ZENTRALER KREDITAUSSCHUSS

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Zentraler Kreditausschuss

Contribution to CESR's Call for Evidence

"Mandate to CESR for technical advice on possible implementing measures concerning the Transparency Directive"

(CESR/04/284)

The Zentraler Kreditausschuss (ZKA) appreciates the opportunity to provide its comments on the Commission's mandate to CESR concerning technical advice on possible implementing measures with regard to the forthcoming Transparency Directive. 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 Deutschland (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 2,500 banks.

The ZKA particularly welcomes the fact that also with regard to its work on implementing provisions concerning the future Transparency Directive, CESR is seeking early consultation with market participants. From our point of view, the mandate covers all essential regulatory aspects of the Transparency Directive which are in need of clarification and are not to become subject to forthcoming further mandates. Concerning the individual regulatory aspects, we would like to submit the following propositions:

3.1.1 Notification of the acquisition or disposal of major holdings (Article 9 (6))

Item (1) — "usual short settlement cycle"

As far as trading for the purposes of clearing and settlement is concerned, we would welcome orientation towards a '**T+3 principle**'. This would also appear appropriate with regard to present deadlines that have become a standard market practice within EU Member States. Notwithstanding the foregoing, also in the field of clearing and settlement, in individual cases there may be the need to accommodate a potentially longer settlement cycle outside a regulated market being due to the fact that parties agree on longer time limits. For such cases, however, an obligation to make a notification pursuant to Article 9 would not appear warranted.

Item (2) – "control mechanism as regards market makers"

In our view, such "control mechanisms" for and "appropriate measures" against market makers are unrelated to the regulatory content of the Transparency Directive. Under the Transparency Directive, the only conceivable link to market makers is the exemption provided for pursuant to

Art. 9 (3b). Articles 5 et seq. of the Directive for Markets in Financial Instruments (FIMD) lays down the need for market makers to receive a specific authorisation as an investment firm. In the course of their prudential supervision duties, the competent authorities can thus draw upon this obligation and hence easily verify the question whether a market maker shall be regarded as authorised pursuant to the Directive for Markets in Financial Instruments (FIMD). Hence, there is no need for a separate regulation in this respect. Any questions beyond, such as matters which may relate to potential infringements by market makers, are to be regulated under the forthcoming Directive for Markets in Financial Instruments (FIMD) and/or the present Investment Services Directive (ISD).

3.1.2 Procedures on the notification of major holdings of voting rights (Article 11 (5)) and aggregation amongst financial instruments (Article 11 a (2)),

Item (2) — "trading days"

The ZKA welcomes the fact that the DG Internal Market sees no need for an EU-wide calendar of trading days. This notwithstanding, the language chosen by the Commission, i.e. "*Instead, it invites CESR to provide advice on the trading days of which Member State should be relevant*" is still ambiguous. For the purposes of an adequate reflection of Member States' national public holiday regimes as well as any further idiosyncrasies inherent in national markets, we propose preparation of separate, individual calendars for the various Member States. In order to avoid applicability of different trading days with regard to one and the same issuer whose securities are admitted to trading on different regulated markets, we propose drawing upon the issuer's home Member State as that Member State the trading days of which should be relevant.

Item (4) — circumstances under which the shareholder should have learnt of the acquisition

The clause "*circumstances under which the shareholder ... should have learnt of the acquisition ...*" illustrates that the shareholder has failed to behave in a way that would have allowed him to learn of the acquisition. Had he applied the degree of reasonable due diligence necessary for dealings, the shareholder would have had to know of the acquisition. Hence, this is a case of negligence on the part of the shareholder. Thus, this field of prudential supervision intersects with a central legal concept under civil law that has not been subject to harmonisation. We therefore kindly ask CESR to be mindful of the fact that excessively detailed regulations in the field of prudential supervision law may have a considerable impact on the civil law concept of

negligence. Such impact should not be underestimated and it may also have a knock-on effect on the law of liability.

Yet, in our view, the necessary degree of reasonable due diligence means in particular an obligation to establish and maintain an effective internal organisational structure for forwarding information. For the purposes of a definition of the term 'reasonable due diligence', we feel that – as a benchmark – one should draw upon that degree of diligence which is usually applied by an average market participant with major shareholdings.

3.3.2 Half-yearly financial reports (Article 5 (5))

Item (1) — Clarification of the nature of the auditors' review

As far as any forthcoming clarification of the nature of the auditor's review of half-yearly financial reports is concerned, we would strongly welcome the solution proposed under the mandate, i.e. we would welcome it if CESR were to notably consider the regulatory framework developed by the International Auditing and Assurance Standards Board and, hence, an adoption of ISRE 2400 "Engagements to review financial statements". Such an approach would provide safeguards for compliance with internationally accepted minimum standards hence creating a pan-European comparability.

Item (2) — Minimum content of the half-yearly financial reports

The minimum content of the half-yearly financial reports that are not being prepared under the IFRS, should be laid down in consistency with CESR's recommendations for the consistent implementation of the European Commission's Regulation on Prospectuses No. 809/2004. Accordingly, the condensed set of financial statement would consist of a condensed balance sheet, a condensed profit and loss account and selected explanatory notes, as Article 5 (3) of the Directive provides for. In clarifying the minimum content of such components Articles 73 et seq. of Directive 2001/34/EC could serve as a starting point. This well proven minimum standard for issuers of shares can – in order to comply with the new transparency standards – be adopted to all issuers of listed securities. Where there are no other explicit national provisions on interim financial reporting, international standards (IAS 34.23) could serve for the purposes of assessing materiality of information. In this exercise, in comparison to valuations in the context of annual financial data, valuations during the ongoing financial period would rely more on estimates. Regardless to this, the applicable accounting policies for the interim financial report should be

commensurate to the national provisions on the annual financial reporting, as provided for in Articles 5 (3), 4 (3) of the Directive. Thus, continuity and comparability of the interim and annual financial reports can be assured.

3.4 Third countries: equivalence as regards issuers and UCITS management companies/investment firms (Article 19)

We feel that the assessment of the equivalence between those provisions envisaged in the Transparency Directive and those provisions envisaged by third countries is a important issue. Any assessment of the equivalence should be based on the rationale behind each of the requirements listed under item (a) – (h). We further suggest close coordination with the respective work under the Commission's Mandate dated 25 June 2004. Such work concerns the equivalence between national accounting standards from certain third countries and IAS/IFRS ("Formal mandate to CESR for technical advice on implementing measures on the equivalence between certain third country GAAP and IAS/IFRS"). There is a need for particular care so as to ensure that detailed provisions under one mandate do not clash with the requirements set forth under another mandate. Similar safeguards are needed in order to prevent the forthcoming provisions from turning into an obstacle, let alone a roadblock on the way towards implementation.

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On behalf of the
ZENTRALER KREDITAUSSCHUSS
Deutscher Sparkassen- und Giroverband e.V.

Dr. Thomas Schürmann