the case of a typical limit order with a term of, for example, one month, market practice and diligence does not provide for inquiring daily whether the order has been executed. This is true in general and for shareholders with large portfolios and a large trading volume in particular.

Moreover, the notification requirement and the commencement of the notification period are geared to the acquisition or disposal of voting rights. The acquisition or disposal are, however, only completed once the shareholder has acquired or (in the case of disposal) lost title to the shares. This is the case on the value date. Only once the shareholder has or should have obtained knowledge thereof does the notification period commence under Article 12 (2) (a) of the Transparency Directive. Otherwise the notification period would commence before the notification requirement is triggered. An approach geared to the date of execution of the transaction would

therefore also shorten the notification period. We thus suggest gearing commencement of the notification period to the value date. This is unlikely to lead to an excessive lack of homogeneity within the EU because a settlement cycle of T+2 to T+3 is the standard throughout Europe. Compared with the approach proposed by CESR, the delay for market participants would probably be one trading day here. This appears quite reasonable, particularly as, according to its wording and purpose (notification of an **existing** proportion of voting rights), Article 12 (1) (a) of the Transparency Directive is geared to acquisition/disposal under property law. At any rate, knowledge of the acquisition or disposal should not be assumed to have been obtained any earlier than one day after the execution of the transaction.

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

Yes. Please see our reply to Question 14.

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

Please see our reply to Question 14.

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.

With respect to Question 17, we emphatically support the reasoning of the “second view”, as outlined in paragraphs 190 to 196 of the consultation paper, since only this approach is capable of supporting the objective of Article 12 (4) (formerly Article 11 (3a)).

The notification requirements on changes in major holdings, as laid down in Chapter III, Section I (Articles 10 et seq., formerly Articles 9 et seq.) of the Transparency Directive, primarily serve the purpose to inform issuers and (potential) investors about changes in the actual allocation of voting powers in the issuer’s general meeting (cf. recital 18, formerly recital 11). Therefore, the aggregation rule in Article 10 (e) in connection with Article 12 (3) aims at de-

picting the factual allocation of power rather than the legal situation representing ownership rights.

Therefore, in determining the scope of the exemption from the obligation to aggregate the shareholdings in Article 12 (4) (formerly Article 11 (3a)), the decisive criterion must be whether there is any risk of a concentrated control of voting rights within the same corporate group.

Companies managing collective investment schemes in accordance with the UCITS Directive are obliged to act in the sole interest of their investors. These circumstances do not depend on the management company or its products being legally authorised under the UCITS Directive, but rather on factually following the management standards required by this regulation.

Thus, we strongly urge CESR to extend the application of Article 12 (4) of the Transparency Directive to all management companies that conduct their management activities under the conditions laid down in the UCITS Directive, provided that the management company exercises the voting rights independently from the parent undertaking.

The same arguments apply to voting rights resulting from holdings in portfolios of investments managed by management companies in accordance with Article 5 (3) (a) of the UCITS Directive (mandates given by investors on a discretionary, client-by-client basis). Within these mandates, the allocation of voting powers is on a par with the situation within collective investment schemes. Therefore, equal treatment concerning aggregation of holdings is imperative, especially since in these cases the management company is not an investment firm authorised under MiFID.

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

No. Because of the numerous regulations for the management company and the parent company of an investment firm authorised under the MiFID, which CESR outlines once again, no further rules are necessary. An additional confirmation, as envisaged in paragraph 245, would merely be a further act of bureaucracy without any real meaning. However, the proposal made in paragraph 244 (b) should also be reviewed.

The purpose and practical impact of the provision laid down in paragraph 244 (b) of the consultation paper remain unclear to us. Does CESR imply that any parent undertaking has to send a declaration to the respective competent authority of the issuer either

- of every single share it holds (since the controlled management company might also hold, buy or sell these very shares any time – this would create an enormous notification workload for both the parent undertaking and the competent authorities) or

- of every share it holds which at the same time is also being held by the controlled management company (i.e. the situation in which the parent undertaking would actually benefit from the exemption rule – this would require a continuous data flow from management company to parent undertaking and cause a high frequency of notifications to the competent authorities, thereby thwarting the benefits of the exemption rule) or

- in any case the aggregated holdings of parent undertaking and controlled management company would trigger a notification requirement according to Article 10 (e) disregarding the exemption rule of Article 12 (4) (formerly Article 11 (3a) – this would virtually reinstall the notification requirement which was supposed to be eliminated by the exemption rule, only with a change of addressee)?

None of these interpretations is even remotely feasible nor does it in any way serve the purpose of the exemption rule of Article 12 (4) (formerly Article 11 (3a)).

As explained in further detail above, the purpose of this provision is to depict the "real" world rather than the "legal" one. This aim is achieved as soon as the notification requirements on holdings follow the actual decision-making powers and not any group structures. Additional requirements to issue "statements of independence" to competent authorities do not help this

For the same reasons, we strictly object any confirmation obligations on behalf of the management company (Question 18).

In case CESR insists on issuing a statement of independence, we could envisage a general notification requirement to the competent authority of the parent undertaking about the fact that, within a certain group structure, the requirements of the exemption rule are complied with on a continuous basis.

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.

No, this is not the case. As a rule, investment firms are regulated adequately by national law implementing the UCITS Directive.

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.

None of the suggestions made in paragraph 248 are convincing. The independence between the parent undertaking and the controlled management company is established by a host of rules and regulations which CESR outlines itself in section 6. Further mechanisms, which can ultimately only record compliance with these rules and regulations, are unnecessary. This would only create more red tape that would place an additional burden on financial institutions, which are strictly regulated in any case, without bringing any real benefit.

Q21 What are your views in relation to the meaning given to indirect and direct instructions? Please give your reasons.

From the practical point of view, it is essential to restrict the definition of "indirect instructions" to activities that are conducted **with the intention to influence the way of exercising the voting rights**. Without this constraining criterion, most of the relationship within a group of companies would qualify as potentially generating indirect instructions, because each way of exercise of voting rights may be assessed as having beneficial or detrimental impact on the business operations of the parent undertaking. In order to cope with the current approach, management companies or investment firms would effectively have to abandon any business ties with their controlling company, which appears neither economically prudent nor practically feasible and certainly does not correspond with the purpose of CESR's proposal.

Concerning the suggested "mechanisms through which parent undertakings could demonstrate that they have not used instructions to influence" the exercise of voting rights (Paragraph 256 of the consultation paper) we would, by way of precaution, like to point out that those control mechanisms may in no case lead to a reversal of the burden of proof. Such an approach would impose an unacceptable duty upon the parent undertaking, as it is virtually impossible for a person to prove that he has generally not acted in the breach of law.

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.

No, we do not agree with the technical advice. Confirmation by the parent company that it complies with the law is superfluous in this case, too. It can basically be assumed that the companies which make use of the exemption under Article 12 (4) and (5) do so lawfully. Should the competent authority believe that an enterprise supervised by it breaches a particu-

lar regulation, it will in any case ask the enterprise for information or institute formal proceedings. In such cases, the enterprise concerned will outline the structures that it is required to establish under the existing Directives, particularly the MiFID, and thus be able to demonstrate independence. Confirmation of this in advance again appears merely to place an administrative burden on the notifying parties without bringing any recognisable benefit.
We would also like to draw attention in this context to the reservations about paragraph 244 already set out in our reply to Question 18.

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

Before replying to the individual questions, we should like to point out in general that the contents of section 7 and thus the requirements set for notifications under Article 12 of the Transparency Directive are excessively detailed. In our view, establishment of a basic principle in line with the requirements set at Level 1 (particularly Articles 9, 10 and 12 of the Transparency Directive) would have been sufficient. Under this approach, a notification pursuant to Article 12 (1) of the Transparency Directive would always have to contain the following:

- The resulting situation in terms of voting rights or the entitlement to exercise a certain number of voting rights in any of the cases set out in Article 10 (a) – (h).
- Whether, as a result of the acquisition or disposal or the existence of any of the cases covered in Article 10 (a) – (h), the shareholder reaches, exceeds or falls below any of the thresholds set in Article 9 (1); where the shareholder falls below the 5% threshold, only this fact should have to be notified, as otherwise a detailed notification requirement below the 5% threshold would be established.
- The information stipulated under Article 12 (1) (c) – (d) of the Transparency Directive. As regards disclosure of the identity of the shareholder (Article 12 (1) (d)), we would point out that on fulfilment of several notification criteria below the 5% threshold which, only when aggregated, mean that the notifying party exceeds the threshold, the identity of the shareholder must only be disclosed if an individual shareholder also exceeds the 5% threshold. Otherwise a lower threshold than that set under Article 9 would *de facto* be introduced at Level 2. Further details are contained in our reply to Question 30.

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

No, it is not necessary to indicate the total number of voting rights. For one thing, this is not required at Level 1 and, for another, this is superfluous information for the market. The mar-

ket is only interested in whether thresholds have been exceeded, particularly thresholds which, for example, allow control over a company. The same goes for the issuer concerned.

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

No. Here, too, proposals should always be guided by the question of whether additional notification requirements going beyond Level 1 are absolutely necessary to give the market a full picture. This does not appear to be the case here. Should this information be given on a voluntary basis, it would do no harm, however.

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

No. Such a proposal would also go further than the powers granted to CESR at Level 1. What is more, the information specified in paragraph 290 would be of no importance for the issuer or the capital market. In addition, this information is usually not available. Particularly in trading activities or in asset management outside the EU, where none of the exemption criteria take effect for the group, the banks cannot determine in individual cases which transaction triggered the notification requirement.

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

No, as only the number of voting rights and whether a shareholder reaches, exceeds or falls below the thresholds set under Article 9 (1) are of importance. Furthermore, paragraph 291 rightly points out that the Level 1 text expressly refers only to voting rights, so that there is no room for further regulation. There should, however, be the possibility to give this information voluntarily in order to disclose which basis for calculation was used by the notifying party.

Q27 Do you agree with this approach, or do you consider it necessary to have a break down of each party to the agreements holding? Please give your reasons

Yes. It is not necessary to have a breakdown of each party to the agreements holding. The only information that is important is that an agreement allows certain designated persons to jointly exercise a certain number of voting rights and that the thresholds set under Article 9 (1) of the Transparency Directive are thus exceeded.

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.

No, such disclosure is only necessary if individual persons reach, exceed or fall below the thresholds set under Article 9 (1) of the Transparency Directive also after termination of the agreement. Otherwise there would be a conflict with the requirements under Article 9 and 10 at Level 1. See also our reply to Question 12.

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

Yes. As regards the information proposed in paragraph 327 (c), see our reply to Question 28, however.

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

We agree, for the most part, with this approach. In particular, we basically welcome the pragmatic approach presented in paragraph 341. However, this approach should be brought into line with the Transparency Directive. The identity of the shareholder should only be disclosed in cases in which the shareholder holds more than 5% of the voting rights, as only then does the Level 1 text (Article 9 (1)) set a notification requirement. Otherwise, as with the 1% threshold proposed by CESR, a lower notification threshold would be introduced *de facto* at Level 2. The pragmatic approach should be geared here to the notification thresholds set under Article 9 in order to ensure uniformity between Level 1 and Level 2. The same problem of disclosing the identity of a large number of shareholders also arises under Article 10 (f) if a depository may exercise the voting rights attached to the shares held with it at its discretion. Here, too, a pragmatic approach should be adopted and the identity of the shareholders only disclosed if the shares they hold with the depository make up more than 5% of the voting rights.

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

Yes.

SECTION 8
FINANCIAL INSTRUMENTS

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

We prefer the first approach, under which the notification should be triggered upon the acquisition or disposal of the financial instrument. The main argument in favour of this approach is that it is easy to apply in practice. The explanation of the second approach makes clear that the financial instruments in question can differ considerably, so that it is unclear when and how the underlying shares can be acquired or disposed of. The consequence would be that the notification date would vary according to the financial instrument involved. This means that the first approach proposed by CESR is preferable. What is more, the Member States which already have such a notification requirement have evidently adopted this approach and their experience with it has been positive.

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

No.

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

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

Yes.

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

Yes.

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.

No. Like CESR, we believe that the definitions already found in the MiFID to determine what a financial instrument is are adequate and that, for the purposes of the Transparency Directive,

the financial instruments which are ultimately subject to a notification requirement can then be selected from this list of definitions.

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

Yes.

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

Yes. To give the notifying parties legal security, a list of instruments that qualify as financial instruments for the Transparency Directive should be established. This could take place at Level 3.

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

Yes.

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

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

Yes. At the same time, it should always be borne in mind that an electronic notification is always preferable to a written notification and that over-detailed requirements for a standard form are questionable from the outset.

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.

The proposals made in paragraph 460 are superfluous information in our opinion, which should therefore not be included in the notification.

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.

No. CESR provided the reasons itself in paragraph 459.

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.

No, we do not consider the ISIN code to be relevant information, because what is important to the public is the proportion of voting rights attached to the shares of a certain issuer and not whether the underlying shares can be attributed to a certain issue. The identification of the issuer is amply sufficient.

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

Yes.

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

Yes.

CHAPTER 2 – HALF-YEARLY FINANCIAL REPORTS

SECTION 1
MINIMUM CONTENT OF HALF-YEARLY FINANCIAL STATEMENTS NOT PREPARED IN ACCORDANCE WITH IAS/IFRS

Q50 Do you agree with this proposal? If not, please state you reasons.

CESR's proposes that half-yearly financial reports that are not prepared in accordance with IFRS should be based to the greatest extent possible on the minimum requirements of IAS 34. We regard both this proposal and the exemptions with regard to both the statement of changes in equity and the cash-flow statement as appropriate. Reference to IAS 34, which dispenses with mandatory formats for presentation of the balance sheet and the profit and loss account, gives investors at the same time a great deal of flexibility in preparing the half-yearly finan-

cial report. The important thing is that the half-yearly financial report can be compared with the annual financial statements.

SECTION 2
MAJOR RELATED PARTIES TRANSACTIONS

Q51 Do you agree with this proposal or do you believe that other definitions could be followed?

We regard the reference to IAS 24 for the definition and separation of transactions which are disclosed in the half-yearly financial report as a sensible approach that we welcome. This ensures that this information can be compared by issuers who are subject to the IAS Regulation and issuers who are not required to apply IFRS.

Q52 Do you agree with the proposed definition? If not, please state your reason

We also welcome the reference to the fact that the information in the half-yearly financial report should be limited to information that has a material effect on the financial position and performance of the enterprise. We understand this reference to mean that a much lower volume of transactions – compared with that reported in the annual financial statements – usually has to be disclosed. We also wish to point out that these provisions are only of relevance to issuers who issue equity securities on a regulated market but do not draw up consolidated accounts in accordance with the Seventh Company Law Directive. This is likely to be the case for only a very small number of issuers.

SECTION 3
AUDITORS' REVIEW OF HALF-YEARLY REPORT

Q53 Do you agree with the approach proposed by CESR?

The CESR's draft advice stresses that it cannot be CESR' job to establish which standards auditors should comply with for conducting a review of half-yearly reports. We agree with this. An auditors' review usually takes place on a voluntary basis – as provided for also in Article 5 (5) of the Transparency Directive. On no account should a requirement to conduct an auditors' review be established by way of Level 2 measures. We welcome the reference to the International Standard on Review Engagements 2400 issued by the International Auditing and Assurance Standards Board, as this ensures compliance with internationally recognised minimum standards and thus pan-European comparability.

Q54 Do you consider that there is a need for the adoption at national level of a single standard to which audit reviews are conducted? Please give your reasons.

Given the already existing broad level of convergence in auditors' review of half-yearly reports, we see no need for further review standards at national level. It can be assumed that ISRE 2400 will be accepted as general standard.

CHAPTER 3 – EQUIVALENCE OF THIRD COUNTRIES INFORMATION REQUIREMENTS

SECTION 1
EQUIVALENCE AS REGARDS ISSUERS

We wish to point out that the recognition of information for compliance with the transparency requirements should in principle take place on a reciprocal basis. Information which meets the criteria set by CESR should be recognised both in the EU and in third countries.

Q55 Do you agree with the proposed approach? If not, please give your reasons.

We welcome it that the definition of "equivalence" is in line with that in the CESR concept paper on equivalence of GAAP (CESR 04-509).

Q56 Do you consider that there is any other way to develop Level 2 implementing measures related to Article 19(1) of the Transparency Directive? Please explain your answer.

We regard CESR's proposal to assess equivalence by drawing up criteria for each of the requirements set out under (a) – (h) as a suitable approach.

Q57 Do you agree with this interpretation of Article 19(1) of the Transparency Directive as regards time limits? Please give reasons for your answer.

We agree with CESR's interpretation of Article 19 (1) of the Directive.

With regard to the individual requirements with regard to equivalency set out under (a) – (h) in the mandate to CESR, we wish to comment as follows:

(a) Annual management reports

We welcome it that CESR has carried out a careful coordination with the already existing EU rules that we called for in earlier consultations and has adopted the requirements regarding the contents of the annual management report set out in the Fourth Company Law Directive (78/669/EEC) and the Modernisation Directive (2003/51/EC). The annual management reports of third-country issuers – provided they are to be regarded as "equivalent" within the meaning of the Transparency Directive – cannot be subject to any rules other than those applying to EU issuers. On the other hand, we do not understand the additional information requirements for share issuers based on EC Regulation 809/2004 for implementation of the Prospectus Directive. The information required here is basically the same as that in the annual management report called for by the Fourth Company Law Directive and the Modernisation Directive. However, the inclusion of these additional requirements in the consultation paper creates the impression that information going beyond the requirements set for all issuers is concerned here. We therefore feel that reference at this point in the text to the relevant Company Law Directives is sufficient.

(b) Half-yearly (interim) management reports

This paragraph repeats the requirements set in Article 5 (4) of the Transparency Directive. It is logical that the same requirements should also apply to the interim management reports of third-country issuers. Reference to the relevant article of the 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 are set directly by Article 4 (2) (c) and Article 5 (2) (c) of the Directive. The reference here to these requirements is logical. See also our remarks under (b) above.

(d) Interim management statements under Article 6

We regard the proposed rules as sensible.

(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

We regard the definition of "parent" in line with the provisions of the Seventh Company Law Directive (83/349/EC) as sensible. While the rule that third-country issuers do not have to submit a complete set of individual accounts but merely information on dividends and capital maintenance, where this is not contained in the consolidated accounts, is appropriate, it means in our opinion that third-country issuers are treated differently from EU issuers. EU issuers are required under Article 4 (3) of the Directive to submit consoli-

dated and individual accounts in the annual financial statements. It would be advisable to drop submission of a complete set of individual accounts for EU issuers too.

Q58 Do you agree with this proposal? Please give reasons for your answer.

No, there is no need here to introduce rigid time limits that ultimately more or less reflect the timeframe set in the Transparency Directive. Instead, it should suffice if the investor receives the information within a reasonable period. CESR itself points out in paragraph 531 that equivalency does not mean "identical" and that equivalency of information can only mean that under third-country rules the investor should have a level of information similar to that he would have if the issuer were to be treated in accordance with the disclosure requirements set in the Transparency Directive and the investor is therefore able to make a decision on a similarly informed basis.

Q59 Do consultees agree with this draft advice? Please give your reasons.

No. See the reasons given in our reply to Question 58.

Q60 Do you agree with this proposal? Please give your reasons.

No. The equivalence concept set out by CESR in paragraph 531 should also be applied here (see also our reply to Question 58). Consequently, holding more than 10% of own shares would also have to be accepted under the Transparency Directive if the issuer's legal regime allows this.

Q61 Do you agree with this proposal? Please give your reasons.

Yes.

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 that the alternative approach provides added value? Please give your reasons.

Yes.

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

Yes.

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

Yes.

CHAPTER 4 – PROCEDURAL ARRANGEMENTS WHEREBY ISSUERS MAY ELECT THEIR "HOME MEMBERS STATE"

Q65 Do you agree with this proposal? Please give reasons.

If CESR's proposal will require issuers to make available the information that has to be disclosed under the Prospectus Directive to the mechanisms for the central storage of information, we categorically reject it. Neither the Transparency Directive nor the Prospectus Directive set a requirement for issuers to make available the information that has to be disclosed under the Prospectus Directive to the central storage mechanisms. On the contrary, Articles 21 and 22 of the Transparency Directive show that there is in fact to be no such requirement: Whilst Article 22 of the Transparency Directive, which deals with the creation of an electronic information network, expressly includes for this purpose the information that has to be disclosed under the Prospectus Directive, Article 21 (1), sentence 1, of the Transparency Directive refers only to so-called "regulated information" (excluding the Prospectus Directive information). This legislative decision at Level 1 of the Lamfalussy procedure for the Transparency Directive, which incidentally is in line with the Commission's proposal, cannot now be nullified by the Commission at Level 2 or by guidelines within the meaning of Article 22 of the Transparency Directive. There is no reason why issuers should have to make available – at some expense – the information that has to be disclosed under Prospectus Directive to the central storage mechanisms if they are not required to do so at Level 1, particularly as the one-stop shop for investors can be created by other means. Under Article 22, national securities regulators, operators of regulated markets and national company registers are to be linked by an electronic network and access by investors to the information is to be facilitated. We expressly welcome the latter, by the way. The aforementioned institutions have been chosen for the network since, because they are usually the competent authorities under the Transparency Directive and the Prospectus Directive, they have the relevant information (regulated information and Prospectus Directive information) at their disposal. There are thus other ways of creating a network within the meaning of Article 22 and a one-stop shop for investors than exceeding the limits set in the Level 1 text of the Transparency Directive and the Prospectus Directive.

Q66 Do you agree with this proposal? Please give your reasons

Yes, we agree with it, as in this way investors know where to obtain the relevant information on the issuer and according to which rules he is rated.