THE COMMITTEE OF EUROPEAN SECURITIES REGULATORS

Ref: CESR /05-267

CESR's revised draft Technical Advice on Possible Implementing Measures of the Transparency Directive

- Dissemination
- Notifications of major holdings of voting rights
- Half-yearly financial reports
- Equivalence of third countries information requirements
- Procedural arrangements whereby issuer may elect its 'Home Member State'

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INTRODUCTION

Background

On 30 March 2004, the EU Parliament approved the Commission's proposal for the Level 1 Directive on the harmonisation of transparency requirements for securities issuers (the Transparency Directive), subject to a number of amendments.

Following on the Parliament's decision, the European Council reached a political agreement on the Draft Directive on 11 May 2004 and agreed with the amendments adopted by the Parliament. Formal adoption of the Directive took place on the 15 December 2004.

According to the Lamfalussy Process, the Commission may adopt implementing measures, so-called "Level 2 measures", with respect to a large number of provisions of the Directive. Before the Commission presents a proposal for implementing measures to the European Securities Committee, it seeks the technical advice on these measures from the Committee of European Securities Regulators ("CESR"). To this aim, the Commission gives a formal mandate or sends a request to CESR for technical advice.

Areas covered

CESR received on 29 June 2004 the official request from the EC for technical advice on implementing measures of the Transparency Directive. The purpose of this consultation document from CESR is to seek comments on the draft technical advice that CESR proposes to give to the European Commission.

There were two elements in the request of the European Commission.

The *first element* was a mandate given to CESR for technical advice on priority measures that are needed to complete the Directive. This advice must be delivered by June 2005. This mandate covered a number of different technical issues which can be grouped as follows:

a. Different technical issues related to **notifications of major holdings of voting rights** in companies whose shares are admitted to trading on regulated markets.

b. The minimum standards for the **dissemination of regulated information** and implementing measures on the conditions under which periodic financial reports of issuers must be kept available.

c. Different technical questions related to **half-yearly financial reports**, to **equivalence of transparency requirement**s for third countries issuers. The mandate also asked for technical advice on the procedural arrangements whereby an issuer may elect its 'Home Member State'.

The *second element* of the Commission's request was presented through letter of the Commission to CESR, inviting CESR to present a progress report on the conditions for officially appointed mechanisms for storage of information and on possible electronic networks of information about issuers. CESR has delivered a Progress report on the Role of Officially Appointed Mechanism (Article 21.2) and the Setting up of a European Electronic Network of Information about Issuers (Article 22) and Electronic Filing (Article 19 4a) to the Commission the on 30 March 2005. Based on this progress report, the Commission will consider whether a second mandate should be sent to CESR requesting technical advice on these issues.

CESR has a deadline of 30 June 2005 for delivering the advice.

Public consultations

Following receipt of the mandate from the European Commission, CESR began its work on 29 June 2004 by launching a call for evidence for interested parties to submit comments by 29 July 2004. As a result of this consultation, CESR received 18 responses from a wide range of interested parties. These responses, which have been published on CESR's website (www.cesr-eu.org), formed a very helpful source in preparation of the first consultation papers.

CESR published two separate consultation papers setting out its draft advice and thinking on these different issues.

A first consultation paper (ref CESR 04-511), which was released for public consultation on 28 October 2004, covered CESR's draft advice possible implementing measures for dissemination of regulated information and on the conditions under which periodic financial reports of issuers must be kept available and the progress report on (i) the role of the officially appointed mechanism and the setting up of a European electronic network of information about issuers and (ii) electronic filing.

A second consultation paper (CESR 04-512c) was released for consultation on 13 December 2004 and presented CESR's draft advice on

(i) Issues related to notifications of major holdings of voting rights
(ii) Issues related to half-yearly financial reports
(iii) The equivalence of transparency requirements for third countries issuers
(iv) The procedural arrangements whereby issuer may elect its 'Home Member State'

The public consultation period on the first consultation on dissemination and storage was closed on 28 January 2005. In the consultation 53 answers were received. An open hearing was held on 7 December 2004.

The second consultation period ended on 4 March 2005. There were 40 answers to the consultation. A public hearing was held on 17 February 2005. About 40 people participated in the open hearing.

The present consultation

The *present document* is the compiled re-consultation paper on issues arising from both consultations.

CESR has carefully considered all the answers from the consultees on the both consultations. CESR is very pleased to find a great deal of support for much of the advice given. CESR has posed a number of questions on all the subjects on which CESR is mandated to deliver technical advice. The answers given and the reasons behind the answers have greatly helped CESR in its work. The consultations also resulted in a large number of comments in areas where specific questions were not asked. In a number of cases these answers and comments have led CESR to reconsidering its draft advice and to ask additional questions in this paper. In some instances, however, the answers given by consultees were split between two possible solutions that CESR had proposed and did not provide additional arguments to those set out by CESR.

In the course of the consultations process CESR has sought clarifications from the Commission on a number of areas regarding the understanding of the mandate given to CESR and on the possible reading of the level 1 text. In one case in particular this has inspired CESR to change its advice and choosing an option which has not previously been presented to the public.

As a matter of due process CESR is now providing consultees the opportunity to react to the changes to the draft advice, which the two above mentioned consultations have resulted in.

CESR chooses to present to the public the full draft advice as it now stands. In the name of transparency this gives the public a possibility to follow changes to the draft advice and see where changes to have been made. This is not to be understood as CESR is now consulting on every aspect of the draft advice again. In many cases CESR has now reached a suitable advice and presents the advice as it is likely to stand when the final advice in June is delivered to the Commission. CESR is only re-consulting on those areas where specific questions are being asked.

CESR wishes to re-consult on areas where the answer from interested parties from the public is needed and where the draft advice has changed in a not inconsiderable way. According to the mandates CESR has been given CESR will have to deliver its advice to the Commission by 30 June 2005. This tight time limit makes it impossible for CESR to provide a consultation period of any longer than four weeks. Hence it is of importance that consultees concentrate their efforts to the areas where specific questions are being posed. CESR will however take all comments into account when assessing the answers.

As mentioned above 93 answers altogether have been received in the consultations. Many comments have led to changes in the advice and where this is the case a brief statement of the answers received will be included in this paper. As a matter of due process CESR will also present a comprehensive summary of all the answers given in the consultations together with CESR comments to these answers. Because of the time constrains CESR is now operating under, CESR will however not do so at this stage. Instead a Feedback Statement taking all consultations into account will be presented in connection with the final advice.

Revised advice and previous papers

Throughout this paper under the headings draft technical advice **bold** type is used (apart from the headlines) to indicate where CESR has revised its draft advice.

For ease of reading in some cases bold is used in the initial paragraphs where large parts of the draft advice is revised or where CESR previously did not give a draft advice because it was contemplating different options, for example Chapter 2, Sections 4 and 8.

In this paper reference to previous consultation papers is sometimes made as "The October Consultation Paper" for document CESR 04-511 on Dissemination and Storage and "The December Consultation Paper" for document 05-512c on Notifications of major holdings of voting rights, half-yearly financial reports, equivalence of third countries information requirements and procedural arrangements whereby issuers may elect their "Home member State".

Responses

This document has been released on 27 April 2005 for public consultation.

Responses to this consultation are expected to reach CESR at the latest on 27 May 2005 in order for CESR to have time to take them into consideration. Responses to consultation should be sent via CESR's website (www.cesr-eu.org) in the section consultation.

An open hearing will take place at CESR's offices in Paris during May. A separate notice will be posted on CESR's website on the time and date.

References to Articles in this document are made to the final version of the Directive. However the Articles referred to in the Commissions mandate, of which extracts are reproduced in this document, refers to the numbering of the Directive in the unofficial version of 11 May 2004 of the Transparency Directive as published on European Commission website (http://europa.eu.int/comm/internal_market/securities/transparency/index_en.htm). This version of the Transparency Directive has also been posted on CESR's website (under Documents – EU Legislation).

CESR

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CHAPTER I

DISSEMINATION OF REGULATED INFORMATION BY ISSUERS

Extract from level 1 text

Article 21.1 The home Member State shall ensure that the issuer, or the person who has applied for admission to trading on a regulated market without the issuer's consent, discloses regulated information in a manner ensuring fast access to such information on a non discriminatory basis and makes it available to the officially appointed mechanism referred to in paragraph 1a. The issuer, or the person who has applied for admission to trading on a regulated market without the issuer's consent, may not charge investors any specific cost for providing the information. The home Member State shall require the issuer to use such media as may reasonably be relied upon for the effective dissemination of information to the public throughout the European Union. The home Member State may not impose an obligation to use only media whose operators are established on its territory.

Extract from the mandate from the Commission

3.2.1 Dissemination of regulated information by issuers (Article 17(1))

DG Internal Market requests CESR to provide technical advice on possible implementing measures on minimum standards for dissemination of regulated information, as referred to in Article 17.1. CESR is particularly invited to consider how to ensure:

a) fast access to regulated information for investors located not only in the issuer Home Member State, but in other Member States. In particular, CESR should consider changes to the current situation at Member States level;

b) fast access to regulated information on a non discriminatory basis. In this respect, it would be useful assessing as to whether different solutions on the method of dissemination should be envisaged according (i) to the type of regulated information, (ii) the type of issuer or the market segment where the issuer's securities are admitted to trading on a regulated market, or (iii) any other criteria.

It should be noted that the issue of dissemination of regulated information, i.e. the duty of the issuer to convey information to end users speedily and without discrimination should not be mixed up with the role of the officially appointed mechanism as provided for under Article 17.1(a) of the Directive, which is storage, i.e. archiving and retrieval of regulated information, and which will be subject to a separate mandate which the Commission intends to grant in early 2005 in the light of a first progress report from CESR on Article 18 of the Transparency Directive.

INTRODUCTION

1. The combined provisions of Article 21 and Article 22 of the Transparency Directive set forth the framework for a comprehensive system of dissemination and storage of regulated information. The overriding objective of the Directive is to promote the integration of the European capital markets by improving investors' access to information disclosed by issuers. CESR has already delivered a first report to the European Commission in relation to storage (CESR 05-150b). This paper deals with some outstanding issues in relation to dissemination of regulated information by issuers.

2. The overriding principles that guided CESR through its thinking on these issues were presented in the previous consultation paper. These principles were not contested during the consultation process and therefore CESR considers that they remain applicable to this consultation paper as well.

3. In its previous consultation paper CESR explained the key concepts upon which its thinking was based. For the purpose of this consultation paper these concepts have not changed with the exemption of the notion of regulated information, to which the Commission provided CESR with some additional clarification as explained below.

4. CESR proposed in the previous consultation paper that regulated information should be distributed by the issuer or by service providers (so called operators). This paper sets out CESR additional thinking as to the standards issuers would have to fulfil when disseminating regulated information, either by themselves or by using the services of these service providers. In addition, CESR considers that if service providers are used, these should fulfil certain requirements designed to ensure adequate dissemination and handling of regulated information. In brief, this paper sets out CESR thinking, bearing in mind the consultations held, in relation to the following:

(i) whether the concept of "connections with media" needs to be clearer;

(ii) how to address the issue of ensuring proper identification of the issuer in the information fields that need to be filed in for the purpose of conveying information to media;

(iii) whether a specific standard of dissemination addressing issues of conflicts of interests is needed, in addition to clarifying the fee structure and some other details in relation to these standards and requirements;

(iv) how to properly deal with concerns, at European level, of approval of service providers.

5. Consultees should be aware that this consultation paper is only dealing with those issues that CESR considers additional guidance is required before it finalises its advice. In addition to that, the draft advice is being provided as it stands in relation to the remaining issues. Therefore, in order to have the complete background on how CESR's thinking on an issue has been developed, consultees should refer to the previous consultation paper in conjunction with this one. Where necessary, CESR has cross referred to specific paragraphs of the previous consultation paper for ease of reference.

6. CESR is not proposing to mandate issuers to use service providers nor is it within its powers to do so. CESR considers that issuers should be free to disseminate regulated information in the way they consider best suited to their needs when fulfilling their regulatory obligation to disseminate regulated information under the Transparency Directive. CESR also considers that the issuer is ultimately legally responsible for ensuring that its obligations under Article 21 of the Directive are met. Therefore, their responsibilities in relation to dissemination, as explained below, are only met when information reaches the media.

7. Following the consultations, CESR has re thought its approach in relation to the type of information to be disseminated. The information to be disseminated is all **regulated Information** within the meaning of Article 2 (1) (k) of the Transparency Directive. For its previous list, referred

to in paragraph 41 of the consultation paper, CESR now considers that information covered by Articles 17 and 18 of the Directive are not covered by this definition of Regulated information for the reasons set out in footnote 2 in paragraph 41 and that, in addition, directors dealings are only regulated information to the extent that this information is available to the issuer under each Member State transposition measures of the Market Abuse Directive.

Explanatory text to draft technical advice

8. The purpose of the technical advice that CESR is requested to provide is to establish possible implementing measures on minimum standards for disseminating regulated information in order to ensure fast access to regulated information on a non-discriminatory basis for investors located not only in the issuer's Home Member State, but in other Member States.

9. The explanatory text to this consultation paper is divided as follows:

a. dissemination standards;

b. dissemination methods;

i. Dissemination by the issuer[1]

ii. Dissemination using a service provider (and minimum standards and requirements for service providers)

a. Dissemination standards

10. CESR consulted previously on the standards for dissemination. It received overall support for the standards proposed and some additional suggestions for clarification that mainly addresses points that CESR has previously classified as "requirements" in relation to the dissemination standards. Therefore, consultees should refer to the previous consultation paper (paragraph 5) or to the advice at the end of this paper to ascertain what these standards and requirements for dissemination are.

11. Following consultation, CESR proposes to advise that the dissemination of information complies with the following amended requirements, that complement what CESR has already set out in the previous consultation paper:

Connections with media

12. CESR envisages that dissemination will occur, in practice, when regulated information reaches entities that are able to distribute the information further and push it to the market. To achieve this, CESR considers that the method for dissemination chosen by the issuer must ensure sufficient connections with a number of media to ensure that regulated information is disseminated as widely as reasonably possible, on both a national and pan-European basis, to allow as many interested parties as possible to gain access to the regulated information as quickly as possible. CESR recognises that the dissemination will not provide every investor in every place in Europe with all regulated information on all issuers. Therefore, a proper balance between practicability and the objective of dissemination throughout Europe needs to be achieved.

13. Requiring a specific level of connections with media does not mean that the media will be obliged to make all the regulated information that they receive available. Media remains free to make their own bussiness decisions as to whether or not to disclose information and on the format of such disclosure.

14. Some respondents to the consultation suggested that CESR should be more specific in setting the standards for these connections with the media because, in fact, appropriate dissemination relies on ensuring an adequate level of media coverage.

15. To ensure that the issuer is fulfiling its obligations under Article 21 of the Directive, CESR would expect these connections to include different channels of distribution such as press agencies, newspapers with wide coverage and websites dedicated to financial matters. In the interest of small and retail investors, free websites that disclose regulated information in full text and real-time should also be included in these connections, where available.

[1] References to "issuer" should be read as meaning an issuer or the person who has applied for admission to trading without the issuer's consent, as appropriate.

16. CESR would also expect connections with media that disseminate regulated information in multiple Member States (including the Member State where the issuer is situated and where its securities are traded). Ideally, connections with media who disseminate regulated information globally to the entire international investor community should exist.

17. In addition, CESR expects all interested media to be able to receive access, on a non discriminatory basis, to all regulated information.

18. CESR intends to propose, following consultation, that, for the purposes of Article 21 of the Directive, these connections with media should include mandatory connections with at least the key national and european newspapers, specialist news providers, news agencies with national and european coverage and financial websites acessible to investors.

Questions

Q1 Do consultees agree with the above proposal?

Q2 What distribution channels do consultees consider should be mandated? Please provide reasons for the answer.

19. Issuers are responsible for ensuring that whatever method of dissemination they choose, sufficient connections with the media is ensured, as explained above. As such, adequate means of reaching the media will need to be employed such as electronic contacts or dedicated lines, in additon to other technical means of communication.

20. CESR received some suggestions that these connections should ideally be electronic because this would allow faster and secure processing.

Questions

Q3 Do consultees consider that CESR should mandate that the connections between issuers (either directly or throught a service provider) and media be based on electronic systems, such as dedicated lines?

Q4 Do consultees consider that a specific method should be mandated? Which one? Please provide reasons for your answers.

Necessary output information fields

21. Information provided to media must be identified as regulated information. CESR therefore proposed in the previous consultation paper some mandatory output information fields. CESR received some comments in relation to the requirement to identify the issuer and also in relation to the numbering of the announcement. CESR sets out below its additional thinking in relation to these issues.

22. Respondents pointed that the use of only the company name, which CESR previously required under the first bullet point of paragraph 6 (b), may not be an adequate way of identifying the entity to which the announcement relates insofar some entities may have quite similar names. The ISIN of the securities was suggested as an appropriate method of issuer identification. CESR also aknowledges that some work is being done to create a number, along the same lines of ISIN numbers, allowing the identification of bussiness entities.

23. CESR agrees that correct identification of the issuer is important and has therefore redrafted the first bullet point of the advice to refer to "identification of the issuer". CESR does not propose to set standards as to what means of identification should be used, as it will be for the players involved to decide the adequate method of issuer identification.

Questions

Q5 Do consultees agree with the approach of redrafting the required field of information, as proposed above?
Q6 Do consultees consider that a specific method of issuer identification should, in addition, be mandated (such as the identification number in the companies registar or the ISIN)? Which of these? Please provide reasons for the answer.

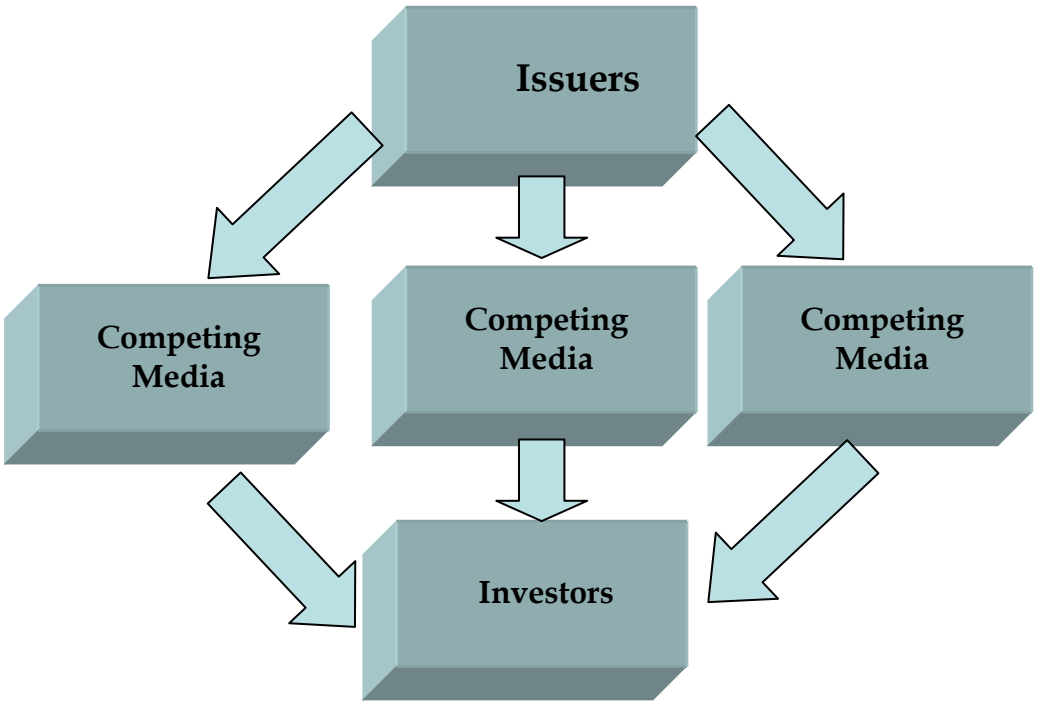
24. Some consultees commented that the information fields that dealt with numbering the announcement were confusing and not necessary. CESR has clarified what these information fields mean by redrafting the required items of information.

Questions
Q7 Do consultees consider that CESR should establish a method, or some sort of a code, by which there would be a single and unique number of identifying each announcement that an issuer makes, that is valid on a european basis and that could be used also for storage?
Q8 What methods do consultees suggest CESR should establish? Please provide reasons for the answer.

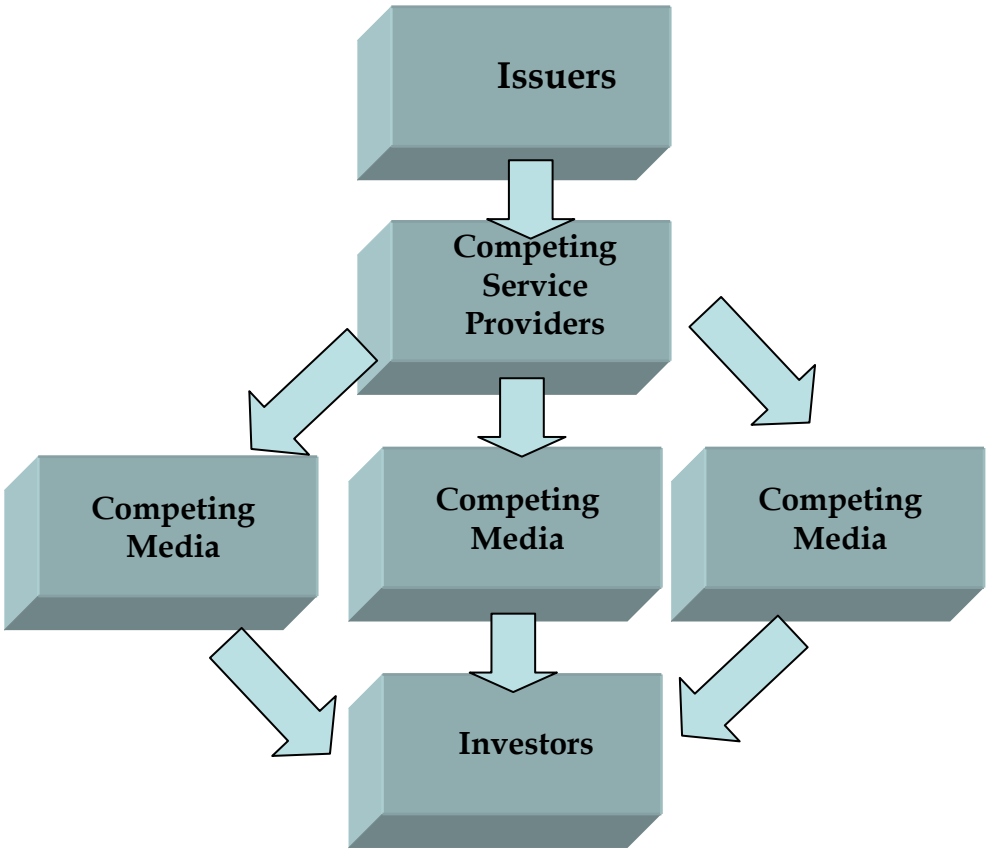
b. Dissemination methods

25. CESR has not been mandated to set a specific dissemination model and considers that issuers are free to choose the model that best suits them. Notwithstanding this, CESR envisages that two basic models can be taken into account: either issuers disseminate regulated information by themselves or they appoint a service provider to disseminate on their behalf. The following paragraphs deal with these two basic models, that are illustrated in the diagrams below:

Dissemination by issuers



Dissemination using service providers



b.*1 - Dissemination by issuers*

26. Issuers may undertake the dissemination of regulated information themselves provided they comply with the standards set out in the previous consultation paper. Ultimately, they will be responsible for ensuring proper dissemination. It is important that all of the standards referred to in paragraph 7 of the previous consultation paper (service provider standards) that are also applicable to an issuer are fulfilled by that issuer. CESR would consider that in particular the requirements of paragraph 7 lit. a (security), e (recovery provisions) and c (information that must be recorded by the service provider), where applicable, are also met by issuers when disseminating regulated information by themselves.

b.2. Dissemination by service providers (operators)

27. In response to the consultation, CESR sets out its additional thinking in relation to the standards that service providers will have to comply with. In addition to what was said in the previous consultation (paragraph 19), CESR now proposes to have an additional standard in relation to conflicts of interests. In fact, these issues may arise when the service provider can also perform different tasks, such as those of media, competent authority, entity in charge of the storage mechanism or stock exchange. In those circunstances, CESR considers that the issue of conflicts of interests needs to be addressed and dealt with. CESR envisages that there is no prohibition in the Directive to this cumulation of functions or tasks and one consultee even suggested a model where dissemination and storage are undertaken using a single technical system, able to perform both functions.

Minimum standards for service providers

(A) SEPARATION OF FUNCTIONS WHEN SERVICE PROVIDERS PROVIDE OTHER SERVICES OR PERFORM OTHER FUNCTIONS

28. Whenever service providers provide other services or perform other functions, such as media, competent authorities, stock exchanges or of the entity in charge of the central storage mechanism, service providers should keep these other services or functions clearly separate from the ones relating to the dissemination of regulated information.

29. In addition, no competitive advantage should be allowed in disadvantage of competing entities (for example, if a service provider is also a media, it should establish a clear separation of functions so that the part of the bussiness that acts as media will not receive regulated information in advance of competing media but only when regulated information is released to media).

Questions

Q9 Do consultees agree with the above proposals? Please provide reasons for the answer.

Q10 When the competent authority is acting as service provider, CESR considers that these competent authorities may not, as stated in the Directive, impede free competition by requiring issuers to make use of their services. Do consultees agree with this approach? Please provide reasons for the answer.

Q11 When stock exchanges act as service providers, CESR considers that their admission to trading critieria on any of their markets can not mandate the use of their service as a service provider. Do consultees agree with this approach? Please provide reasons for the answer.

(B) CHARGES

30. Charges for any service provider service must be clearly stated and indicate the activities covered so that they can be readily compared with competing service providers. CESR considers that the cost structure of the dissemination process should not be detrimental to the overall objective of proper dissemination. Consultees that commented on this point suggested that in order to foster dissemination, media should not be required to pay the service provided to gain access to regulated information.

31. On consideration of this issue, CESR recognises its importance and therefore also intends to make the advice more clear in relation to the fee structure of a service provider that is also involved in other services or functions. CESR considers that these entities should umbundle their fees, to make clear what is being charged for the dissemination service and what is being charged for other services it is providing at the same time.

Questions

Q12 Do consultees agree that media should not be charged by service providers to receive regulated information to be disseminated by them? Please provide reasons for the answer.

Q13 Do consultees consider that it is possible, on a commercial basis, to mandate that media receive regulated information for free from service providers? Please provide reasons for the answer.

Operational hours and security issues

32. CESR has redrafted the draft advice in relation to operational hours. In fact, due to the issuer's obligations namely under the Market Abuse Directive, service providers must be able to receive and push regulated information to media on a 24 hours a day and 7 days a week basis.

33. CESR has also redrafted the advice in relation to security of information source. This change is consistent with what CESR has proposed in the progress report to the European Commission on storage (CESR 05-150b).

Approval of service providers

34. There were mixed responses to the question about whether or not service providers used for disseminating regulated information should be subject to approval. On the one hand, respondents considered that this would help issuers as it would mean that the assessment on whether the service provider was using appropriate tools and fulfiling the requirements would be done by some one else, namely, the Competent Authority. On the other hand, respondents also commented that issuers should be free to choose an unapproved service provider and that by imposing approval CESR would be limiting free provision of these services.

35. CESR has considered these comments and will not be mandating approval of operators. Notwithstanding this, competent authorities that wish to do so will be able to approve service providers.

36. As CESR will not mandate the approval of operators, issuers will be free to use service providers that are not approved. CESR notes that the issuer remains fully responsible for accomplishing dissemination of regulated information as stated above.

37. In order to make issuers choice a more informed one, CESR has taken on board a suggestion to require service providers to prepare a document where they demonstrate the way in which they comply with the dissemination standards and requirements set out above. This document can then be used by issuers to decide which service provider to use.

38. One concern that was raised during consultation was that an approved operator should be able to provide the service across Europe without the need to request, where necessary, approval from other competent authority. On consideration of this issue, CESR envisages that Competent Authorities may agree among themselves a procedure to deal with mutual acceptance of approved service providers.

Questions

Q14 Do consultees consider it useful and practicable to require a document from service providers showing how they meet the dissemination standards and requirements? Please provide reasons for the answer.

Q15 Do consultees consider that CESR should undertake, at level 3, future work on how to address the concerns raised on how approval of operators is to work, even if approval is not mandatory? Please provide reasons for your answer.

DRAFT TECHNICAL ADVICE

39. Issuers must ensure, when chosing a dissemination model, that the following minimum standards are met:

(a) fast access to regulated information for investors

40. CESR considers that the dissemination method must be capable of providing investors with regulated information (as defined in Article 2.1.k of the Directive) without delay. This is especially the case where regulated information is, or may be, of a price sensitive nature, for example 'inside information' as defined under the Market Abuse Directive 2003/6/EC. CESR considers that fast access to regulated information for investors is best achieved through the use of electronic dissemination methods. In this context, it is also important to avoid fragmentation of information streams which may compromise the goal of fast access.

(b) access on a non discriminatory basis

41. Issuers must ensure that the selected dissemination method is capable of allowing investors generally to receive the regulated information, rather than specific categories of investors (e.g. institutional or retail).

(c) effective dissemination throughout the EU

42. CESR considers that the requirements of Article 21(1) of the Directive can only be satisfied by an issuer if it selects a dissemination channel that is capable of reaching investors not only in that issuer's home Member State, but also in other Member States throughout the EU.

43. The dissemination channel must also ensure that investors in several Member States receive the same regulated information as close to simultaneously as possible and that information is not merely made available, but pushed towards investors. Therefore, mere insertion of the information on the issuer's website is not considered as an adequate method of dissemination, althought the issuer's website can be used in connection with the dissemination process itself, as an additional source of information.

(d) investors are not charged by issuers any specific costs for receiving information

44. In accordance with Article 21.1 issuers cannot charge investors for the regulated information provided.

(e) no obligations on issuers to use only media whose operators are established in the home Member State

45. CESR considers that the choice of dissemination methods available to issuers can not be restricted to those channels available in the issuer's home Member State. Issuers should benefit from free competition when choosing the method for disseminating information, including service providers, provided that the minimum standards and requirements are met.

f) Distribution

Connections with media

46. CESR envisages that dissemination will occur, in practice, when regulated information reaches entities that are able to distribute the information further and then passed to the market. To achieve this, CESR considers that the method for dissemination chosen by the issuer must ensure

sufficient connections with a number of media to ensure that regulated information is disseminated as widely as reasonably possible, on both a national and pan-European basis, to allow as many interested parties as possible to gain access to the regulated information as quickly as possible.

47. To ensure that the issuer is fulfiling its obligations under Article 21 of the Directive CESR would normally expect that these connections include different channels of distribution such as press agencies, newspapers with wide coverage and websites dedicated to financial matters. CESR considers that these connections should include mandatory connections with, at least, the key national and european newspapers, specialist news providers, news agencies with national and european coverage and financial websites acessible to investors.

48. CESR would also expect connections with media that disseminate regulated information in multiple Member States (including the Member State where the issuer is situated and where its securities are traded). Ideally, connections with media who disseminate regulated information globally to the entire international investor community should exist.

49. Issuers are responsible for ensuring that whatever method of dissemination they chose, it ensures sufficient and reasonable connections with the media and adequate means of reaching the media (electronic contacts, such as dedicated lines, but also other technical means of communication).

50. In addition, CESR expects all interested media will receive access, on a non discriminatory basis, to all regulated information.

Re-submissions of information

51. It must be ensured through monitoring of the systems used that the regulated information has been successfully transmitted to media. If a media notifies that the transmission of regulated information has failed, all reasonable efforts must be made to re-transmit the missing regulated information without delay.

Output format

52. End users, whether they are institutional investors, private investors, advisors or others, want access to the full text regulated information, as well as, or in preference to, the edited text. Therefore, regulated information must be provided to media in unedited full text and in industry standard formats. In addition, local formats may be used for regulated information at national level.

Necessary output information fields

53. Information provided to media must be identified as regulated information. Announcements of regulated information must include the following fields:

- identification of the issuer concerned;
- headline (the subject of the announcement);
- time and date;
- sequence number of the announcement being released; and
- unique announcement identification number (unique number that identifies the announcement and distinguishes it of all other announcements).

54. To ensure that media have received the entire contents of regulated information, the end of all announcements must be clearly marked in the text body.

55. Member States may not impose on issuers the obligations to use only media whose operators are established in the home Member State. Therefore, the choice of dissemination methods available to issuers must not be restricted to those channels available in an issuer's home Member State. Issuers should benefit from free competition when choosing methods for disseminating information provided that the method chosen satisfies with the minimum standards set.

56. Issuers may disseminate all regulated information themselves or by using the services of a service provider (operator). This entity can be regarded as anyone that provides a service to issuers by providing means for effective dissemination.

57. CESR points out that insofar the issuer is, under the Directive, responsible for the proper dissemination of the regulated information, the issuer's responsabilities are only met when the information reaches the media.

58. Any service provider employed by an issuer for the purpose of disseminating regulated information must meet all the above and the following minimum standards. If an issuer chooses to disseminate regulated information itself, it must fulfil those standards that are applicable to an issuer. CESR would consider that in particular the requirements of a) (security) and f) (recovery privisions) below and, where appropriate, of c) (information that must be recorded and preserved by the service provider) below, are applicable to issuers when these disseminate information by themselves:

(A) SECURITY

59. An appropriate level of security must be incorporated into the service provider dissemination mechanism. Breaches of security can lead to erroneous announcements being released or information leaking into the market. Both of these factors could seriously undermine the orderliness of the trading market. Consequently, security is essential at each of the three stages of the operator system: input, processing and output.

Input

60. It is essential that any system has a secure input mechanism to ensure that:

- the service provider is confident that the regulated information has been submitted by an organisation authorised to submit such information. These tools could be in the form of measures ensuring at least the same level of security as that of appropriate access codes that are assigned by the competent authority or of Digital Signatures.
- there is no significant risk of data corruption in the input process which may lead to incorrect regulated information being released; and
- there is no significant risk of interception by unauthorised persons during input which may allow access to unpublished price sensitive regulated information.

Processing

61. It is essential that the system processes regulated information securely to minimise the risk of erroneous regulated announcements being released, that the physical location of the service provider is secure and that there is no significant risk of misuse of unpublished price sensitive

regulated information.

Output

62. Media must be certain that the information they receive has been provided:

- in a secure manner; and
- by the service provider.

Breaches of security

63. In the event that there is a breach of any security measure relating to the provision of a service by the service provider, appropriate corrective action must be taken without delay.

(B) OPERATIONAL HOURS

64. In order to facilitate issuers operating in more than one international market, service providers must be able to receive and release regulated information 24 hours a day, seven days a week.

(C) INFORMATION THAT MUST BE RECORDED AND PRESERVED BY THE SERVICE PROVIDER

65. For the purposes of maintaining records to ensure that security measures are being met by the service provider, the following information regarding the regulated information that it processes, must be recorded and preserved by the service provider for a reasonable time period:

- name of person submitting regulated information;
- security validation details;
- date and time regulated information received;
- medium in which regulated information received;
- company name;
- details on any embargo by the issuer (if relevant);
- details of the service provider staff in contact with regulated information from receipt to release, in order to ensure that records of proper handling of the information are kept and available for supervisory purposes;
- details of any changes made to a document by the service provider during processing; and
- date and time regulated information is released.

(D) MANAGEMENT OF REGULATED INFORMATION BY THE SERVICE PROVIDER

66. CESR does not intend to mandate the format in which regulated information must be accepted by service providers. Ideally transmission of information from the service provider to the media should occur by electronic means, as these would allow fast access to such information. In general, regulated information must be released without delay. Regulated information received electronically (e.g. by Internet based input facilities) must be released without delay, unless embargoed by the issuer. CESR considers that service providers are likely to process regulated information submitted by fax or hard copy for commercial reasons. Regulated information received in non-electronic format (e.g. facsimile or hard copy) must be prioritised by the issuer according to its price sensitivity. Urgent priority regulated information received by facsimile or hard copy must

be released by the service provider without delay.

67. Regulated information should be recorded as received once it first enters the service provider service's processing systems and as released once it has left the service provider service's processing systems.

(E) DISSEMINATION BY MEDIA

68. In terms of the connection between service providers and media, CESR does not propose to set minimum standards for the activities of media, first of all because it will probably be outside of CESR powers to do so. Accordingly, media are not obliged to publish regulated information that has been disseminated to them by operators. Media are also not obliged to aggregate all regulated information received from service providers, and may edit this information. In practice, some media currently publish all information they receive from service providers unedited, for commercial reasons, without the need for regulation. CESR has no reason to believe that this will change going forward.

(F) RECOVERY PROVISIONS

69. CESR considers that the service provider must have adequate recovery systems in place to rectify as soon as possible a failure in or disruption to its operations. The recovery service must be available during the operational hours of the operator (as set out in point (b) above) in order to ensure the timely receipt and dissemination of regulated information to media.

(G) SERVICE PROVIDER HELP SUPPORT

70. The service provider must provide support/help to issuers during receipt hours and media during release hours.

(H) SEPARATION OF FUNCTIONS WHEN SERVICE PROVIDERS PROVIDE OTHER SERVICE OR PERFORM OTHER FUNCTIONS

71. Whenever service providers provide other services or perform other functions, such as media, competent authorities, stock exchanges or of the entity in charge of the central storage mechanism, service providers should keep these other services or functions clearly separate from the ones relating to the dissemination of regulated information.

72. In addition, no competitive advantage should be allowed in disadvantage of competing entities (for example, if a service provider is also a media, it should stablish a clear separation of functions so that the part of the bussiness that acts as media will not receive regulated information in advance of competing media but only when regulated information is released to media).

(I) CHARGES

73. Charges for any service provider service must be clearly stated and indicate the activities covered so that they can be readily compared with competing service provider. CESR considers that the cost structure of the dissemination process should not be detrimental to the overall objective of proper dissemination. Therefore, media should not be required to pay the service provider to gain access to regulated information.

74. Entities that perform more than one service or function as stated in paragraphs 71 and 72 above should clearly identify and separate the fees being charged for each specific function or service, to allow comparision between the various service providers.

75. All price sensitive regulated information, irrespective of the type of issuer or market segment where the issuer's securities are admitted to trading on a regulated market, should be disseminated without delay, irrespective of the method chosen for dissemination.

76. When a service provider is used, it is essential that the mechanism chosen satisfies each of the standards set out above. This serves both the interest of investors who will be likely to obtain the information in a timely manner. It is also advantageous for issuers who may rely on specialised service providers and will not be in danger of mishandling insider information with the attached risk of administrative or criminal sanctions. However, where certain regulated information is not time critical and of a large volume, it may be possible to disseminate that information using other methods, provided that the issuer disseminates an announcement through the service provider or appropriate media stating that the information has been published and where it is available. In any event, such information should be available in the storage mechanism within an appropriate time delay (i.e. by the following trading day).

CHAPTER II

NOTIFICATIONS OF MAJOR HOLDINGS OF VOTING RIGHTS

In this chapter CESR sets out its advice on notification of major holdings of voting rights. As in the original consultation it contains eight sections following the European Commission's mandate to CESR to provide a technical advice for implementing measures. Although CESR is not asking questions on all of these sections some of them reflect changes in CESR's thinking as a result of consultation, particularly sections 4. Others contain some additional explanation of CESR's thinking, particularly section 5.

(i) The maximum length of "the usual short settlement cycle" to which reference is made in Article 9(4) in cases of shares and financial instruments, and whether or not the "T+3 principle", which is used in the field of clearing and settlement, is appropriate;

(ii) Control mechanism by competent authorities as regards market makers, further to their limited exemption under Article 9(5);

(iii) To determine a calendar of "trading days" for all Member States for notification purposes under Article 13(8);

(iv) To clarify which person (the shareholder or the natural person or legal entity referred to in Article 10 or both) should make the notification, for the purposes of Article 10;

(v) To clarify the circumstances under which the shareholder, or the natural person or legal entity referred to in Article 10, should have learnt of the acquisition or disposal of shares to which voting rights are attached, for the purposes of Article 12(2a);

(vi) To clarify 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 12(4) and 12(5);

(vii) To draw up a standard form to be used by an investor throughout the Community when notifying the required information to the issuer taking into account existing national standards;

(viii) Types of financial instruments under Article 13; their aggregation; the content of the notification to be made, a standard form for such notification, the notification period, and to whom the notification is to be made by the holder of a financial instrument.

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

Extract from the mandate:

DG Internal Market requests CESR to provide technical advice on possible implementing measures on the following:

maximum length of "the usual short settlement cycle" referred to in Article 9(3a) in cases of shares and financial instruments to be defined under Article 11(a) 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.

Relevant Level 1 text:

9(4) of the Transparency Directive:

"Article 9 [Notification of the acquisition or disposal of major holdings] shall not apply to shares acquired for the sole purpose of clearing and settling within the usual short settlement cycle (…)"

INTRODUCTION

77. CESR sets out below its advice following the first consultation. Consultees agreed with CESR that it was not necessary to create a separate definition of clearing and settlement for the purposes of the Transparency Directive, as well as with the conclusion that the T+3 principle should apply.

78. There were some suggestions in the answers that different time frames should apply outside a regulated market. However, there was no consistency as to what other time frames should be used and the majority agreed with the proposal.

79. CESR also believes it is important to align requirements on and off regulated markets for transparency purposes. For these reasons CESR has not changed its initial advice. For reasons of clarity some conclusions have been moved under the heading draft technical advice.

EXPLANATION TO THE ADVICE

The objective of the provision

80. Article 9(4) exempts those who acquire shares and other financial instruments for the sole purpose of clearing and settling transactions from the duty to disclose major holdings. The objective of the provision is to ensure that no notification requirement is triggered whenever:

a) the holding of the shares and other financial instruments:
   i) aims exclusively at clearing and settling transactions; and
   ii) is temporary;

b) during this temporary period, during which the shares or financial instruments are being held:
   i) there is no exercise of the voting rights attached to the shares or financial instruments: and
   ii) the voting rights are not being used for intervention in the management of the issuer.

81. CESR has taken into account the work conducted in this area by several international organisations including IOSCO, a recent paper by the Commission and the CESR/ECB Standards for Securities Clearing and Settlement Systems in the European Union, and the report on EU Clearing

and Settlement Arrangements of the Giovannini Group of April 2003, and other related documentation[2].

(a) What clearing and settlement means

82. When analysing what is meant by clearing and settlement for the purposes of "the usual short settlement cycle", CESR considers it prudent to adopt the terminology of:

a) CESR/ECB Standard No 3 (as published in the September 2004 Report – ref CESR/04-561)

i) Clearing is defined as:

"the process of calculating the mutual obligations of market participants, usually on a net basis, for the exchange of securities and money."

ii) Settlement is defined as:

"the completion of a transaction through final transfer of securities and funds between the buyer and the seller."[3]

b) the 2nd report on EU Clearing and Settlement Arrangements of the Giovannini Group from April 2003 which uses the following terminology:

i) Clearing is defined as the:

"process of transmitting, reconciling and, in some cases, confirming payment orders or security transfer instructions prior to settlement, possibly including the netting of instructions and the establishment of final positions for settlement."

ii) Settlement is defined as:

"an act which discharges obligations in respect of funds or securities transfers between two or more parties."

83. In view of these existing definitions, which, for the purpose of the Transparency Directive, are quite similar, CESR does not consider it necessary to establish a different set of definitions of what clearing and settlement means.

84. In all of the papers to which reference has been made, there is a reference to the T+3 principle. CESR considers this principle to be adequate as the "usual short settlement cycle" to which reference is made in Article 9(4), for the following reasons:

a) the standards of CESR/ECB identified T+3 as the most common clearing and settlement practice over Europe (with the exception of OTC transactions), therefore, it can be considered the "usual" clearing and settlement period;

b) CESR/ECB retains T+3 settlement as a minimum standard for settlement cycles;

c) the US has a settlement cycle of T+3;

d) the T+3 principle covers the majority of situations where the activities described above occur;

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[2] - IOSCO, Recommendations for securities settlements, Nov. 2001;- Communication of the European commission on Clearing and Settlement, Brussels 28.4.2004, COM (2004) 312 final;
- CESR/ ECB Final Report, Standards for Securities Clearing and Settlement Systems in the European Union, September 2004, and
- The Giovannini Group, Second Report on EU Clearing and Settlement Arrangements, Brussels, April 2003

e) the usual settlement cycle depends on the legislation of each member state. There are member states that apply settlement cycles shorter than T+3. As T+3 is the maximum short settlement cycle, existing practices can be maintained.

(b) Whether or not the same principle applied to shares traded on a regulated market should also apply to shares traded outside a regulated market

85. CESR considers that when shares admitted to trading on a regulated market are also traded outside the regulated market, clearing and settlement should occur following the same T+3 principle, if the exemption is to be applied. This will, in fact, ensure that the transparency requirements are the same, regardless of where trading of these shares effectively takes place.

86. CESR advice does not intend that the clearing and settlement procedures should be aligned between trading on and outside regulated markets but only means that when the exemption is to be used, this timeframe must be followed.

(c) To establish whether the principles established for shares should be the same ones that apply to other financial instruments

87. Article 13 of the Transparency Directive refers to the notification requirements applicable to shares as also being applicable to "financial instruments that result in an entitlement to acquire (…) shares to which voting rights are attached already issued of an issuer whose shares are admitted to trading"; it implies that the exemptions will also apply to instruments covered by Article 13.

88. CESR believes that the same principles applicable to shares should apply to other financial instruments relevant under Article 13.

DRAFT TECHNICAL ADVICE

89. For the purpose of the exemption of notification of major holdings under Article 9(4) of the Transparency Directive, usual short settlement cycle means a T+3 clearing and settlement cycle.

90. CESR does not consider it necessary to establish a different set of definitions of what clearing and settlement means.

91. CESR believes that the short settlement cycle should be used on a regulated marked, as well as outside a regulated market.

92. CESR believes that the same principles as applies to shares should be applied to other financial instruments relevant under Article 13.

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.

Extract from mandate

DG Internal Market requests CESR to provide technical advice on possible implementing measures on the following issues:

(2) control mechanism by competent authorities as regards market makers, considering their specific authorization as an investment firm pursuant the Directive on Financial Instruments Markets (MIFID). CESR is in particular invited to consider the appropriate measures against a market maker, in particular where the market maker does not respect such control mechanisms; such measures shall be consistent with the MIFID.

Relevant Level 1 provisions

Article 9(5) of the Directive states that Article 9 (disclosure of major holdings) shall not apply to the acquisition or disposal of a major holding reaching or crossing the 5% threshold by a market maker acting in its capacity of a market maker, provided that:

a) it is authorised by its home Member State under Directive 2004/39/EC of the European Parliament and of the Council; and

b) it does not intervene in the management of the issuer concerned, nor exert any influence on the issuer to buy such shares or back the share price.

INTRODUCTION

93. CESR sets out below its proposed changes to its advice in relation to this mandate following the consultation. Only the significant drafting changes that have been made are discussed, other comments that were made will be discussed in a feedback statement.

94. As explained in the consultation, CESR has been mandated to provide the European Commission with advice relating to what control mechanisms should be established for market makers that want to benefit from the limited exemption.

95. These control mechanisms will have to meet the requirements of Article 9(5) which establish when the limited exemption can apply. These requirements are:

a) that the market maker is acting in its capacity as a market maker (Article 9(5));

b) that the market maker is authorised by its home Member State competent authority under MiFID to act as an investment firm (Article 9(5)(a));

c) that the market maker does not intervene in the management of the issuer concerned nor exert any influence on the issuer to buy such shares or back the share price (Article 9(5)(b)).

96. CESR explained what each of these elements mean. In response to the comments received through consultation, CESR is proposing to make changes to c) above.

Discussion of meaning of "that the market maker does not intervene in the management of the issuer concerned nor exert any influence on the issuer to buy such shares or back the share price".

97. This requirement deals with two separate situations:

- the intervention in the management of the issuer; and
- the exertion of influence over the issuer to buy such shares or back the share price.

The intervention in the management of the issuer

98. CESR explained that there are many different ways in which a market maker could intervene in the management of the company, and that it considered that for the purposes of this exemption, this means that the market maker is not going to exercise "any of the rights attached to the shares, nor use the shares to influence the management of the issuer concerned."

99. Responses to the consultation raised concerns about the reference to "any of the rights attached to the shares" explaining that this unnecessarily restricts that the market makers' ability to benefit from rights attaching to the shares that have nothing to do with the ability to exert influence, for example financial rights such as receiving dividends or taking up rights offers.

100. CESR has therefore decided that for the purposes of the exemption this non intervention in the management of the company means that the market maker is not going to exercise "any of the voting rights attached to the shares, nor to use the shares to influence the management of the issuer concerned".

Question
Q16 Do you agree with this change? Please give reasons for your answer.

The exertion of influence over the management to buy such shares or back the share price

101. The provision relates to the ability of the market maker to take advantage of the shares it is holding in order to get the issuer to buy the shares or back the share price.

PROPOSED CHANGES TO DRAFT TECHNICAL ADVICE

102. For the reasons discussed in some detail below, CESR has made some changes to its original draft advice.

103. In the consultation, the draft advice was divided into three areas as follows:

a) possible methods of controlling the market maker activity with regard to the exemption provided:

b) measures to be taken with regards market makers violation of the conditions of the exemption; and

c) who should be the relevant competent authority?

104. Following the consultation, of the three areas, CESR is proposing to make changes to the first two.

A) Possible methods of controlling the market maker activity with regard to the exemption provided

105. In the consultation, CESR explained that following discussions about the various mechanisms that can be used and whether or not it was necessary to establish a form of control over the market maker before or after it commenced its market making activities or a combination of pre and post control, and taking into account that the investment firm has already been authorised by its home

Member State under MiFID, it considered that is necessary for market makers that want to benefit from the exemption to be able to demonstrate the following:

a) in circumstances where the investment firm is conducting other activities in relation to the issuer's shares or the issuer in question, these different activities need to be kept separate.

b) in circumstances where an investment firm intends to act as a market maker under the Transparency Directive, it should notify the relevant competent authority in order for the relevant competent authority to know who intends to benefit from the exemption.

c) If a market making agreement between the market maker and the stock exchange and/or the issuer is required under national requirements, the market maker should upon request of the relevant competent authority provide the agreement to it.

d) when undertaking market making activity an investment firm should hold the shares subject to that activity in a separate account. CESR considers this to be necessary as it is the only way that the market maker and the relevant competent authority can monitor if the market maker is using those shares purely for market making activities.

106. Responses to the consultation raised concerns about what was meant in the first proposal about keeping activities separate, and how the notification to the competent authority was going to work.

Keeping activities separate

107. In relation to the first issue of concern, respondents explained that:

a) it was not necessary for a firm's different activities to be kept physically separate, as long as it is possible to identify a particular trade as being done for market making purposes; and

b) that market making and own trading is normally not kept separate in different departments or teams of an investment bank, and that there is no need for this as a matter of compliance.

108. The original drafting did not intend that it would be necessary for Chinese walls to be created, and as for the test of independence discussed in Section 6 of this paper, CESR does not wish to interfere in the way that investment firms currently do or will be organising themselves for the purposes of this exemption.

109. CESR does however consider that it is necessary for the investment firm to be able to identify a separation of activities in addition to keeping separate accounts; this is because this avoids any conflicts of interests arising on the market makers part when conducting its market making activity.

110. As a result of the comments made CESR proposes to make the following change:

a) in circumstances where the investment firm is conducting other activities in relation to the issuer's shares or the issuer in question, these different activities need to be **identified.**

111. The purpose of the re-drafting is to better reflect that the firm will need to be able to demonstrate upon request that market making and other activities are kept separate, but how this separation is achieved is a matter for the investment firm. For example identification of the separation of activities can be achieved by identifying those who perform this function or what the market making policy is.

Question
Q17 Do you agree with this change? Please explain.

Issues arising from proposal to notify the competent authority of intention to use the exemption

112. Comments were raised about when the notification to the competent authority has to be made, and whether or not it is necessary to make this declaration in relation to each share for which market making activity is conducted.

113. In consideration of these points, CESR proposes to change its advice making it clearer that this requirement is not something that needs to be demonstrated, but that the declaration has to be made in relation to each share for which it conducts market making activity.

114. On the issue of when the declaration has to be made unlike the management company and investment firms situation for the test of independence (discussed in section 6 of this chapter), it is not possible to make a global notification to all competent authorities upon implementation because this notification has to be done on an issuer by issuer basis.

115. This is important because this is the only way that the relevant competent authority can correctly regulate the major shareholding notifications that are being made about the issuers for which it is responsible under the Transparency Directive.

116. CESR does however intend to give the market maker as much choice as possible in relation to the time when this notification has to be made.

117. In addition, CESR would like to make it clear that this is a non-public declaration that is to be made only to the relevant competent authority.

118. CESR also proposes to include a new section in its advice that deals specifically with this issue of declaration and proposes to include the following in its advice:

Notification to the competent authority

119. In circumstances where an investment firm intends to act as a market maker under the Transparency Directive, it should notify the relevant competent authority in relation to each share for which it conducts market making activities in order for the relevant competent authority to know who intends to benefit from the exemption on an issuer by issuer basis.

120. **The market maker can make this declaration:**

a) **at the start of the implementation of the Transparency Directive for those issuers in which they are acting as market makers at that moment;**

b) **whenever the market maker enters into a new contract whereby it will be performing market maker activities; or**

c) **at the latest within the time limit of Article 12.2, four trading days after the relevant threshold was crossed.**

121. The number of notifications that the market maker will have to make clearly depends on the number of issuers for which it conducts such activities.

Question
Q18 Do you agree with the proposed changes to this advice? Please explain.

122. If an investment firm ceases to be a market maker it must notify the relevant competent authority of the issuer under the Transparency Directive. This will mean that the exemption no longer applies and:

a) where the market maker has reached a notifiable threshold this will trigger a notification obligation, or

b) where the market maker has not reached a notifiable threshold there is no notification obligation.

123. If the market maker wants to undertake any of the activities that it is prohibited from undertaking in order to get the exemption, (for example, intervene in the management of the issuer) it has to notify the competent authority accordingly. This will mean that the exemption no longer applies and that the notification requirements provided for in the Transparency Directive will apply.

B) Measures to be taken with regards market makers violation of the conditions of the exemption

124. CESR explained that it is required to give technical advice on possible measures to be taken by competent authorities when a breach of the market maker exemption is discovered, and that these measures shall be consistent with the MiFID. It discussed the measures in MiFID and proposed that the minimum measures that could be appropriate for the relevant competent authority to use in order to regulate market makers who do not comply with the conditions of the exemption are the two administrative measures set out below.

a) Require the market maker to notify its holding to the issuer

b) Notify the investment firm's home competent authority under MiFID who can take appropriate action

125. CESR also pointed out that Member States may impose more restrictive measures than those set out above by exercising its powers under Article 24.

126. Comments were made about the fact that CESR had not made it clear that under the provisions of Article 28, all Member States have the ability to impose penalties.

127. In clarification of this issue CESR proposes to make this clearer by amending its advice to as follows :

128. Member States may impose more restrictive measures than those set out above by exercising their powers under Articles 24 and 28 of the Transparency Directive.

REVISED DRAFT TECHNICAL ADVICE

129. For the reasons discussed in some detail above, CESR has made changes to its original draft advice, which is set out below.

A) Possible methods of controlling the market maker activity with regard to the exemption provided

130. CESR discussed the various mechanisms that can be used and whether or not it was necessary to establish a form of control over the market maker before or after it commenced its market making activities or a combination of pre and post control.

131. Taking into account that the investment firm has already been authorised by its home Member State under MiFID, and that CESR is only required to establish the basis upon which a market maker can get the benefit of the exemption under the Transparency Directive, CESR does not consider it necessary to establish a full set of controls. CESR considers that the only form of pre control that is appropriate under the circumstances is for the market maker to notify the relevant competent authority of its intention to act as such and that it wants to get the benefit of the exemption and that it will comply with the relevant requirements.

132. As such, CESR considers that it is necessary for market makers that want to benefit from the exemption to be able to demonstrate the following:

a) in circumstances where the investment firm is conducting other activities in relation to the issuer's shares or the issuer in question, these different activities need to be **identified.**

133. *This drafting change reflects concerns raised about what keeping activities separate means.*

b) If a market making agreement between the market maker and the stock exchange and/or the issuer is required under national requirements, the market maker should upon request of the relevant competent authority provide the agreement to it.

c) when undertaking market making activity an investment firm should hold the shares subject to that activity in a separate account. CESR considers this to be necessary as it is the only way that the market maker and the relevant competent authority can monitor if the market maker is using those shares purely for market making activities.

Notification to the competent authority

134. In circumstances where an investment firm intends to act as a market maker under the Transparency Directive, it should notify the relevant competent authority **in relation to each share for which it conducts market making activities** in order for the relevant competent authority to know who intends to benefit from the exemption on an issuer by issuer basis.

135. The market maker can make this declaration:

a) at the start of the implementation of the Transparency Directive for those issuers in which they are acting as market makers at that moment;

b) whenever the market maker enters into a new contract whereby it will be performing market maker activities; or

c) at the latest within the time limit of Article 12(2) four trading days after the relevant threshold was crossed.

136. *These changes reflect the need to better clarify how and when the declaration to the relevant competent authority is to be made.*

137. If an investment firm ceases to be a market maker it must notify the relevant competent authority of the issuer under the Transparency Directive. This will mean that the exemption no longer applies and that the notification requirements provided for in the Transparency Directive will apply.

138. If the market maker wants to undertake any of the activities that it is prohibited from undertaking in order to get the exemption, (for example, intervene in the management of the issuer) it has to notify the competent authority accordingly. This will mean that the exemption no longer applies and that the notification requirements provided for in the Transparency Directive will apply.

139. It is important to point out that CESR does not consider any of these control mechanisms to be foolproof and as such does not guarantee to a competent authority that the market maker is not conducting any of the prohibited activities.

140. As such, the competent authority in question will have to rely on information received from the market, the issuers themselves and other market participants and, as and when required, to exercise its powers under Article 24 to obtain information and documents from the investment firm.

B) Measures to be taken with regards market makers violation of the conditions of the exemption

141. CESR is required to give technical advice on possible measures to be taken by competent authorities when a breach of the market maker exemption is discovered, and that these measures shall be consistent with the MiFID.

142. MiFID establishes the following measures to ensure that an investment firm can comply with its duties:

a) competent authorities can withdraw the authorisation to act as an investment firm or can limit or restrict the scope of such authorisation (Article 8(c) of MiFID);

b) competent authorities can apply appropriate administrative measures and sanctions (Article 51 of MiFID);

c) host Member States' competent authorities retain some limited powers under Article 62 MiFID to act in cases of breaches to applicable regulations.

143. It is important for CESR to point out that MiFID only deals with breaches to MiFID and not the Transparency Directive; therefore it is necessary for CESR to establish which measures are appropriate for the purposes of the Transparency Directive.

144. On consideration of these MiFID measures, CESR considers that the minimum measures that could be appropriate for the relevant competent authority to use in order to regulate market makers who do not comply with the conditions of the exemption are the two administrative measures set out below.

a) Require the market maker to notify its holding to the issuer

b) Notify the investment firm's home competent authority under MiFID who can take appropriate action

145. CESR considers it important to point out that Member States may impose more restrictive measures than those set out above by exercising its powers under Article 24 **and imposing penalties under Article 28** of the Transparency Directive.

146. *Drafting change reflects comments made about Article 28 of the Transparency Directie.*

Who should be the relevant competent authority?

147. In order to supervise the use by the market makers of the exemption under the Transparency Directive, it is necessary for CESR to establish which competent authority will be responsible for the supervision of the use of this exemption.

148. Under the Transparency Directive, it is the competent authority of the issuer whose shares **and or voting rights** were acquired or disposed of that will be receiving the notifications of major holdings. As such, it makes sense that this is the authority in charge of controlling whether the exemption is or is not being used correctly.

149. *Drafting change reflects the fact that there are also notification requirements in relation to voting rights.*

150. If the investment firm acting as market maker under the Transparency Directive breaches the notification requirements under the Transparency Directive and in doing so also breaches the requirements of MiFID under which it was authorised, the relevant competent authority for the breach of MiFID will be the competent authority under which the investment firm was authorised.

151. CESR considers it prudent that whenever a market maker breaches its notification obligations

under the Transparency Directive, the competent authority of the issuer under the Transparency Directive should notify the home competent authority of the investment firm.

SECTION 3

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

Extract from mandate

DG Internal Market requests CESR to provide technical advice on possible implementing measures on the following issues:

to determine a calendar of "trading days" for all Member States for notification purposes under Article 11(5). DG Internal Market does not consider necessary to define a uniform calendar of trading days throughout the EU. Instead, it invites CESR to provide advice on the trading days of which Member State should be relevant.

Relevant Level 1 provisions

Article 12(2)
The notification to the issuer shall be effected as soon as possible, but not later than four trading days, the first of which shall be the day after the date on which the shareholder, or the natural person or legal entity referred to in Article 10 (…).

Article 12(6)
Upon receipt of the notification under paragraph 1, but no later than three trading days thereafter, the issuer shall make public all the information contained in the notification.

Article 12(7)
A home Member State may exempt issuers from the requirement in paragraph 6 if the information contained in the notification is made public by its competent authority, under the conditions laid down in Article 21, upon receipt of the notification, but no later than three trading days thereafter.

Article 14
Where an issuer of shares admitted to trading on a regulated market acquires or disposes of own shares, either itself or through a person acting in his own name but on the issuer's behalf, the home Member State shall ensure that the issuer shall make public the proportion of own shares as soon as possible, but not later than four trading days following such acquisition or disposal where that proportion (…).

INTRODUCTION

152. CESR sets out below its draft technical advice following the first consultation. The majority of respondents agreed with CESR draft advice. Although some alternative suggestions were put forward CESR does not consider them to be feasible.

153. CESR is, as a result of the consultation adding to its original advice, advice about publication of the relevant calendar on the website of the competent authority.

EXPLANATION TO THE ADVICE

a) Which calendar of trading days should be used by persons who must notify and/or issue a publication, with the necessity for a clear rule?

154. Persons in charge of making the notification to issuers, acting on behalf of shareholders or persons referred to in Article 10 have to comply with time requirements defined in the Directive. Time requirements are D + 4 (four) trading days concerning the notification and D + 4) + 3 (three) trading days concerning the publication. "D" is the date on which the shareholder, or natural

person or legal entity, learns of or should have learned of the execution of the transaction (see Section 5 in this chapter of this Consultation Paper).

155. There is no single calendar of trading days throughout the EU. A rule for the determination of which calendar should be used is necessary because if shareholders and/or issuers do not meet the exact deadlines, they could be subject to sanctions. Secondly, CESR considers it important to create a rule so that no form of calendar arbitrage is possible.

b) What criteria should be used to determine the rule for establishing which calendar to use?

156. Several options are set out below :

Calendar of the location where the trade takes place:

157. This criterion introduces too many possible locations where the transaction can be considered to be legally concluded for this to be a viable option. In addition, this option is open to calendar arbitrage, especially in relation to transactions that are executed outside of the regulated market.

Calendar of the state where the shares are admitted to trading on a regulated market:

158. This solution could raise some difficulties when shares are listed on several regulated markets. To deal with this difficulty, the calendar could be that of the country of the issuer's first listing on a regulated market. However, this would mean that the regulated market of this first listing must be known by all market participants.

159. Under this option, problems arise for market participants as they would need to know all the markets on which the shares are traded as well as the market on which the issuers was first admitted to trading.

Calendar of the state where the shareholder is located

160. CESR recognises that this option may be the easiest from the perspective of the shareholder who is required to make the notification, as they would know the relevant trading day in their jurisdiction. As the notification requirements under the Directive relate to both acquisitions and disposals, in cases where the shareholder making a disposal is located in a different country to that of both the issuer and the shareholder acquiring the shares, this would mean that although the acquisition and the disposal of those shares take place on the same day, the notifications about the acquisition and the disposal would be received on different days. In addition, this problem is exacerbated when the investor is located in a third country. CESR therefore does not consider this to be a viable option.

Calendar of trading days of issuer's home Member State

161. This option is by CESR seen as the most viable solution for all market participants, issuers, investors and competent authorities (who are responsible for receiving the notifications, supervising compliance with the provisions of their content, and if it chooses to do so, publishing them), for the following reasons:

a) Legal certainty as to which calendar is to be used.

b) Reduces the number of potential calendars that can be used as it is limited to the EU Member States.

c) For most issuers whose shares are admitted to trading on a regulated market, the home Member State will also be the country in which the issuer has its registered office (for a large number of European exchanges, most listed companies are domestic companies). For this reason, investors will already be familiar with the applicable calendar of trading days in that jurisdiction.

d) The issuer's home Member State should be easily identifiable by investors who can obtain this information from the issuers' website, annual reports, prospectuses and other forms of issuer publications and information providers' websites.

162. It is important to note that this is also the option that has been recommended by those who responded to the call for evidence.

163. CESR notes that there is no requirement on competent authorities to determine the calendar of trading days as such. However, for ease of reference for all market participants, CESR considers it prudent for the competent authority to publish the calendar which applies to its regulated markets. This will be particularly important for those jurisdictions in which there are a number of different regulated markets that use different calendars.

164. From a practical perspective, CESR envisages that all parties will know the relevant calendar through the ability to access this information in the following ways:

a) calendars of trading days in each EU Member State could be attached to the standard form of notification which could be available on electronic networks on the competent authorities websites;

Each Member State's competent authority could draw up a list of the issuers which are admitted to trading on its regulated markets in its Member State.

DRAFT TECHNICAL ADVICE

165. For the purposes of determining which calendar of trading days should be used when establishing the time period within which a notification has to be made as set out in Article 12, CESR considers that the best option is to use the calendar of trading days of the issuers' home Member State.

166. CESR considers it necessary for the Commission to mandate that each competent authority publish on its website which calendar applies to its regulated markets.

167. In addition, should issuers wish to also publish on their websites which their relevant competent authority is, they can do so.

SECTION 4

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

Extract from the mandate

DG Internal Market requests CESR to provide technical advice on possible implementing measures on the following issues:

(3) to clarify which person (the shareholder or the natural person or legal entity referred to in Article 10 or both) should make the notification;

Relevant level 1 provisions

Article 10 of Transparency Directive

Acquisition or disposal of major proportions of voting rights

The notification requirements defined in paragraphs 1 and 2 of Article 9 shall also apply to a natural person or legal entity to the extent it is entitled to acquire, to dispose of, or to exercise voting rights in any of the following cases or a combination of them:

(a) voting rights held by a third party with whom that person or entity has concluded an agreement, which obliges them to adopt, by concerted exercise of the voting rights they hold, a lasting common policy towards the management of the issuer in question;

(b) voting rights held by a third party under an agreement concluded with that person or entity providing for the temporary transfer for consideration of the voting rights in question;

(c) voting rights attaching to shares which are lodged as collateral with that person or entity, provided the latter controls the voting rights and declares its intention of exercising them;

(d) voting rights attaching to shares in which that person or entity has the life interest;

(e) voting rights which are held, or which may be exercised within the meaning of points (a) to (d), by an undertaking controlled by that person or entity;

(f) voting rights attaching to shares deposited with that person or entity which the latter can exercise at its discretion in the absence of specific instructions from the shareholders;

(g) voting rights held by a third party in its own name on behalf of that person or entity;

(h) voting rights which that person or entity may exercise as a proxy where it can exercise the voting rights at its discretion in the absence of specific instructions from the shareholders.

INTRODUCTION

168. The previous consultation dealt with the following four issues:

a) Aggregation of holdings of voting rights;
b) Clarification of who has to make the notification under the circumstances of Article 10;
c) Possibility to appoint another person to comply with the notification duty;
d) Possibility of making a single notification in case of joint notification duty.

169. Consultees all agreed with CESR's proposals in relation to the issue of aggregation (paragraphs 85 to 90 of the December Consultation Paper) as well as in relation to the issue of single notification (paragraphs 146-149 of that paper) and CESR's proposals on these issues have not changed.

170. In relation to the notification obligations triggered by Article 10 situations, CESR explained at some length (in paragraphs 93-96 and 140-142 of the December Consultation Paper) that there were two different approaches.

171. The consultation responses were also split on this issue, and following a review of the consultation responses, further discussion within CESR and with the Commission, CESR sets out below its new thinking in relation to who has a notification obligation under both Articles 9 and 10 in relation to the situations set out in Article 10.

172. In relation to the issue of appointment of another person to comply with the notification duty (paragraphs 143-145 of the December Consultation Paper), some consultees asked for clarification. This clarification is also given below.

173. The new thinking of CESR and the clarifications made to the original proposals result in a revised draft technical advice.

WHO SHOULD MAKE THE NOTIFICATION UNDER ARTICLE 10

a) General principles

174. As a general principle, CESR considers it important to point out that Article 9 imposes obligations on shareholders and Article 10 imposes obligations on those who are entitled to acquire, dispose of or exercise voting rights attached to shares.

175. Article 10 sets out a number of situations which result in a notification obligation being triggered for those who are entitled to acquire, dispose of or exercise voting rights. CESR has been mandated to clarify who is required to make the notification that is triggered in these circumstances.

176. In addition, CESR considers it necessary to point out that the purpose of Article 10 is to identify who is controlling the way in which voting rights are exercised. This is done in the following ways:

a) by identifying additional voting rights that shareholders may have under the circumstances listed in Article 10, for the purposes of aggregation with the shares they hold; and
b) by identifying an additional set of natural persons or legal entities that need to make notifications on major entitlements to voting rights.

b) Objective of notification requirements

177. Just like for the issue of aggregation (paragraph 85 of the December Consultation Paper), CESR considers it important to point out that irrespective of how one can interpret Articles 9 and 10, it is not the intention of the Transparency Directive to change the acquis which imposed notification obligations on shareholders in respect of changes in their "holdings" of voting rights. On an examination of Article 9 there are references to voting rights, holdings, major holdings and shares. However, it is clear that the intention of the Transparency Directive is to impose ongoing obligations on shareholders in respect of acquisitions and disposals of both shares and voting rights.

178. In addition to the above, the objective of the notification requirements in the Transparency Directive is to disclose to the market major holdings of voting rights and continuing changes in such holdings, when the proportion of voting rights reaches, exceeds or falls below a notification threshold. Therefore CESR interprets Article 9 as requiring from shareholders notification of acquisitions and disposals of voting rights even though shares are not acquired or disposed of.

179. There is one CESR member who does not agree with this interpretation and considers that Article 9 only imposes obligations in relation to acquisitions and disposals of shares and that Article 10 only imposes obligations in relation to voting rights for the following reasons:

180. This one member points out that the wording of Article 9 refers to the acquisition and disposal of shares and not of voting rights. Any approach reading acquisition and disposal of voting rights into Article 9 is an extension of the scope of Level 1 by Level 2 measures. Furthermore, this new approach may lead to a multiplication of notifications which may be meaningless or even misleading from a market transparency perspective.

181. According to this view an example of the consequences of such an approach, would be Article 10 (h), where any time a shareholder is giving a proxy over his voting rights to the proxy holder ahead of an annual general meeting this would be treated as a disposal of voting rights, notifiable under Article 9 if a threshold is crossed, and another notification of the proxy holder under Article 10 (h) if a threshold is crossed. From a legalistic view a notification duty under Article 9 would be misleading as the shareholder does not dispose of his shares and the proxy can be terminated at any time so that in reality the shareholder is still in control. From a practical point of view this could potentially lead to a chain of notifications in situations where the shareholder gives instructions to the proxyholder in a particular case (acquisition of voting rights by the shareholder, notifiable under Article 9) and then reinstates the discretion of the proxyholder the next day (disposal of voting rights, notifiable under Article 9). Clearly this chain of notifications may send out the wrong message to the market, the message being there is movement in the holdings of the issuer whereas in reality there is not.

c) Notification thresholds

182. CESR points out that in the discussion below whenever there is a reference to a notification obligation, this is always on the basis that an Article 9 threshold has been reached, exceeded or fallen below. For example, X is a shareholder with a percentage of voting rights attached to those shares equal to 11 %; X enters into an agreement with Y which provides for the temporary transfer for consideration to Y of 4 % of the voting rights attached to the shares which Y will be entitled to exercise. Y is not required to make a notification because a notification threshold is not reached. X however is required to make a notification because he falls below the 10 % notification threshold.

d) Overview of the circumstances covered by Article 10 (a)-(h)

Article 10(a) of Transparency Directive

183. *"The notification requirements defined in paragraphs 1 and 2 of Article 9 shall also apply to a natural person or legal entity to the extent it is entitled to acquire, to dispose of, or to exercise voting rights in any of the following cases or a combination of them:*

a) voting rights held by a third party with whom that person or entity has concluded an agreement, which obliges them to adopt, by concerted exercise of the voting rights they hold, a lasting common policy towards the management of the issuer in question;"

184. This Article covers situations where a natural person or legal entity (for example, a shareholder, or a natural person or legal entity that has concluded an agreement with a shareholder) enters into an agreement with a third party, who already holds voting rights (for example, because he is a shareholder, or because he has concluded an agreement with a shareholder), which obliges them to adopt, by concerted exercise of the voting rights they hold, a lasting common policy towards the management of the issuer in question.

185. CESR considers that existing shareholders or holders of voting rights that enter into an agreement without acquiring additional voting rights are also covered by this Article. They will have to make a notification if their combined holdings of voting rights reach a threshold under Article 9. The Shareholder has a notification duty under Article 9, and the holders of voting rights under Article 10a.

186. All parties to the agreement are responsible for making the notification because by pooling their voting rights together they acquire the right to exercise voting rights.

187. However, in determining who should make the notification, CESR considers that it should be left to the parties to the agreement in question to decide whether or not they wish to appoint a representative of the group, or another third party, to make the notification on behalf of all of them.

188. All parties to the agreement are also responsible for making a subsequent notification when the agreement itself comes to an end (in so far as this event results in a threshold being fallen below) or when subsequent changes to the agreement result in a change to the total number of voting rights held under the agreement (resulting in a threshold being crossed or fallen below). For example, : X, Y and Z all each hold 3 % of voting rights, they conclude an agreement which results in each of them being able to control 9 % of voting rights. If their agreement comes to an end, they all cross the 5 % threshold because they no longer control 9 % of voting rights, but only 3 %.

Article 10(b) of Transparency Directive

189. *"The notification requirements defined in paragraphs 1 and 2 of Article 9 shall also apply to a natural person or legal entity to the extent it is entitled to acquire, to dispose of, or to exercise voting rights in any of the following cases or a combination of them:*

b) voting rights held by a third party under an agreement concluded with that person or entity providing for the temporary transfer for consideration of the voting rights in question;"

190. This Article covers situations where a natural person or legal entity enters into an agreement with a third party who holds voting rights (for example, because he is a shareholder, or because he has concluded an agreement with a shareholder) as a result of which the third party transfers his voting rights for consideration to the natural person or legal entity temporarily.

191. The natural person or legal entity that acquires the voting rights and is entitled to exercise them under this agreement is required to notify.

192. In addition, the natural person or legal entity who is transferring temporarily the voting rights for consideration is also required to notify. In this situation, if the natural person or legal entity that is transferring the voting rights temporarily is a shareholder, this notification obligation arises from its ongoing notification obligation under Article 9, and if the natural person or legal entity that is transferring the voting rights temporarily is not a shareholder, this obligation arises from its ongoing notification obligation under Article 10.

193. When the agreement comes to an end, both the natural person or legal entity who acquired the voting rights and was entitled to exercise them, and the natural person or legal entity to whom the voting rights are being returned, will be required to make a notification.

Article 10(c) of Transparency Directive

194. *"The notification requirements defined in paragraphs 1 and 2 of Article 9 shall also apply to a natural person or legal entity to the extent it is entitled to acquire, to dispose of, or to exercise voting rights in any of the following cases or a combination of them:*

c) *voting rights attaching to shares which are lodged as collateral with that person or entity, provided the latter controls the voting rights and declares its intention of exercising them;"*

195. This Article covers situations where a natural person or legal entity has collateral of shares, with voting rights attached, lodged with it ("the collateral holder") by a third party -for example, by a shareholder (" the collateral lodger").

196. If the collateral lodger still has the ability to decide how the voting rights are to be exercised, irrespective of the fact that the shares have been given to the collateral holder as collateral, then the collateral holder, is not required to make a notification.

197. If the collateral holder controls the voting rights attached to the shares it holds and declares its intention to exercise the voting rights, then the collateral holder has to make a notification. In addition in this situation, the collateral lodger is also required to make a notification if he is a shareholder.

198. When the shares and/or voting rights attaching to the shares are returned by the collateral holder to the collateral lodger, both the collateral holder and the collateral lodger also have to make a subsequent notification.

Article 10(d) of Transparency Directive

199. *"The notification requirements defined in paragraphs 1 and 2 of Article 9 shall also apply to a natural person or legal entity to the extent it is entitled to acquire, to dispose of, or to exercise voting rights in any of the following cases or a combination of them:*

d) voting rights attaching to shares in which that person or entity has the life interest;"

200. This Article covers situations where a natural person or legal entity acquires, voting rights attaching to shares in which he has a life interest.

201. If the natural person or legal entity who has the life interest in those shares to which voting rights are attached is entitled to exercise those voting rights, then he is required to make the notification.

202. The shareholder who is giving the life interest in the shares to which voting rights are attached is also obliged to make a notification under Article 9.

203. When the life interest comes to an end, the natural person or legal entity who had the life interest is required to make the notification under Article 10 and the shareholder who gets back the right to exercise the voting rights attached to the shares is also required to make a notification under Article 9.

Article 10(e) of Transparency Directive

204. *"The notification requirements defined in paragraphs 1 and 2 of Article 9 shall also apply to a natural person or legal entity to the extent it is entitled to acquire, to dispose of, or to exercise voting rights in any of the following cases or a combination of them:*

e) voting rights which are held, or which may be exercised within the meaning of points (a) to (d), by an undertaking controlled by that person or entity;"

205. Article 10(e) applies to situations where a controlled undertaking is required to notify under the situations described in Article 10 (a)-(d). The Article requires the controlling natural person or legal entity to make a notification regardless of whether or not it holds voting rights itself.

206. Two situations can be distinguished. The first one is the situation where the controlled undertaking(s) has/have a notification duty at an individual level; the second one is the situation where the controlled undertaking(s) has/have no notification duty at an individual level, but where the group in aggregation has a notification duty.

a) circumstances where the controlled undertaking(s) has/have a notification duty at an individual level

207. In circumstances where the controlled undertaking(s) is (are) required to make a notification under Article 10(a)-(d), the controlling natural person or legal entity is also required to make a notification under Article 10(e).

208. CESR considers that both the controlling natural person or legal entity and the controlled undertaking(s) are responsible for making the notification. However, under the provisions of Article 12(3), the controlled undertaking(s) shall be exempted from making the notification if the parent undertaking makes the notification on behalf of the controlled undertaking(s).

209. The controlling natural person or legal entity will have to aggregate the holdings.

210. Pursuant to Article 12(1b), the notification shall include the chain of controlled undertakings through which voting rights are effectively held.

b) circumstances where the controlled undertaking(s) has/have no notification duty at an individual level

211. There are circumstances where neither the controlled undertakings nor the controlled undertaking(s) and the controlling natural person or legal entity have reached a trigger threshold at an individual level, but they may have reached a trigger threshold together. Under these circumstances, the controlled undertakings have no duty to notify (because they do not reach a trigger threshold at an individual level). However, the controlling natural person or legal entity, who is considered to have control over the exercise of the voting rights of the controlled undertaking(s), will have to notify when either the controlled undertakings or the controlled undertaking(s) and the controlling natural person or legal entity have crossed a threshold together.

212. To do so, the controlling natural person or legal entity will need to aggregate the holdings.

213. Pursuant to Article 12(1b), the notification shall include the chain of controlled undertakings through which voting rights are effectively held.

Article 10(f) of Transparency Directive

214. *"The notification requirements defined in paragraphs 1 and 2 of Article 9 shall also apply to a natural person or legal entity to the extent it is entitled to acquire, to dispose of, or to exercise voting rights in any of the following cases or a combination of them:*

(f) voting rights attaching to shares deposited with that person or entity which the latter can exercise at its discretion in the absence of specific instructions from the shareholders;"

215. This Article covers situations where a natural person or legal entity (the "depositor") has deposited shares with voting rights attached with another natural person or legal entity "the deposit taker".

216. If the depositor still has the ability to decide how the voting rights are to be exercised, irrespective of the fact that the shares have been deposited with the deposit taker, then the deposit taker is not required to make a notification.

217. If, in the absence of the depositor giving specific instructions to the deposit taker, the deposit taker can exercise the voting rights attached to the shares deposited at its discretion, then the deposit taker is considered to be entitled to exercise the voting rights and must therefore make the notification. In addition to the deposit taker, the depositor is also required to make a notification if he is a shareholder under Article 9.

218. When the voting rights attaching to the shares are returned by the deposit taker, the deposit taker and the original depositor have to make a subsequent notification.

Article 10(g) of Transparency Directive

219. *"The notification requirements defined in paragraphs 1 and 2 of Article 9 shall also apply to a natural person or legal entity to the extent it is entitled to acquire, to dispose of, or to exercise voting rights in any of the following cases or a combination of them:*

(g) voting rights held by a third party in its own name on behalf of that person or entity;"

220. This refers to situations where a natural person or legal entity controls voting rights which are held by a third party in the third party's own name, for example, in a trust.

221. The natural person or legal entity that controls the voting rights, irrespective of the name in which they are held should make the notification.

222. When the voting rights are no longer held by the third party in its own name on behalf of that person or entity, a subsequent notification requirement can be triggered.

223. In situations where the shareholder is transferring beneficial ownership of the exercise of the voting rights to a natural person or legal entity, then it has a notification obligation under Article 9.

Article 10(h) of Transparency Directive

224. *"The notification requirements defined in paragraphs 1 and 2 of Article 9 shall also apply to a natural person or legal entity to the extent it is entitled to acquire, to dispose of, or to exercise voting rights in any of the following cases or a combination of them:*

(h) voting rights which that person or entity may exercise as a proxy where it can exercise the voting rights at its discretion in the absence of specific instructions from the shareholders."

225. This provision relates to situations where a natural person or legal entity who holds voting rights (for example, because he is a shareholder or because he has concluded an agreement with a shareholder) has given control of the exercise of its voting rights to another natural person or legal entity, i.e. to a proxy holder, who can exercise the voting rights at its discretion in the absence of specific instructions.

226. The proxy holder has to make the notification, as he has control over the voting rights.

227. The shareholder or Article 10 natural person or legal entity who has given his proxy to the proxy holder will also be required to make a notification under Article 9 and Article 10 respectively.

228. When the proxy holders discretion ends, the proxy holder will be required to make a notification and the shareholder or Article 10 natural person or legal entity who gave the proxy holder discretion will also be required to make a notification.

THE APPOINTMENT OF ANOTHER PERSON TO COMPLY WITH THE NOTIFICATION OBLIGATION

229. CESR considers that as a general principle, where a shareholder, natural person or legal entity is required under Articles 9 and 10 to make a notification, it can appoint another person to make the notification on its behalf.

230. This principle also applies when the duty to make a notification lies with more than one shareholder, natural person or legal entity.

231. However, CESR does not consider that this appointment releases the shareholder, natural person or legal entity from its obligation to make the notification. If the appointed person does not make the notification, then the legal obligation to notify still remains with the original shareholder, natural person or legal entity. CESR wants to point out that this obligation includes the content of notification as well as the notification obligation.

REVISED DRAFT TECHNICAL ADVICE

Table Setting Out Who Has To Make the Notification

Circumstances	Who has to make the notification
Art. 10(a)	All parties to the agreement.
Art. 10(b)	The natural person or legal entity that acquires the voting rights and is entitled to exercise them under the agreement (if threshold crossed); AND the natural person or legal entity who is transferring temporarily for consideration the voting rights if in doing so the voting rights now held fall below a relevant threshold.
Art. 10(c)	The collateral holder, if it controls the voting rights attached to the shares it holds and declares its intention to exercise them (if threshold crossed); AND the collateral lodger if as a result of lodging the collateral and transferring the shares and voting rights, the voting rights now held as a result of the transfer fall below a relevant threshold.
Art. 10(d)	The natural person or legal entity who has the life interest in the shares if he is entitled to exercise the voting rights attached to the shares (if threshold crossed); AND The natural person or legal entity who is disposing of the voting rights if in doing so he falls below a relevant threshold.
Art. 10(e)	When the controlled undertaking has a notification duty at an individual level : the controlling natural person or legal entity and the controlled undertaking(s) under Articles 10(a)-(d) and Article 9 When the controlled undertaking has no notification duty at an individual level : the controlling natural person or legal entity under Articles 10(a)-(d) and Article 9 .
Art. 10(f)	The deposit taker of the shares, if he can exercise the voting rights attached to the shares deposited with him at his discretion (if threshold crossed); AND The depositor of the shares, if as a result of depositing the shares with the deposit taker the number of voting rights held by him falls below a relevant threshold.
Art. 10(g)	The natural person or legal entity that controls the voting rights (if threshold crossed).
Art. 10(h)	The proxy holder, if he can exercise the voting rights at his discretion in the absence of specific instructions from the shareholders (if threshold crossed); AND the shareholder who has given his proxy to the proxy holder if by giving the proxy he falls below a relevant threshold.

232. In addition to the above, whenever changes to the circumstances described in Article 10(a)-(h) above take place, which result in changes to the amount of voting rights attributable to the person that was required to make the notification, a subsequent notification requirement is triggered **if the change result in threshold(s) being crossed, reached or fallen below.**

233. A shareholder, a natural person or a legal entity that has to make a notification can appoint another **person** to make a notification on its behalf.

234. This principle also applies when the duty to make a notification lies with more than one shareholder, natural person or legal entity.

235. Such an appointment does not release the shareholder, natural person or legal entity from its

obligation to make a notification. **This obligation includes the content of notification as well as the notification obligation itself.**

236. Single notification is acceptable where the duty to make a notification lies with more than one shareholder, natural person or legal entity.

237. The use of a single notification does not release the persons involved from their obligation to make a notification.

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

Extract from the mandate:

DG Internal Market requests CESR to provide technical advice on possible implementing measures on the following issues:

to clarify 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.

Relevant Level 1 provision

Article 12

Procedures on the notification and disclosure of major holdings

1. *The notification required under Articles 9 and 10 shall include the following information:*

   (a) the resulting situation in terms of voting rights;

   (aa) the chain of controlled undertakings through which voting rights are effectively held, if applicable;

   (b) the date on which the threshold was crossed or reached; and

   (c) the identity of the shareholder even if the latter is not entitled to exercise voting rights under the conditions laid down in Article 10, and the natural person or legal entity entitled to exercise voting rights on behalf of the shareholder.

2. *The notification to the issuer shall be effected as soon as possible, but not later than four trading days, the first of which shall be the day after the date on which the shareholder, or the natural person or legal entity referred to in Article 10,*

   a) learns of the acquisition or disposal or of the possibility to exercise voting rights, or on which, having regard to the circumstances, should have learned of it, regardless of the date on which the acquisition, disposal or possibility to exercise voting rights takes effect; or

   b) is informed about the event mentioned in Article 9(2).

INTRODUCTION

238. In relation to this mandate, CESR asked consultees a number of questions in order to establish when the shareholder, natural person or legal entity's notification obligations under the Directive commence.

239. Following the consultation, CESR sets out below a discussion of the issues arising out of the consultation about which CESR considers it necessary to clarify issues. Other issues raised by consultees but not discussed in this paper, will be addressed in a separate feedback document.

240. The following issues have arisen as a result of the consultation process:

a) The interpretation of Article 12(2)(a);

b) CESR's proposals regarding when a natural person or legal entity is deemed to have knowledge for the purposes of its notification obligations.

A) The interpretation of Article 12(2)(a)

241. Following a review of the responses to the December Consultation paper, it is clear that a number of respondents raised concerns about CESR's proposals that the relevant starting date for the purposes of determining when a natural person or legal entity "should have learned" is the transaction date.

242. Some respondents considered CESR's reasoning to be incorrect, because the relevant starting date should be determined by reference to when legal transfer of ownership of a share takes place, which as CESR pointed out in paragraph 161 of the December Consultation paper may differ depending upon applicable national laws, rules and regulations.

243. Some respondents consider that the notification obligation can not be triggered before the shareholder can exert any influence by way of holding the shares, therefore, because this does not happen when the order is executed but when settlement has taken place, therefore they proposed that the relevant point of time should be when the settlement has taken place.

244. CESR, other than one CESR member, disagrees with these comments.

245. CESR would like to make it clear that the original statement in paragraph 161 of the December Consultation paper was intended as a general statement of fact, namely that there are differences between member states regarding when legal ownership of a security is deemed to take place, however it was not intended to mean, that for the purposes of determining when the notification obligation under the Directive commences, the applicable starting point was upon the legal transfer of ownership.

246. For the requirements of the Directive, the Article that stipulates from which point in time the notification obligation commences is Article 12(2)(a) which states:

"The notification to the issuer shall be effected as soon as possible , but not later then four trading days, the first shall be the day after the date on which the shareholder, or the natural person or legal entity referred to in Article 10:

learns of the acquisition or disposal or the possibility of exercising voting rights, or which , having regard to the circumstances, should have learned of it, regardless of the date on which the acquisition or disposal or possibility of the exercise of the voting rights takes effect.."

247. It is clear that objective is that the notification is made as soon as possible, but at the latest four trading days from the date on which the shareholder, natural person or legal entity learns or should have learned of the acquisition disposal or possibility of exercising voting rights.

248. The question therefore arises at which point in time is a notification obligation triggered.

249. On further consideration of this issue, CESR considers it important to point out that it believes the purpose of the Transparency Directive is to create harmonisation and certainty as to the point in time at which a notification obligation is triggered irrespective of differences in national legal systems. CESR believes that such clarification is necessary for all parties concerned, i.e. shareholders, issuers, brokers, regulated markets and competent authorities.

250. In order to establish when a notification obligation is triggered, looking at the text of Article 12(2) (a), learning about an acquisition or disposal or the possibility of exercising voting rights does not require that actual legal transfer of the shares or voting rights has actually taken place, and it is clear that knowledge of the possibility to exercise voting rights is very different from the legal ability to actually exercise them after legal transfer has occurred.

251. The purpose of the Transparency Directive is to set minimum requirements regarding the time frames within which such notification has to be made, and the purpose of the mandate was to give certainty about what is meant by "should have learned" for the purposes of this notification requirement.

252. Taking the above into consideration, CESR considers the right point in time at which a notification obligation is triggered is the time at which a shareholder, natural person or legal entity learns or should have learned about **the execution of a transaction.** In the case of a transaction that takes place on exchange, CESR considers a transaction is executed at the point in time when the matching of the orders occurs and for transactions conducted off exchange to be the point in time when an agreement is entered into by the meeting of the minds of all parties to that agreement. In fact this is the point of time that is being used in practice in most member states.

253. CESR's proposal in this area avoids any unnecessary debate about when and whether or not legal transfer of shares has taken place, and also deals with the situations covered in Article 10 where notification obligations are triggered irrespective of legal transfer of voting rights.

254. In addition the interpretation that notification obligations only commence after legal ownership would require all shareholders to know when legal ownership takes place in each member state in order to be able to work out when their notification obligations commenced.

255. For these reasons, as CESR originally proposed in its October consultation paper, it considers that the relevant date for the determining when the notification obligation commences is the date when the shareholder, natural person or legal entity to learns or should have learned of the transaction being executed and not when the shareholder, natural person or legal entity learns or should have learned that the legal transfer of the shares of voting rights has taken place.

256. This point was re-iterated in Section 7 of the December consultation paper which set out the content of the Standard form requirement, where it was proposed that one of the content requirements would be the date of the execution of the transaction.

257. As explained in that paper, if an instruction is given to a broker to acquire or dispose of shares, then as discussed in the paper, there may be an element of uncertainty regarding whether or not that instruction was or was not carried out, however, as pointed out in paragraph 169 of that consultation paper CESR considers that natural persons and legal entities always have a duty of care to exercise when acquiring or disposing of major holdings.

Different view from one CESR member

258. One CESR member is of the opinion that the notification duty should be triggered by the transfer of legal ownership or by the ability to exercise voting rights (in Art.10 situations) for the following reasons:

259. The transfer of legal ownership or the ability to exercise voting rights (or not being able to exercise voting rights anymore in a disposal situation) would provide a concept to provide legal certainty as to when the notification duty arises even if it does depend on the different civil laws of

the member-states. The approach described above risks running into problems once the execution of an off-exchange transaction is depending on the fulfilment of a certain condition or the approval by an authority (such cases are considered as the crucial ones in practice). Referring to the "meeting of the minds of all parties" does not give a clear answer to when then notification duty commences. Depending on the parties minds it could arise either with the entering into the agreement regardless of the fulfilment of the condition and the approval by the authority, respectively, or with its fulfilment/approval.

260. In the former case a notification would lead to misleading information to the market as – contrary to the content of the notification – the seller of the shares/voting rights is actually still the holder of the voting rights and, therefore, the one who is entitled to exercise the voting rights. If the condition does not get fulfilled or the approval is not given this would trigger a second notification, although a shift in the voting rights has not taken place at all.

261. Under the latter case – "meeting of the minds" on fulfilment of condition/approval by authority - a precise definition of when this "meeting of the minds" takes place and the drafting of a full casebook detailing when the notification duty arises instantaneously on execution and when the duty is suspended until a certain condition, event etc occurs would be required. If one takes into account that across 27 jurisdictions the same legal terms may mean different things because of non-harmonised civil laws this may be at the detriment of legal certainty.

262. It must also be pointed out that reference to an execution of a transaction may mean (depending on how execution of a transaction is to be defined) that the notification deadline could be triggered before the actual notification duty arises because civil law provisions require the transfer of legal ownership before voting rights are held and according to Art.9 a "shareholder notifies the issuer of the proportion of voting rights held by the shareholder as a result of the acquisition or disposal...". Implementing a Level 2 measures saying the notification obligation starts at execution of transaction may mean ignoring a Level 1 provision, namely that the Art.9 notification duty arises once voting rights are held. Furthermore, any notification submitted before the voting rights are held can be misleading since the notifying person may in future never gain or lose the voting rights as such because something may happen between execution of transaction and the transfer of the voting rights so that quite the opposite of market transparency would be the outcome. The consequence would be an increased workload for the competent authorities without gaining more transparency for the market.

263. The desired harmonisation of notification deadlines would depend on how one construes the "meeting of the minds" of parties in situation where a transaction is under conditions etc. This would be wide open to different national implementations and interpretations, thus, the harmonising effect of this concept may be limited.

264. Knowing when the transfer of legal ownership does occur in different member-states does not seem to be too a harsh a requirement as indicated in the majority view considering the relevant person would know under which regime a transaction is conducted.

B) CESR's proposals regarding when a natural person or legal entity is deemed to have knowledge for the purposes of its notification obligations.

265. CESR proposed two possible options for when a natural person or legal entity is deemed to have knowledge of the acquisition or disposal or the possibility to exercise voting rights.

266. Either on the date when the transaction is actually executed, or on the day after the transaction was actually executed.

267. The majority of the respondents consider that the date should be on the day after the transaction was actually executed.

268. In light of the responses, CESR has decided that it should advise the commission that a natural person or legal entity is deemed to have knowledge of the acquisition or disposal or of the possibility

to exercise voting rights on the day after the transaction was actually executed, and sets out below its draft technical advice.

REVISED DRAFT TECHNICAL ADVICE

269. Taking into account the very high duty of care that a natural person or legal entity that acquires and disposes of major holdings should exercise, CESR considers that a natural person or legal entity is deemed to have knowledge of the acquisition or disposal or the possibility to exercise voting rights *on the day after* the transaction was actually executed.

270. This date is considered to be appropriate because there may be circumstances where the natural person or legal entity has exercised the duty of care set out above, and for some reason is still not able to attain "actual knowledge" of the acquisition or disposal on the date of the execution of the transaction. For this reason, it is considered prudent to recognise the effort that the natural person or legal entity has undertaken to establish "actual knowledge" and to consider that deemed knowledge only occurs one day after the transactions was executed.

271. This will give large and multinational cooperatives and management companies time to aggregate their holdings through the group and also give overseas companies similar conditions as European companies by taking into account possible time differences. Holdings by such companies are monitored on a daily basis by sometimes complex systems and reports that indicate a passing of a threshold are generated automatically. One day is considered sufficient time for the production of such reports.

272. One day is also considered an appropriate amount of time for shareholders to contact their broker to confirm whether or not a trade has taken place if they have not already heard from their broker.

273. In light of their recognition that there is a difference between learned and should have learned in the Directive, one should consistently approach that difference and should draw consequences from it, otherwise the differentiation would be meaningless.

274. CESR recognises that this is based on a presumption that the need to use this advice in practice will be in situations where the natural person or legal entity is considered not to have made the notification within the deadlines set out in the Directive and the competent authority is trying to establish why.

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 12(4) AND 12(5).

Extract from the mandate

DG Internal Market requests CESR to provide technical advice on possible implementing measures on the following issues:

5) to clarify the conditions of independence to be complied with by the management companies, or by investment firms, and the parent undertakings to benefit from the exemptions in Articles 11(3a) and 11(3b). In particular, CESR is invited to consider:

a) the level of independency (e.g. right to freely participate in security holders' meetings, right to freely participate in minority shareholders' meetings, right to contest decisions of the issuer, including the right to take legal action, etc). In this context, the notion of indirect instructions should be clarified, and

b) conditions that management companies/investment firms and their parent undertakings should comply with to benefit from the exemption of not being required to aggregate major holdings at the level of the parent undertaking (for instance: internally between the parent undertaking and the management company/investment firm or for instance externally in terms of public disclosure, involvement of auditors and/or of the competent authority).

Relevant level 1 provisions

Management Companies

Article 12(4) of the Directive states that the parent undertaking of a management company shall not be required to aggregate its holdings under Articles 9 (disclosure of major holdings) and 10 (disclosure of major proportions of voting rights) with the holdings managed by the management company under the conditions laid down in Council Directive 85/611/EEC, provided such management company exercises the voting rights independently from the parent undertaking.

However, Articles 9 and 10 shall apply where the parent undertaking, or another controlled undertaking of the parent undertaking, has invested in holdings managed by this management company and the management company has no discretion to exercise the voting rights attached to such holdings and may only exercise such voting rights under direct or indirect instructions from the parent or another controlled undertaking of the parent undertaking.

Investment Firms

Article 12(5) of the Directive states that the parent undertaking of an investment firm authorized under the Directive 2004/39/EC of the European Parliament and the Council on markets in financial instruments shall not be required to aggregate its holdings under Articles 9 and 10 with the holdings which an investment firm manages on a client-by-client basis within the meaning of Article 4(1) No 9 of Directive 2004/39/EC of the European Parliament and the Council on markets in financial instruments, provided that:

- *the investment firm is authorized to provide such portfolio management under point 4 of Section A of Annex I to Directive 2004/39/EC of the European Parliament and the Council on markets in financial instruments*

- *it may only exercise the voting rights attached to such shares under instructions given in writing or by electronic means or it ensures that individual portfolio management services are conducted on an independent manner from any other services under conditions equivalent to those provided for under Council Directive 85/611/EEC by putting into place appropriate mechanisms; and*

- *the investment firm exercises its voting rights independently from the parent undertaking*

However, Articles 9 and 10 shall apply where the parent undertaking, or another controlled undertaking of the parent undertaking, has invested in holdings managed by this management company and the management company has no discretion to exercise the voting rights attached to such holdings and may only exercise such voting rights under direct or indirect instructions from the parent or another controlled undertaking of the parent undertaking.

INTRODUCTION

275. In relation to this mandate, CESR asked a number of detailed questions in order to establish what the test of independence should be for both management companies and investment firms.

276. Overall, respondents were positive about CESR's proposals in this area, although there were some particular areas of concern or requests for clarification that were raised, which has, as discussed below, resulted in CESR making some changes to its draft advice.

277. In summary the key points that have come out of the consultation are:

A) the scope of a parent undertakings management companies

B) Overall agreement with CESR's reasoning in establishing its advice

C) The revised draft advice

278. CESR discusses each of these below

A) Scope of parent undertakings management companies

279. In the Consultation paper, CESR explained that the Transparency Directive (Article 12(4), first paragraph) has granted **the parent undertaking** of a management company an exemption from the obligation to aggregate its holdings under Articles 9 and 10 of the Directive with the holdings managed by its management companies provided that the management company exercises the voting rights independently from the parent undertaking (Article 12(4), first paragraph).

280. According to the second paragraph of Article 12(4), the exemption is not granted **to the parent undertaking** and the principle of aggregation applies if:

- the parent undertaking or another controlled undertaking has invested in holdings managed by this management company, i.e. the parent undertaking or another controlled undertaking and the management company both hold shares or voting rights attached to the shares of the same issuer, or the parent undertaking is a client of the management company; and

- the management company has no discretion to exercise the voting rights attached to such holdings and may only exercise such voting rights under direct or indirect instructions from the parent or another controlled undertaking of the parent undertaking.

281. The main issue in relation to management companies was that of the scope of the companies that are meant to be covered by this exemption.

282. According to Article 2(1)(m) of the Transparency Directive, a management company is a company as defined in Article 1a(2) of the Council Directive 85/611/EEC[4] on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investments in transferable securities (UCITS Directive).

283. Under Article 1a(2) of the UCITS Directive, a management company "shall mean any company, the regular business of which is the management of UCITS in the form of unit trusts/common funds and/or of investment companies (collective portfolio management of UCITS);"

284. CESR explained in some detail that there were two different views within the CESR group as to which management companies are included in this definition, and therefore, which companies can benefit from the exemption provided for in Article 11(3a) of the Transparency Directive.

The **first view** was that only management companies authorised under the UCITS Directive can benefit from the exemption provided for under Article 12(4) for the reasons explained in paragraphs 186-189 of the December Consultation Paper.

285. The **second view** was that the exemption should apply to all management companies that conduct their management activities under the conditions laid down under the UCITS Directive, whether they are authorised under that Directive or not for the reasons detailed below. The reasons for this were explained in paragraphs 191-196 of the December consultation paper.

286. CESR asked conslutees which of these views was considered to be most appropriate and why.

287. The responses to the consultation were almost unanimous in their support for the second view that the exemption should apply to all management companies that conduct their management activities under the conditions laid down under the UCITS Directive, whether they are authorised under that Directive, provided the management company exercises the voting rights independently from its parent undertaking.

288. This was supported because it was considered to be the only approach that is capable of supporting the objective of Article 12(4).

289. CESR therefore proposes to make it clear in its advice that the scope of the exemption is such that it applies to all management companies that conduct their management activities under the conditions laid down under the UCITS Directive, irrespective of whether or not they are authorised under that Directive.[5]

290. However, several CESR members are of the opinion that as authorisation is not required, there must be some means, such as the ability to collect information, for the competent authorities to supervise whether or not the parent undertaking's management companies are in fact management companies operating under the conditions of the UCITS Directive. These members would therefore

[4] References to Directive 85/611/EEC throughout this paper are to this Directive as amended by different subsequent Directives and published in a consolidated version published on 13 February 2002 in the Official Journal.

[5] One Member State has some doubts whether this approach may be reviewed after the end of the transition period of the UCITS Directive, which ends on 13.2.07.

require the management companies to be supervised under national legislation in order for the parent undertaking to benefit from the exemption Thus the declaration that needs to be submitted to the competent authority will need to include a reference of the name of the competent authority by which the different management companies that are not authorised under UCITS are supervised.

Question
Q19 Do you agree with this change in the content of the declaration that the parent undertaking has to make? Please explain.

291. A number of respondents raised comments about holdings in portfolios of investments managed by management companies in accordance with Article 5(3)(a) of the UCITS Directive relating to individual portfolio management activities that are also conducted under the provisions set out in UCITS are covered.

292. CESR would like to reiterate that all of the activities that are conducted by the management company under the conditions laid down in the UCITS Directive are covered, the Transparency Directive (Article 12(4)) does not differentiate between the conduct of individual or collective portfolio management.

B) Overall agreement with CESR's reasoning in establishing its advice

293. In the Consultation, CESR discussed in some detail what the level 1 requirements were for management companies (paragraphs 180-181) and for investment firms (197-212).

294. In addition, CESR gave detailed explanation in paragraphs 213-260 of the December consultation paper, which following the consultation process it does not intend to make any changes to.

Discussion about the advice that CESR has been mandated to give

295. As discussed in the December consultation paper, CESR is asked to provide the European Commission with advice relating to three issues:

a. The level of independence to which reference is made in the first paragraphs of Articles 12(4) and 12(5);

b. The conditions (internal or external) that the management companies/investment firms and their parent undertakings should comply with to benefit from the exemption of Article 12(4) and 12(5), first paragraph of the Transparency Directive; and

c. The notion of indirect instructions to which reference is made in the second paragraphs of Articles 12(4) and 12(5).

a. The level of independence to which reference is made in first two paragraphs

The general principle

296. Consultees agreed with the detailed explanation that CESR gave about general principle and therefore CESR is not proposing to make any changes to this principle.

The level of independence

297. CESR explained (in paragraphs 220-222 of the December consultation) that the level of independence that was important for the purposes of the Transparency Directive was in relation to the ability of the management company or investment firm to use the voting rights without any constraint from the part of its parent undertaking.

298. Respondents raised concerns about this explanation as the reference to **exercise the rights attached to the assets and the examples given** was much broader than the general principle, namely

that independence should cover any possible use of the voting rights by the company or investment firm. It was pointed out that the rights attached to shares includes economic rights for example the rights to dividends and to corporate actions, and that the focus should, as CESR had explained be on the exercise of the voting rights.

299. In addition, as an example of the possible consequences of the drafting, it was explained that for example the decision to start or stop legal action is not one that would necessarily be taken at the subsidiary level.

300. CESR agrees with these concerns and would like to reiterate that the general principle is that the independence should only cover any possible use of the voting rights by the management company or investment firm. In addition, the original explanation was dealing with a specific request in the mandate to give advice about the level of independence in relation to :

" the level of independency (e.g. right to freely participate in security holders' meetings, right to freely participate in minority shareholders' meetings, right to contest decisions of the issuer, including the right to take legal action, etc)."

301. As a result of the concerns raised, CESR therefore concludes for the purposes of the exemption, the use of the rights attached to the assets should be restricted to the exercise of voting rights attached to the assets, as there may be occasions where the management company or investment firm does not have the right to freely participate in security holder's meetings, in minority shareholding meetings or to contest decisions of the issuers, as this may be related to issues of corporate action where the parent undertaking takes over.

b. Conditions (internal and external) the management companies and investment firms and their parent undertakings should comply with to benefit from the exemption.

302. CESR explained that it did not consider necessary to impose an extensive set of conditions on the parent undertaking or additional conditions on the management company or investment firm in order for the parent undertaking to get the benefit of the exemption provided for in the Transparency Directive, in light of the fact that both management companies and investment firms were already subject to a comprehensive set of regulations through which they maintain their independence from their parent undertaking in relation to how they manage the assets of those on whose behalf they act and exercise voting rights.

303. CESR explained that the only conditions that should be imposed under the Transparency Directive for the purposes of the exemption are those relating to links/internal relationship between the parent undertaking and the management company or investment firm.

304. Respondents were very supportive of this approach; there was a recommendation that CESR should mandate specific internal procedures in order for the exemption to be granted. CESR is of the opinion that the relationship between the management company and investment firm and its parent undertaking is a matter of internal organisation and does not intend to interfere in the way that groups are organised.

305. CESR does not consider it necessary to impose an extensive set of conditions on the management company or investment firm in order for the parent undertaking to get the benefit of this exemption.

The proposed test of independence

306. CESR proposed that in order for a parent undertaking to benefit from the exemption it must ensure that:

- the management company or investment firm exercises its voting rights independently from its parent undertaking; and

- it sends a declaration to the competent authority of the issuer of the shares.

307. In addition to the above, a number of questions were asked about these proposals, as well as other methods that can be used in order for the parent undertaking to demonstrate its independence.

308. CESR discusses below the reaction to these proposals and how CESR proposes to deal with them.

a. Management company/investment firm's independence from its parent

309. CESR explained that it considers that the parent undertaking must be able to demonstrate on request that:

- the organisational structures of the parent undertaking and the management company or investment firm are such that the voting rights are exercised independently; and
- the persons who decide how the voting rights are to be exercised are not the same for the parent undertaking and the management company or investment firm and act independently from one another.

310. In addition to the above, in circumstances where the parent undertaking is a client of its management company or investment firm or has holdings in the assets managed by the management company, or the portfolio managed by the investment firm, it should be able to demonstrate that there is a clear written mandate for an arms-length customer relationship between the parent undertaking and the management company or investment firm. This written mandate will ensure that the parent undertaking which is also a client of a management company or investment firm subsidiary is treated like any other client.

311. Overall, respondents were supportive of the above proposals, explaining that they consider them to be well thought-out and workable

b. Declaration to the competent authority

312. CESR explained in paragraph 249 of the December consultation paper, that in order for the competent authority to know who wants to make use of the exemption, that it considered it necessary for the parent undertaking to make a declaration to the competent authority of the under the Transparency Directive, i.e. the competent authority of the issuer of the shares.

313. CESR also made proposals about what the content of this declaration should be (paragraph 266 of the December consultation paper) and the timing of when such a declaration should be made (paragraph 267 of that paper).

314. In addition, CESR proposed in paragraph 268 that when the parent undertaking is no longer to make use of the exemption, that it should notify the relevant competent authority of this.

315. These proposals in relation to this declaration raised a number of comments from consultees, some were about when the declaration should be made and to which competent authority, others related to general disagreement to the proposal that any declaration should be made.

316. There was strong disagreement to the proposal for such a declaration by a number of respondents but not from some of the largest fund management companies or their international representatives.

317. On a detailed review of the reasoning for this objection, CESR concludes that this is due to a misunderstanding about this proposals and how it is to work in practice.

318. Consultees asked whether this declaration has to be made about each share that the parent undertaking holds, of every share that the parent undertaking holds that is also held by its management companies and or investment firms.

319. Respondents are correct in their understanding that the proposal is that the parent undertaking has to make a declaration to the relevant competent authority of each share. However, CESR considers that these comments were made on the basis of a fundamental misunderstanding as to when this declaration has to be made.

320. In order for the competent authority to be able to fulfil its duties as set out under the Directive it needs to know who wants to make use of the exemption. Therefore CESR considers that a parent undertaking who intends to use the exemption should make a declaration to the competent authority under the Transparency Directive, i.e. the competent authority of the issuer of the shares.

321. CESR is not suggesting that the parent undertaking has to identify each and every underlying share in which it has an investment, do the same exercise for its management companies and investment firms, and then make different notifications to each competent authority of these shares, and then make additional notifications each time the content of its portfolio of investments changes.

322. CESR proposes that it is for the parent undertaking to decide how it wishes to make this declaration. For example, it could simply make the same deceleration to all competent authorities, irrespective of whether or not at that time hold interests in that competent authorities underlying issuers, or it could make separate notifications each time it adds to or changes its portfolio of investments.

323. In order to address concerns raised, CESR proposes to re-draft the advice to make this clearer by stating that :

324. CESR considers that in circumstances where a parent undertaking intends to use the exemption, it should make a declaration to the competent authority of the Transparency Directive. This declaration only needs to be made once and does not need to be made on an issuer by issuer basis.

325. The parent undertaking can chose:

(i) either to submit the declaration at the start of the implementation of the Transparency Directive; or

(ii) to submit the declaration whenever they want to make use of the exemption

Which Competent Authority should receive the declaration

326. In addition, there was a suggestion that if a declaration has to be made, that it should be made to the competent authority of the parent undertaking and not to the competent authority of the issuer.

327. CESR would like to explain that this declaration has to be made to the competent authority of the issuer because this will be the competent authority responsible for supervising the reporting of major holdings under the Transparency Directive. In addition, this proposal is not workable because parent undertakings may not have EU competent authorities although their management companies and investment firms will do.

Content of declaration

328. CESR set out in some detail what the content of the declaration should be. Although it did not ask a specific question about respondents views as to its content, a number of consultees suggested that this was too prescriptive and that the declaration should simply be that within a certain group structure the requirements of the exemption rule are complied with on a continuous.

329. CESR considers that the proposed content of the declaration is as generic as it can be.

Proposals that additional declaration should be made if parent undertaking no longer eligible to benefit from the exemption

330. CESR proposed in paragraph 268 of the December consultation, that in the event that the parent undertaking decided that it was not longer eligible to benefit form the exemption, that it should notify the relevant competent authority of this. Although many respondents agreed with this proposal, some respondents suggested that this requirement was not necessary.

331. On reflection, CESR agrees with this because the Level 1 text gives parent undertakings this exemption, provided they meet this test of independence. Therefore, if the parent undertaking for whatever reason decides that it no longer qualifies, then by definition they are no longer eligible to get the exemption, and will have to aggregate their holdings when making notification requirements, as such it is not necessary to impose an additional administrative burden on them.

332. CESR therefore proposes to drop this requirement, and seeks consultees views on this proposal.

Question
Q20 Do you consider there to be any benefit by CESR retaining its original proposals and requiring a subsequent notification from the parent undertaking when it ceases to meet the test of independence?

c. Notion of indirect instructions

333. CESR explained that the third element about which it had been mandated to give advice was that of the notion of indirect instructions.

334. CESR explained in paragraph 254 of the December consultation paper, that direct instructions are the instructions given by the parent undertaking or other controlled companies to the management company or investment firm that specify how the voting rights shall be exercised in particular cases (particular shareholders' meetings, particular voting and particular issues).

335. CESR explained that indirect instructions are those that may influence the position of the management company or investment firm in the exercise of voting rights and can be general or vague in nature as to their content and do not refer to specific voting, issue or decision.

336. The majority of respondents raised concerns about the explanation given about indirect instructions. These can be summarised as follows :

a) that the definition needs to be restricted so that only instructions given with the intention of influencing the way in which the voting rights are exercised are covered,

b) that a general global voting policy (which is therefore not meeting or resolution specific) launched by the parent undertaking to maintain good corporate governance throughout the group should not be seen as indirect instructions.[6]

c) that vague statements can not be correctly deemed to be an indirect instruction affecting the subsidiary's independence in voting shares owned by a parent.

d) that indirect instructions are those that provided by the parent undertaking or another controlled undertaking according to the codified rules of the Governance relating to these entities.

337. CESR has taken all these comments into account, and agrees that the definition needs to be redrafted; it was not the intention that general policies of supporting good corporate governance should be included in this definition.

[6] It was explained that in some countries, bodies representing institutional shareholders issue guidance to their members on how they should vote on matters in general and on particular resolutions. This guidance is influential in the market place and that some parent undertakings issue policies in relation to such guidance, which it self may relate to codes on corporate governance , or have other generic policies about voting

338. A number of drafting suggestions were made, and CESR would like to thank those that made specific drafting suggestions about what the definition of indirect instructions should be. These were not taken up because they were considered to be too broad for example "indirect instructions are those that otherwise control the management company or investment firm in the exercise of voting rights" could still cover general statements about voting in accordance with good corporate governance policies, CESR therefore proposes the following definition:

339. CESR therefore proposes that the definition of indirect instruction should be:

"Indirect instructions are any instruction regardless of the form even if general that limits the discretion of the management company or investment firm in relation to the exercise of the voting rights in order to serve specific interests of the parent undertaking or another controlled undertaking of the parent undertaking."

340. CESR considers that such a definition deals with the concerns raised, and that all general voting policies would be excluded because the instruction would have to serve a specific interest of the parent undertaking or other controlled undertaking, which by definition goes against the principles by which such firms are allowed exercise voting rights which has to be in the interests of their clients.

Question
Q21 What are your views on this new definition of indirect instruction?

C. REVISED DRAFT TECHNICAL ADVICE

Introduction

341. For the reasons discussed in some detail above, CESR has made some changes to its original draft advice, which is set out below.

342. In addition, some respondents made some drafting suggestions that CESR has taken on board, and has been reflected in its revised advice.

343. For ease of reference, the text in italics is the explanation about drafting changes that have been made.

Revised draft technical advice

Scope of management companies included for the purposes of this exemption

344. The exemption in Article 12(4) applies to all management companies that conduct their management activities under the conditions laid down under the UCITS Directive, irrespective of whether or not they are authorised under that Directive.

The requirements

345. In order for a parent undertaking to benefit from the exemption in relation to holdings under Article 9 and 10 it must ensure that:

a. the management company or investment firm exercises its voting rights independently from its parent undertaking; and

b. it sends a declaration to the competent authority of the issuer of the shares.

a. Management company's or investment firm's independence from its parent

346. CESR considers that the parent undertaking must be able to demonstrate on request that the organisational structures of the parent undertaking and the management company or investment firm are such that the voting rights are exercised independently **of the parent.** This must be demonstrated by at least having implemented written policies and procedures reasonably designed to

prevent the distribution of information between the parent undertaking and the management company or investment firm that relate to the exercise of voting rights.

347. *The changes in the drafting reflect comments made about the original reference in paragraph 262 of the December consultation paper to "to investment decision over securities traded" which has nothing to do with the exercise of voting rights and the test of independence. In addition, it was suggested that it needs to be made clearer that the voting rights are exercised independently of the parent. CESR agrees with these comments and therefore has amended the drafting accordingly.*

348. CESR also considers that the parent undertaking must be able to demonstrate on request that the persons who decides how the voting rights are to be exercised are not the same for the parent undertaking and the management company or investment firm and act independently.

349. In addition to the above, in circumstances where the parent undertaking is a client of its management company or investment firm or has holdings in the assets managed by the management company or investment firm, it should be able to demonstrate that there is a clear written mandate for an arms-length customer relationship between the parent undertaking and the management company or investment firm.

b. Declaration to the competent authority

350. CESR considers that in circumstances where a parent undertaking intends to use the exemption, it should make a declaration to the competent authority of the Transparency Directive. **This declaration only needs to be made once and does not need to be made on an issuer by issuer basis.**

351. *Some additional drafting in bold has been added to the original proposals to deal with the nature of the declaration that has to be made to the competent authority.*

CONTENT OF THE DECLARATION

352. The declaration by the parent undertaking shall have the following content:

a. A statement from the parent undertaking to the competent authority as defined under the Transparency Directive that it does not interfere in any way in the exercise of the voting rights held by the management company or investment firm;

b. A statement from the parent undertaking that it can demonstrate that its management companies or investment firms exercise the voting rights attached to the assets that they manage independently from it;

c. The names of the parent undertaking's subsidiary management companies or investment firms. The parent undertaking will have an ongoing obligation to update the list of the management companies or investment firms in case of any change in the list (e.g. when a new management company or investment firm is established or ceases to exist).

353. The parent undertaking can chose either:

(i) to submit the declaration at the start of the implementation of the Transparency Directive; or

(ii) to submit the declaration whenever they want to make use of the exemption

354. *This is new drafting to that originally proposed in paragraph 267of the December Consultation in order to deal with the concerns raised about the nature of the declaration that has to be made to the competent authority.*

The notion of indirect instructions

355. Direct instructions are the instructions given by the parent undertaking or other controlled companies to the management company or investment firm and specify how the voting rights shall be exercised in particular cases (particular shareholders' meetings, particular voting and particular issues). **Indirect instructions are any instruction regardless of the form even if general that limits the discretion of the management company or investment firm in relation to the exercise of the voting rights in order to serve specific interests of the parent undertaking or another controlled undertaking of the parent undertaking.**

356. *New drafting of indirect instruction as discussed above.*

The exemptions in relation to financial instruments (as determined by Article 13)

357. In order for the parent undertaking to be able to benefit from the exemption in relation to financial instruments, it has to make the declaration to the competent authority of the issuer of the relevant underlying shares but only include the information contained in paragraph 350 c) above. It must also comply with the requirements set out in paragraphs 351 above.

358. If the parent undertaking wants to benefit from the exemption from the requirement to notify aggregated holdings under Article 9, 10 and 13, it can if it chooses submit a single declaration to the relevant competent authority.

Use of third parties to exercise voting rights

359. The provisions of Articles 12(4) and 12(5) also apply in cases where the exercise of the voting rights is delegated by the management company or investment firm under the relevant requirements of the UCITS Directive and MiFID as applicable, to a third party provided that the third party exercises the voting rights independently from the parent undertaking of the management company or investment firm.

360. *New text to reflect the fact that CESR considers that this principle should be included in the advice.*

SECTION 7

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

Extract from the mandate

DG Internal Market requests CESR to provide technical advice on possible implementing measures on the following issues:

1) 3.1.2(1) to draw up a standard form to be used by an investor throughout the Community when notifying the required information to the issuer taking into account existing national standards. The standard form should at least cover the most frequent cases. CESR is invited to consider that this form should also be used when the issuer has to file the same information under Article 15 (3).

Relevant Level 1 provisions

Article 12 of the Transparency Directive states that *the notification required under Articles 9 and 10 shall include the following information:*

(a) *the resulting situation in terms of voting rights;*

(b) *the chain of controlled undertakings through which voting rights are effectively held, if applicable;*

(c) *the date on which the threshold was crossed or reached;*

(d) *the identity of the shareholder even if the latter is not entitled to exercise voting rights under the conditions laid down in Article 10, and the natural person or legal entity entitled to exercise voting rights on behalf of the shareholder.*

INTRODUCTION

361. CESR sets out below its proposed changes to its advice in relation to this mandate following the consultation. Only the significant drafting changes that have been made are discussed, other comments that were made will be discussed in a feedback statement.

362. As explained in the December consultation paper, CESR has been mandated to draw up a standard form to be used on a pan-European basis by investors in order to notify the issuer that a threshold has been reached, exceeded or fallen below.

363. Following the consultation process, there are a number of standard form content requirements about which CESR would like to re-consult before finalising its advice, these are:

a) What does "the identity of the shareholder" mean in relation to Article 10 notifications?

b) What does the "resulting situation" mean in relation to notifications that are below the 5% threshold?

c) Identification of the issuer

A) What does "the identity of the shareholder" mean in relation to Article 10 notifications?

364. CESR explained in the consultation that under Article 10 (b) to (g), the full name of the natural person or legal entity that is entitled to exercise voting rights attached to shares must be disclosed.

365. As the natural person or legal entity who is entitled to exercise the voting rights is not the shareholder, the notification must also disclose the identity of the shareholder who holds the shares to which the voting rights are attached. Identity will mean, for the purposes of this provision, the full name of the shareholder.

366. CESR proposed that for the purposes of Article 10(g), it considered that a more pragmatic approach was possible, and that only the identity of those shareholders who held 1% or more of the voting rights of an issuer needed to be disclosed as well as the total number of proxies.

367. This proposal raised concerns with consultees who agreed with the pragmatic approach that CESR was taking, but disagreed with this proposal on the basis that Article 12(1)(d) only requires the identification of those shareholders whose individual holdings reaches one of the notification thresholds set out in Article 9(1).

368. This means that as the minimum threshold in Article 9 is 5%, only those shareholders with a notifiable interest can be considered as shareholders who should be identified for the purposes of Article 10 notifications.

369. Following these comments, and on further consideration of this issue, CESR has decided to change its advice on this matter, so that only the identity of those that have a notifiable interest under one of the Article 9 thresholds (so an interest of 5% or more of voting) have to be identified.

370. This means that for Article 12(1)(d), there is no need to apply an exemption to the general approach, and that only those shareholders that have a 5% or more holding of voting rights need to be disclosed as well as the total number of proxies.

371. In addition, CESR also considers it necessary to make it clear that in the case of Article 10(f) the deposit taker will have to include in its notification the identify of only those shareholders who have a that have a notifiable interest under one of the Article 9 thresholds (so an interest of 5% or more of voting rights) have to be identified.

Question
Q22 Do you agree with this approach in relation to Article 12(1)(d)? Please give reasons.

B) What does the "resulting situation" mean in relation to notifications that are below the 5% threshold?

372. Respondents to the consultation suggested that CESR should consider changing the "resulting situation" disclosure requirements when the notification threshold falls below 5% to a simple notification of the fact that the notifier's interest is below 5%.

373. CESR has taken these comments into account and is currently neutral on the issue of whether or not Article 12(1a) can be interpreted in different ways for different situations.

374. There is an argument that support this approach propose that when the a shareholder, natural person or legal entity is making a notification that would bring it below the 5% notification threshold, information about the resulting situation should only have to be of the fact that the notifier's interest is below 5%, and all other information about the resulting situation that is set out in section 6 of the standard form should not need to be filled in.

375. The reason for this is that from a market transparency perspective all that is important is transparency about the fact that the shareholder, natural person or legal entity no longer has a notifiable interest. Thus making it easier to focus on those shareholders, natural persons and legal entities that do.

376. In addition, the value of requiring additional information from a shareholder, natural person or legal entity that will not have a notifiable interest until there is an upward change their holding of voting rights that triggers a new notification obligation is questionable.

377. For example, X has 6% of voting rights and disposes of 2% of voting rights, thereby triggering a notification obligation that includes information about the 4% of the voting rights now held. Following this notification, any subsequent disposals by X of their voting rights will not be notifiable, therefore the market transparency of the fact that X once held 4% is questionable.

378. On the other hand, there is an argument that all the notification requirements should be the same when one falls below any threshold, and that all of the information about the resulting situation is important for market transparency purposes. In situations where the notification is of an interest that is below that of the minimum threshold, it is important to know what the shareholder, natural person or legal entity actually holds from the market's perspective. For example, there is an important difference between a holding of 4.9% and 1.5 %.

Question
Q23 What do you think the resulting situation information disclosure should be when the notification is of a holding below that of the minimum threshold?

C) Identity of the issuer

379. Some respondents commented that it is essential that the standard form has a method of identifying the issuer that does not just rely on its name, and that there is strong case for security codes of the issuer to be included in the standard form.

380. It was suggested that this security identification should be an internationally recognised numbering standard which would clearly identify the share that the disclosure relates to.

381. CESR asked a question in the December consultation about the need to include the ISIN number for identification of the underlying share in relation to financial instrument disclosures, the responses to which were mixed.

382. CESR therefore considers it necessary to re-consult on this issue before finalising its advice.

Questions
Q24 Should the standard form for all notification requirements include some form of issuer identification number? Please give your reasons.

Q25 Should CESR mandate what form this security identification should be in? If so, please state what the standard should be and why.

REVISED EXPLANATORY TEXT

383. CESR discusses below what it considers is meant by each of the information requirements listed in Article 12(1) in relation to both Article 9 and Article 10 situations.

Article 9 situations

(a) The resulting situation in terms of voting rights

384. CESR considers "the resulting situation in terms of voting rights" to be the proportion of voting rights held by a shareholder under Articles 9 and 10 when that proportion reaches, exceeds or falls below the thresholds of: 5%, 10%, 15%, 20%, 25%, 30% (or one third), 50% and 75% (or two thirds).

385. CESR considers that the notification of the resulting situation should include the breakdown into class/type of share in order for the holder to fulfil its transparency requirements under Article 9(1).

386. Taking into consideration that the proportion of voting rights must be calculated on the basis of all shares held by the shareholder to which voting rights are attached and on the basis of all shares in the same class/type of the issuer, CESR considers that the following information is required in order to give the market a clear picture of "the resulting situation in terms of voting rights":

In relation to the transaction that triggered the notification requirement

387. Number of voting rights attached to shares of each class/type that have been acquired or disposed of by the shareholder, when reaching, exceeding or falling below the thresholds specified in Article 9.

388. The threshold(s) as detailed in Article 9, which has/have been reached, exceeded or fallen below should be disclosed.

389. CESR considers that it is necessary to include this information in order to give a complete picture of the resulting situation in terms of voting rights.

In relation to the resulting situation after the triggering transaction

390. A) Totals per class/type of shares

a. Total number of voting rights attached to shares of each class/type that the shareholder holds after the triggering transaction ;

b. Total percentage of voting rights attached to shares of each class/type that the shareholder holds after the triggering transaction.

391. B) Overall totals

a. Total number of voting rights held by the shareholder in relation to all classes/types of share after the triggering transaction;

b. Total percentage of voting rights held by the shareholder in relation to all classes/types of share after the triggering transaction.

(b) The chain of controlled undertakings through which voting rights are effectively held, if applicable

392. CESR considers that this information is necessary in order to identify who is controlling the way in which voting rights are or can be exercised, for example a parent undertaking might not hold shares to which voting rights are attached in its own name, but if these are held by its controlled undertaking it controls the way in which the voting rights are exercised.

393. CESR therefore considers that the notification should include the name(s) of the controlled undertakings through which the voting rights are held, and the amount of voting rights and the percentage held by each controlled undertaking (insofar as individually, the controlled undertaking holds 5% or more).

(c) The date on which the threshold was crossed or reached

394. Article 12(2) of the Directive requires that the notification has to be effected as soon as possible, but not later than four trading days after the shareholder or natural person or legal entity learns or should have learned[7] of the acquisition or disposal, or of the passive breach.

[7] Please see section 5 of this consultation paper for further discussion.

395. In order to ensure that the notification has been made within the required timeframe, the notification shall include the date on which the threshold was reached, exceeded or fallen below.

396. The date on which the threshold was reached, exceeded or fallen below shall be the date on which the transaction took place. [8]

397. For passive crossings, the date on which the threshold was reached, exceeded or fallen below will be the date when the corporate event took effect.

398. However, it is important to point out, that in relation to passive breaches, the 4 trading day period specified in Article 12(2) within which the notification has to be made to the issuer, starts to run from the date that the shareholder is informed about the passive breach, in accordance with Article 15 of the Transparency Directive.

(c) The identity of the shareholder even if the latter is not entitled to exercise voting rights under the conditions laid down in Article 10, and the natural person or legal entity entitled to exercise voting rights on behalf of the shareholder

399. For the purpose of Article 9, the identity of the shareholder must be disclosed.

400. Article 12(1)(d) states that the "identity" of the shareholder must be included in the notification. CESR considers it necessary to discuss the meaning of "identity".

401. CESR considers that the identity of a shareholder must include the shareholder's full name.

Article 10 situations

Article 10(a)

402. In relation to Article 10(a), and the disclosure requirements of Article 12(1), it is necessary to consider what notification content is required for when the agreement is first entered into, when subsequent changes to the agreement are made, and when the agreement is terminated.

(a) the resulting situation in terms of voting rights

403. CESR considers that upon both the entering into of the agreement and upon termination of the agreement, the content of the notification for the resulting situation in terms of voting rights should be the following:

In relation to the transaction that triggered the notification requirement

404. The threshold(s) as detailed in Article 9, which has/have been reached, exceeded or fallen below should be disclosed.

405. Totals per class/type of shares

a. Total number of voting rights attached to shares of each class/type that the parties to the agreement hold after entering into or terminating the agreement;

b. Total percentage of voting rights attached to shares of each class/type that the parties to the agreement hold after entering into or terminating the agreement.

406. Overall totals

a. Total number of voting rights held by the parties to the agreement in relation to all classes/types of share after entering into or terminating the agreement;

[8] Note that this may change following discussion about section 5.

b. Total percentage of voting rights held by the parties to the agreement in relation to all classes/types of share after entering into or terminating the agreement.

407. There is no need to have any disclosure about the triggering transaction itself, because for an Article 10(a) situation, it is the entering into or termination of the agreement that is the triggering event.

408. For subsequent changes to the agreement, the notification content will include the same notification as for entering into or termination of the agreement, as well as the number of voting rights attached to shares of each class/type that have been acquired or disposed of by the parties to the agreement which resulted in a change to the agreement, when reaching, exceeding or falling below the thresholds specified in Article 9.

409. In cases where the notification requirement has been triggered as a result of a change in the breakdown of voting rights, this should be stated.

410. In relation to other elements of Article 12(1) the same information as discussed under Article 9 above applies to the Article 10(a) situations.

(b) The chain of controlled undertakings through which voting rights are effectively held, if applicable

411. For Article 10(a) the notification should include the name(s) of the controlled undertakings through which the voting rights are held.

(c) The date on which the threshold was crossed or reached

412. For Article 10(a) the date on which the threshold was reached, exceeded or fallen below shall be:

a) when entering in to the agreement- the date when the agreement was entered into;

b) when there are subsequent changes to the agreement, this will be the date of the change by the acquisition or disposal of voting rights;

c) when the agreement is terminated, this will be the date of termination.

413. In case of passive breaches, paragraphs 397 to 398 apply.

The identity of the shareholder even if the latter is not entitled to exercise voting rights under the conditions laid down in Article 10, and the natural person or legal entity entitled to exercise voting rights on behalf of the shareholder

414. For Article 10(a), the full name of all the parties:

a) that enter into the agreement upon entering into the agreement; or
b) that are parties to the agreement at the time of a change in the agreement; or
c) that are parties to the agreement upon its termination.

Articles 10(b)-(h)

415. After consideration of Articles 10(b)-10(h) and the requirements of Article 12(1), CESR came to the conclusion that a general approach to the content of notification can be established for the notification requirements of Articles 10(b)-10(h).

The general approach for notification requirements of Article 10(b)-10(h)

(a) The resulting situation in terms of voting rights

In relation to the transaction that triggered the notification requirement

416. The relevant crossing transaction is what triggers the notification under each of the points of Articles 10(b)-10(h). The notification will be the relevant number of voting rights that is the subject of the Article 10(b)-10(h) situation.

417. The threshold(s) as detailed in Article 9, which has/have been reached, exceeded or fallen below should be disclosed

In relation to the resulting situation after the triggering transaction

418. The total number of voting rights and the percentage of voting rights held by the entity that has the duty to notify under Article 10(b)-10(h), broken down by each class/type of share ;

419. The total number and percentage of voting rights in relation to all classes and types of shares after the triggering transaction

Passive crossings under Article 9(2)

420. In cases where the notification requirements of Articles 10(b)-10(h) are triggered by a passive crossing under Article 9(2), this should be stated.

(b) The chain of controlled undertakings through which voting rights are effectively held, if applicable

421. This will be the name(s) of the controlled undertakings through which voting rights are held

(c) The date when the threshold was crossed or reached

422. This will be the date of the relevant 10(b)-10(h) situation that triggers the notification requirement.

423. In case of passive breaches, paragraphs 397 to 398 apply.

(d) the identity of the shareholder, even if the latter is not entitled to exercise voting rights under the conditions laid down in Article 10, and the natural person or legal entity entitled to exercise voting rights on behalf of the shareholder

424. Under Article 10 (b) to (h), the full name of the natural person or legal entity that is entitled to exercise the voting rights attached to the shares must be disclosed.

425. As the natural person or legal entity who is entitled to exercise the voting rights is not the shareholder, the notification must also disclose the identity of the shareholder who holds the shares to which the voting rights are attached, if they have a notifiable interest under one of the Article 9 thresholds. Identity will mean, for the purposes of this provision, the full name of the shareholder.

426. In addition, the annex to the standard form that is to be filed with the relevant competent authority will include the contact address for a natural person, and the registered office of the legal entity, as well as the same information for the shareholder as explained in the section below.

Filing with the competent authority under Article 19(3)

427. For the sake of clarity, CESR notes that under Article 19(3) it is the shareholder who shall file the notification with the competent authority.

428. CESR notes that it has been mandated to consider the use of the standard form for filing this information with the competent authority under Article 19(3). However, for regulatory purposes,

the identification of the shareholder by use of its name may be insufficient because it does not provide the necessary contact information that the competent authority may require in order to fulfil its duties under Article 24 of the Directive.

429. For example, more information might be required in order to correctly identify who the shareholder is, as there may be cases where the same name is being used for example, for two different individuals or for controlled undertakings of the same parent undertaking.

430. In order for the competent authority to be able to correctly identify who the shareholder is CESR considers that the contact address is a suitable method. For a legal entity the registered office is a suitable source of information.

431. CESR considers that for individuals, this information should only be provided to the competent authority and not to the public at large as the disclosure of such information is restricted under European and national law. Therefore, this additional information cannot be in the standard form and should be provided in an annex to the standard form that is sent only to the competent authority.

432. Although such restrictions do not apply to the disclosure of the registered office for a legal entity, CESR does not consider that there should be differences in the nature of the information about the shareholders identity that is included in the standard form.

433. As such, for the purposes of Article 19(3), it will not be possible just to file the same standard form with the competent authority; the additional annex will also need to be filed.

434. In addition, CESR considers it important to point out that the issue of "identity" also raises questions about how the true identity of the shareholder can be verified for notification purposes. CESR considers this to be a matter of how competent authorities deal with these notifications from an administrative standpoint, and as such should be left to national requirements.

REVISED DRAFT ADVICE

435. Following the discussions above, and comments made about the need to clarify certain standard form requirements, CESR has made some changes to its proposed draft advice, which are highlighted in bold for ease of reference.

Requirements for Article 9

436. In relation to the standard form requirements for Article 9, CESR considers the following should be included in the standard form:

(a) the resulting situation in terms of voting rights

In relation to the transaction that triggered the notification requirement

437. Number of voting rights attached to shares of each class/type that have been acquired or disposed of by the shareholder, when reaching, exceeding or falling below the thresholds specified in Article 9.

438. The threshold(s) as detailed in Article 9, which has/have been reached, exceeded or fallen below should be disclosed.

In relation to the resulting situation after the triggering transaction

A) Totals per class/type of shares

- Total number of voting rights attached to shares of each class/type that the shareholder holds after the triggering transaction;

- Total percentage of voting rights attached to shares of each class/type that the shareholder holds after the triggering transaction.

B) Overall totals

- Total number of voting rights held by the shareholder in relation to all classes/types of share after the triggering transaction;
- Total percentage of voting rights held by the shareholder in relation to all classes/types of shares after the triggering transaction.

439. In cases where the notification requirement has been triggered as a result of a change in the breakdown of voting rights, this should be stated.

440. In addition to the above, in situations where a controlled undertaking has made use of the Article 12(3) exemption, and the parent undertaking is making the notification on behalf of the controlled undertaking, the notification has to include the above information in respect of each of its controlled undertakings (insofar as individually, the controlled undertaking holds 5% or more)

(b) the chain of controlled undertakings through which voting rights are effectively held, if applicable

441. The notification should include the name(s) of the controlled undertakings through which the voting rights are held.

(c) the date on which the threshold was crossed or reached

442. The notification shall include the date on which the threshold was reached, exceeded or fallen below.

443. The date on which the threshold was reached, exceeded or fallen below shall be the date on which the transaction took place.

444. For passive crossings, the date on which the threshold was reached, exceeded or fallen below will be the date when the corporate event took effect.

(d) the identity of the shareholder even if the latter is not entitled to exercise voting rights under the conditions laid down in Article 10, and the natural person or legal entity entitled to exercise voting rights on behalf of the shareholder

445. The identity of a shareholder must include the shareholder's full name.

Filing with the competent authority under Article 19(3)

446. For the purposes of filing the standard form with the relevant competent authority, in addition to the standard form, an annex containing the contact address for a natural person and the registered office for a legal entity is to be provided.

Requirements for Article 10

447. In relation to the standard form requirements for Article 10, CESR considers the following should be included in the standard form:

Article 10(a)

(a) the resulting situation in terms of voting rights

448. Upon both the entering into the agreement and upon termination of the agreement, the content of the notification for the resulting situation in terms of voting rights should be the following:

In relation to the transaction that triggered the notification requirement

449. The threshold(s) as detailed in Article 9, which has/have been reached, exceeded or fallen below should be disclosed

The resulting situation after the triggering transaction

A. Totals per class/type of shares

- Total number of voting rights attached to shares of each class/type that the parties to the agreement hold holds after entering into or terminating the agreement;
- Total percentage of voting rights attached to shares of each class/type that the parties to the agreement hold after entering into or terminating the agreement.

B. Overall totals

- Total number of voting rights held by the parties to the agreement in relation to all classes/types of share after entering into or terminating the agreement;
- Total percentage of voting rights held by the parties to the agreement in relation to all classes/types of share after entering into or terminating the agreement.

450. For subsequent changes to the agreement, the notification content will include the same notification as for entering into or termination of the agreement, as well as the number of voting rights attached to shares of each class/type that have been acquired or disposed of by the parties to the agreement which resulted in a change to the agreement, when reaching, exceeding or falling below the thresholds specified in Article 9.

451. In cases where the notification requirement has been triggered as a result of a change in the breakdown of voting rights, this should be stated.

(b) the chain of controlled undertakings through which voting rights are effectively held, if applicable

452. For Article 10(a) the notification should include the name(s) of the controlled undertakings through which the voting rights are held.

(b) the date on which the threshold was crossed or reached

453. For Article 10(a) the date on which the threshold was reached, exceeded or fallen below shall be:

a) when entering into the agreement, this will be the date when the agreement was entered into;

b) when there are subsequent changes to the agreement, this will be the date of the change by the acquisition or disposal of voting rights;

c) when the agreement is terminated, this will be the date of termination.

454. For passive crossings, the date on which the threshold was reached, exceeded or fallen below will be the date when the corporate event took effect.

(d) The identity of the shareholder even if the latter is not entitled to exercise voting rights

under the conditions laid down in Article 10, and the natural person or legal entity entitled to exercise voting rights on behalf of the shareholder

455. For Article 10(a), the full name of all the parties:

a) that enter into the agreement upon entering into the agreement; or
b) that are parties to the agreement at the time of a change in the agreement; or
c) that are parties to the agreement upon its termination.

Articles 10(b)-(h)

456. For Articles 10(b)-(h) the standard form shall contain the following:

(a) The resulting situation in terms of voting rights

In relation to the transaction that triggered the notification requirement

457. The relevant crossing transaction is what triggers the notification under each of the points of Articles 10(b)-(h). The notification will be the relevant number of voting rights that is the subject of the Article 10(b)-(h) situation.

458. The threshold(s) as detailed in Article 9, which has/have been reached, exceeded or fallen below should be disclosed

In relation to the resulting situation after the triggering transaction

459. The total number of voting rights and the percentage of voting rights held by the entity that has the duty to notify under Article 10(b)-(h), broken down by each class/type of share ;

460. The total number and percentage of voting rights in relation to all classes and types of shares after the triggering transaction.

Passive crossings under Article 9(2)

461. In cases where the notification requirements of Articles 10(b)-(h) is triggered by a passive crossing under Article 9(2), this should be stated.

(b) the chain of controlled undertakings through which voting rights are effectively held, if applicable

462. The name(s) of the controlled undertakings through which voting rights are held.

(c) the date when the threshold was crossed or reached

463. The date of the relevant Article 10(b)-(h) situation that triggers the notification requirement.

464. In case of passive breaches, the date on which the threshold was reached, exceeded or fallen below will be the date when the corporate event took effect.

(d) the identity of the shareholder, even if the latter is not entitled to exercise voting rights under the conditions laid down in Article 10, and the natural person or legal entity entitled to exercise voting rights on behalf of the shareholder

465. Under Article 10(b)-(h), the full name of the natural person or legal entity that is entitled to exercise voting rights attached to shares must be disclosed.

466. As the natural person or legal entity who is entitled to exercise the voting rights is not the shareholder, the notification must also disclose the identity of the shareholder **who holds a notifiable interest in** the shares to which the voting rights are attached. Identity will mean, for the purposes of

this provision, the full name of the shareholder.

Notifications of combinations of Article 9 and Article 10 situations

467. In the case of holdings under both Articles 9 and Article 10 situations, a distinction should be made between the number and percentage of voting rights held under Article 9 (direct holdings) and Article 10 (indirect holdings) situations.

Filing with the competent authority

468. In addition, the annex to the standard form that is to be filed with the relevant competent authority will include the contact address for a natural person, and the registered office of the legal entity, as well as the same information for the shareholder

Standard form

469. A standard form covering the most frequent cases, and including a column for the number of shares for those member states who will be requiring this information at national level, and containing the elements listed above could be presented as follows:

STANDARD FORM[9]

1. **Name of the issuer:**

2. **Reason for the notification** (*please tick the appropriate box*):
   - [ ] an acquisition or disposal of shares with voting rights attached "direct holding *"(please specify if needed)*
   - [ ] an acquisition or disposal of voting rights "indirect holding" (*please specify*[10])
   - [ ] an event changing the breakdown of voting rights (*please specify the corporate event if known*)

3. **Identity of :**

   [ ] shareholder[11]; or

   [ ] person entitled to exercise voting rights;[12]and

   [ ] of the shareholder who disposed of the voting rights if the shareholder has a notifiable interest

   [ ] person disposing of voting rights;[13] and

   [ ] of the shareholder to whom the voting rights are being transferred if the shareholder has a notifiable interest

   [ ] all parties to the agreement, if applicable[14]

4. **Date on which the threshold was crossed or reached:**

5. **Threshold/s that has/have been crossed or reached:**

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9 This form is to be sent to the issuer and to be filed with the competent authority.

10 For example: voting rights held through pledge, proxy, agreement, deposit, life interest, etc are examples of "indirect holding".

11 If you are a shareholder acquiring or disposing:

a) of shares with voting rights attached: or

b) only voting rights and you are also the person who can exercise those voting rights fill in your full name in this section only

12 To be used when the natural person or legal entity can only exercise voting rights, in which case please also include full name of those shareholder[s] who have a notifiable interest from whom one has acquired the voting rights

13 To be used when the natural person or legal entity is disposing of voting rights in which case please also include the full name of those shareholder[s]who have a notifiable interest to whom one is transferring the voting rights

14 To be used in the case of concerted exercise of voting rights, please insert full name of all parties.

6.

Class/ Type Of shares	Triggering transaction[15]	Resulting situation after the triggering transaction				
	Number of voting rights acquired (+) or disposed (-) of when reaching or crossing a threshold	Number of Shares [16]	Number of voting rights		Percentage (%) of voting rights	
		Direct	Direct	Indirect	Direct	Indirect
TOTAL						

7. Chain of controlled undertakings through which the voting rights are effectively held, if applicable:

8. Additional information:

Done at [place] on [date].

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15 This column needs not to be filled in, in case of notification due to an event changing the breakdown of voting rights nor when entering into or terminating an agreement, ….

16 To be used in Member States where applicable.

ANNEX[17]

a) Identity of the holder:

Full name (including legal form for legal entities)	
Contact address (registered office for legal entities)	
Phone number	
Other useful information (at least legal representative for legal persons)	

b) Identity of the notifier, if applicable[18]**:**

Full name	
Contact address	
Phone number	
Other useful information	

17 This annex is only to be filed with the competent authority.

18 Whenever another person makes the notification on behalf of the shareholder or the natural person/legal entity entitled to exercise the voting rights.

SECTION 8

FINANCIAL INSTRUMENTS

Extract from the mandate:

DG Internal Market requests CESR to provide technical advice on possible implementing measures on the following issues:

(6) types of financial instruments under Article 11a.1 (i.e. financial instruments resulting in an entitlement to acquire, on the initiative of the holder, shares to which voting rights are attached and which have already been issued) and the aggregation amongst financial instruments. CESR is invited to consider the definition of financial instruments established under the Directive on Financial Instruments Markets;

(7) nature of the formal agreement resulting in an entitlement for the holder of the financial instrument to acquire shares as referred to in paragraph (5), the content of the notification to be made, a standard form for such notification, the notification period, and to whom the notification is to be made by the holder of a financial instrument.

Relevant Level 1 provisions:

Article 13
The notification requirements laid down in Article 9 shall also apply to a natural person or legal entity who holds, directly or indirectly, financial instruments that result in an entitlement to acquire, on such holder's own initiative alone, under a formal agreement, shares to which voting rights are attached already issued of an issuer whose shares are admitted to trading on a regulated market.
The Commission shall, in accordance with the procedure referred to in Article 23(2), adopt implementing measures in order to take account of technical developments on financial markets and to ensure the uniform application of paragraph 1. It shall in particular determine:
a) the types of financial instruments referred to in paragraph 1 and their aggregation;
b) the nature of the formal agreement referred to in paragraph 1;
c) the contents of the notification to be made, establishing a standard form to be used throughout the Community for that purpose;
d) the notification period;
e) to whom the notification is to be made.

INTRODUCTION

470. CESR sets out below its proposed changes to its advice in relation to this mandate following the consultation. Only the significant drafting changes made will be discussed. Further comments will be presented in a feedback statement.

471. Following the consultation CESR has made changes to its draft advice in two areas adding advice about a) when the notification duty is triggered and b) providing advice about which financial instruments in MiFID that do not qualify for the purposes of Article 13.

a) When is the notification duty triggered?

472. CESR asked in the consultation paper of December 2004 a question regarding the notification period. Two different approaches were envisaged:

473. The answers to the question were divided in preference between the two options. Additional arguments put forward by consultees regarding the options did not provide any additional arguments to those presented by CESR. CESR received suggestions proposing different approaches. Insofar as these were mainly based on assessments of whether the instrument was in-the-money.

CESR considered the proposed approaches to be more complex than the ones proposed by CESR and requiring a daily oversight of the instrument.

474. CESR has decided that notification should be triggered upon acquisition and disposal of a financial instrument.

b) Financial instruments in MiFID

475. CESR also set out a negative list of financial instruments in MiFID which, because they lack certain features, did not qualify as financial instruments according to Article 13.

Other issues

476. CESR has included a question in section 7 of this chapter about whether or not there is a need to identify the security and if this should be provided in the standard form. For the purposes of financial instruments this identification would, if it is made mandatory be required in relation to the underlying share and not the financial instrument itself.

477. In section 7 there is a discussion about what should be the disclosure about the resulting situation when a holding falls under 5 %. The outcome of that question will be treated similarly regarding the standard form for financial instruments in this section.

DRAFT TECHNICAL ADVICE

When is notification duty triggered?

478. CESR consider that notification of a financial instrument under MiFID is triggered upon acquisition or disposal of a financial instrument.

Financial instruments under MiFID that trigger notification

479. To qualify under Article 13, a financial instrument must "entitle the holder (direct or indirect) to acquire shares to which voting rights are attached, already issued, of an issuer whose shares are admitted to trading on a regulated market". To that end, CESR considers that

- *entitled* means that the holder has a legal right that is not dependant on any external factors that may affect such right;
- *holder* means the natural person or legal entity who has the entitlement to acquire shares already issued to which voting rights are attached, i. e. the one upon whom the notification obligation falls;
- *indirect holder* is any natural person or legal entity that holds the instruments through another person or legal entity;
- insofar Article 13 refers to instruments that entitle the holder to *acquire* shares, instruments that entitle the holder to sell shares do not qualify under Article 13.

480. CESR considers "entitle the holder to acquire such shares on his *own initiative alone*" to mean something that the holder does on its own without the influence of any external factors;

481. CESR considers that the following instruments referred to in MiFID will not qualify under Article 13 because they do not have one or more than one of the above features:

(2) Money market instruments;

(3) Units of a collective investment undertaking;

(4) Options, futures, swaps, forward rate agreements and other derivative contracts relating to

securities other than shares, currencies, interest rates or yields

(5), (6) and (7) Derivative commodities;

(8) Derivative instruments for the transfer of credit risk

(9) Financial contracts for differences, if these only allow for a cash settlement;

(10) Derivative instruments related to climatic variables, freight rates, emission allowances, inflation rates, other economical statistics, or assets, rights, obligations, indices and measures.

482. The holder of financial instruments is required, under Article 13, to aggregate and notify all instruments held that qualify under Article 13 relating to the same underlying issuer.

483. In relation to entitle the holder to acquire such shares under a *formal agreement,* CESR considers that a formal agreement to be a legally binding one. In order to know whether an agreement is legally binding, one must consider the law applicable to the contract itself and, as such, national law will be relevant. CESR also considers that the physical representation of the existence of the agreement (i.e. its written or non written representation) is not relevant to the issue of whether or not it exists and is formal.

Separate notifications in relation to each underlying issuer

484. If a financial instrument relates to more than one underlying issuer, the holder has to notify separately its holdings in each underlying share.

Notification deadlines

485. The deadlines for notification under Article 13 should be the same as those established for the notifications under Articles 9 and 10.

486. The notification obligations under Article 13 are triggered in accordance with the timeframes established in Article 12(2) and the respective level 2 measures.

Calculation of number of voting rights

487. The number of voting rights to be considered when calculating whether a threshold is crossed or reached is the number of voting rights in existence according to the issuer's last disclosure under Article 15 of the Transparency Directive. Whenever the issuer discloses additional information under Article 15, the holder has to recalculate its holdings accordingly.

Content of notification requirements

488. The notification under Article 13 shall include the following:

- the resulting situation in terms of voting rights, i.e. the total number of voting rights and the percentage of voting rights held;
- information on the transaction that triggered the crossing or reaching of the relevant threshold by the holder, including information on the date on which the threshold was crossed or reach and total number of voting rights in such transaction;
- in cases where the notification requirement is triggered as a result of a change in the breakdown of voting rights, this should be stated and will be the information on the transaction that made the holder cross or reach the relevant threshold. However, it is important to point out, that in relation to passive breaches, the 4 trading day period specified in Article 12(2) within which the notification has to be made to the issuer, starts to run from the date that the shareholder is informed about the passive breach.

- the chain of controlled undertakings through which the financial instrument is effectively held, if applicable, stating the identity of each controlled undertaking and the total number of voting rights held by each entity;
- for instruments with an exercise period, an indication of the moment when shares will or can be acquired, if applicable;
- date of maturity/expiration of the instrument, i.e. the date upon which the right to acquire the share ends;
- identity of the holder (stating its full name)
- name of underlying issuer

489. The holder of financial instruments that qualify under Article 13 has to notify its holdings to the issuer of the underlying share and the competent authority of such issuer.

STANDARD FORM FOR FINANCIAL INSTRUMENTS[19]

1. Name of the underlying issuer of existing shares to which voting rights are attached

a) Full name of legal entity:

2. Reason for the notification (*please tick the appropriate box*)**:**

- ☐ an acquisition or disposal of financial instruments which may result in the acquisition of shares already issued to which voting rights are attached (*please specify if needed)*
- ☐ an event changing the breakdown of voting rights (*please specify the corporate event if known*)

3. Identity of holder (natural person/legal entity) entitled to acquire shares already issued to which voting rights are attached

a) Full name of the holder:

4. Date on which the threshold was crossed or reached:

5. Resulting situation in terms of voting rights:

Expiration Date[20]	Triggering transaction [21]		Resulting situation after the triggering transaction	
	Number of voting rights that may be acquired (+) if instrument is exercised/converted when reaching or crossing a threshold	Exercise/Conversion Period/ Date[22]	Number of voting rights	% of voting rights

			Total in relation to all expiration dates		

6. Chain of controlled undertakings through which the financial instrument/s are effectively held, if applicable:

7. Additional information:

Done at [place] on [date].

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19 This form is to be sent to the issuer of the underlying shares that the holder of the financial instrument may acquire voting rights in and to be filed with the competent authority.

20 Date of maturity/expiration of the financial instrument i.e. the date when right to acquire shares ends

21 This column needs not to be filled in the case of notification due to an event changing the breakdown of voting rights

22 If the financial instrument has such a period – please specify this period – for example once every 3months starting from [date].

ANNEX[23]

a) Identity of the holder:

Full name (including legal form for legal entities)	
Contact address (registered office for legal entities)	
Phone number	
Other useful information (at least legal representative for legal persons)	

b) Identity of the notifier, if applicable[24]**:**

Full name	
Contact address	
Phone number	
Other useful information	

Additional information

The Standard form shall also include a section for any additional information that either person making the notification wishes to include. This section can also be used for any additional requirements that a Member Sate may require.

[23] This annex is only to be filed with the competent authority.

[24] Whenever another person makes the notification on behalf of the shareholder or the natural person/legal entity entitled to exercise the voting rights.

CHAPTER III – HALF-YEARLY FINANCIAL REPORTS

(Chapter II of the Transparency Directive – Periodic information – Article 5)

SECTION 1

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

Extract from the mandate from the European Commission

3.3.2 Half-yearly financial report (Article 5.5)

DG Internal Market request CESR to provide technical advice on possible implementing measures on the following issues:

" *As to half-yearly reports, minimum content of the condensed balance sheet, profit and loss accounts and explanatory notes on these accounts where they are not prepared in accordance with international accounting standards, as adopted pursuant to the procedure provided for under Article 6 of Regulation (EC) No. 1606/2002*".

Extract from Level 1 texts

Article 5.3 of the Transparency Directive establishes that:

"Where the issuer is required to prepare consolidated accounts, the condensed set of financial statements shall be prepared in accordance with the international accounting standard applicable to the interim financial reporting as adopted pursuant to the procedure provided for under Article 6 of the Regulation (EC) No. 1606/2002.

Where the issuer is not required to prepare consolidated accounts, the condensed set of financial statements shall at least contain a condensed balance sheet, a condensed profit and loss account and explanatory notes on these accounts. In preparing the condensed balance sheet and the condensed profit and loss account, the issuer shall follow the same principles for recognising and measuring as when preparing annual financial reports".

Extract of the Article 5.5 of the Transparency Directive: "*The Commission shall, in accordance with the procedure referred to in Article 23(2), adopt implementing measures in order to take account of technical developments on financial markets and to ensure the uniform application of paragraphs 1 to 4 of this Article.*

The Commission shall, in particular:
(…)
(c) specify the minimum content of the condensed balance sheet and profit and loss accounts and explanatory notes on these accounts where they are not prepared in accordance with the international accounting standards, as adopted pursuant to the procedure provided for under Article 6 of Regulation (EC) No 1606/2002."

490. CESR sets out below its advice on *Half-yearly financial reports* following the December consultation. CESR observes that this part of the draft technical advice generally received strong support from those who responded to the consultation and participated in the open hearing.

491. The draft advice has been amended in order to reflect some suggestions provided by the respondents in order to make the text clearer. The amendments did not change the substance of the

CESR technical advice. CESR is consequently not putting new questions to consultation on this section of the paper.

Explanation to the advice

492. On the basis of the Transparency Directive issuers of shares or debt securities have to prepare a half-yearly report covering the first six months of the financial year.

493. Where the issuer is required to prepare consolidated accounts, the condensed set of financial statements shall be prepared in accordance with the IAS 34 "*Interim Financial Reporting*", adopted according to the Regulation (EC) No. 1606/2002.

494. When issuers are not required to prepare consolidated accounts, the Transparency Directive requires that the condensed set of financial statements shall, at minimum, contain a condensed balance sheet, a condensed profit and loss account and explanatory notes on these accounts. In preparing the condensed balance sheet and the condensed profit and loss account, the issuers have to apply the same principles of recognition and measurement in the half-yearly reports as those used when preparing annual financial reports. Therefore, when issuers are not required to prepare consolidated accounts, the national financial reporting framework of the Member State in which the issuer is incorporated has to be applied.

495. Council Directive 78/660/EEC of 25 July 1978 (Fourth Council Directive) shall be applied on the annual accounts of certain types of companies, Council Directive 86/635/EEC of 8 December 1986 shall be applied on the annual accounts and consolidated accounts of banks and other financial institutions and Council Directive 91/674/EEC of 19 December 1991 shall be applied on the annual accounts and consolidated accounts of insurance. These Directives provide for fixed layouts of the balance sheet and profit and loss and establish the content of the notes on the accounts for annual accounts.

496. In order to allow the Member States to create a level playing field between companies which have to apply IAS and those which do not, these Directives have been revised by the Directive 2003/51/EC (hereinafter modernisation Directive) in order to remove inconsistencies with the IAS.

497. Included in the new provisions introduced by the modernisation Directive, Member States, although not in relation to insurance companies, may permit or require the presentation of the profit and loss account and balance sheet in accordance with international developments, as expressed through standards issued by the International Accounting Standards Board (IASB).

498. No provisions are provided for interim information by the above mentioned Directives. In addition only the Fourth Directive allows Member States to permit a company that does not exceed certain limits to draw up for the annual report an abridged layout of balance sheet and profit and loss account and abridged notes of accounts.

499. The purpose of the half-yearly report is to ensure appropriate transparency for investors through a regular flow of information about the performance of the issuer. To this end the half yearly report constitutes a connective document between the information provided by the annual accounts. Therefore the principal task of this document is to provide information for the first six months of the year comparable with that provided in the preceding financial year.

500. Considering that a harmonization of provisions on periodic financial reporting between all issuers whose securities are traded on a regulated market is in the interest of investor protection and create a minimum level playing field between all issuers, CESR believes that issuers not required to prepare consolidated accounts should at least follow IAS 34 principles as explained in paragraph 15.

501. CESR observes that the provisions of IAS 34 on the content of the interim financial report allow investors to make an informed assessment of the performance of the issuer in the first six months of the year.

502. In particular, the minimum requirement of IAS 34 to show each of the headings and subtotals included in its most recent annual financial statement ensures the comparability between the items of the condensed balance sheet and the condensed profit and loss with those provided in the preceding annual financial statement. This avoids defining numerous fixed layouts.

503. The Fourth Directive provides only for an abridged balance sheet and profit and loss account for the financial year. No dispositions are established for abridged layout for balance sheet and profit and loss account for financial institutions and insurance companies.

504. Regarding the explanatory notes, CESR believes that IAS 34 requirements, as applicable for all issuers publishing consolidated accounts, are useful in order to understand the principal events that have an impact on the performance of the issuer in the first six months of the year. Regarding the minimum requirements of the notes, CESR recognised that there are substantial additional requirements in IAS 34 in comparison with the accounting Directives, namely cash flow disclosures and segment information. Therefore, CESR proposes that this type of information should be included in the half-yearly report if the issuer has provided the same type of information in the annual report.

505. The half-yearly financial reports must include comparative information for the corresponding preceding period. As regards comparative balance sheet information, this requirement will be satisfied by presenting the year end balance sheet.

DRAFT TECHNICAL ADVICE

506. CESR believes that the minimum content of half-yearly (non-consolidated) financial statements as required by the Article 5(3) of the Transparency Directive should be defined by reference to the principles of IAS 34, Interim Financial Information.

507. These principles are as follow:

a) The balance sheet and the profit and loss account must show, as a minimum requirement, each of the headings and subtotals included in the most recent annual financial statements of the issuer. Additional line items shall be included if their omission would make the half-yearly report misleading;
The half-yearly financial information should include comparative information presented as follows:

- Balance sheet as at the end of the first six months of the current financial year and comparative balance sheet as at the end of the immediate preceding financial year;
- Profit and loss account cumulatively for the first six months of the current financial year with comparative information for the comparable period for the preceding financial year.

b) The following information should be included, as a minimum requirement, in the notes of the half-yearly financial statements. However, the issuer shall also disclose any events or transactions that are material to an understanding of the first six months of the financial year:

i. a statement that the same accounting policies and methods of computation are followed in the half-yearly financial statement as compared with the most recent annual financial statements or, if those policies or methods have been changed, a description of the nature and effect of the change;

ii. explanatory comments about the seasonal or cyclical nature of interim operations;

iii. the nature and amount of items affecting assets, liabilities, equity, net income, or cash flows that are unusual because of their nature, size, or incidence (disclosure of cash flow information is required in the half-yearly report only if the issuer has disclosed this type of information in its annual financial statements);

iv. the nature and amount of changes in estimates of amounts reported in prior financial years, if those changes have a material effect in the current interim period;

v. issuances, repurchases, and repayments of debt and equity securities;

vi. dividends paid (aggregate or per share) separately for ordinary shares and other shares;

vii. segment revenue and segment result for business segments or geographical segments, whichever is the entity's primary basis of segment reporting (disclosure of segment data is required in the half-yearly report only if the issuer has disclosed segment data in its annual financial statements);

viii. material events subsequent to the end of the first six months that have not been reflected in the financial statements for the interim period;

ix. the effect of changes in the composition of the entity during the interim period, including business combinations, acquisition or disposal of subsidiaries and long-term investments, restructurings, and discontinued operations, and

x. changes in contingent liabilities or contingent assets since the last annual balance sheet date if the issuer has recognised or disclosed contingent liabilities or contingent assets in its annual financial statements.

508. CESR believes it is important to include in the half-yearly report information required by IAS 34 that is not required by the existing accounting Directive if the issuer has disclosed such information in the annual reports, in order to assure comparability between the annual financial statement and half yearly report and greater harmonization on periodic information.

SECTION 2 - MAJOR RELATED PARTIES TRANSACTIONS

Extract from the mandate from the European Commission

3.3.2 Half-yearly financial report (Article 5.5)

DG Internal market requires CESR to provide technical advice on possible implementing measures on the following issues

(1) clarification of the notion of "major related parties transactions" as part of an interim management report for issuers of shares"

Extract from Level 1 texts

Article 5.4 (Half-yearly financial reports) of the Transparency Directive requires that: "For issuers of shares, the interim management report shall also include major related parties transactions"

Prospectus regulations

509. In Commission Regulation Nr. 809/2004 regarding the implementation of the Prospectus Directive (level 2) the Commission establishes the minimum information that a prospectus shall contain, including:

Details of related party transactions (which for these purposes are those set out in the Standards adopted according to Regulation (EC) No 1606/2002), that the issuer has entered into during the period covered by the historical financial information and up to the date of the registration document, must be disclosed in accordance with the respective standard adopted according to Regulation (EC) No 1606/2002 if applicable.

If such standards do not apply to the issuer the following information must be disclosed:

(a) The nature and extent of any transactions which are - as a single transaction or in their entirety - material to the issuer. Where such related party transactions are not concluded at arm's length, provide an explanation of why these transactions were not concluded at arm's length. In the case of outstanding loans including guarantees of any kind, indicate the amount outstanding.
(b) The amount or the percentage to which related party transactions form part of the turnover of the issuer.

510. In the consultation paper containing CESR's recommendations for the consistent implementation of the Regulation on Prospectuses issued on June 2004 (level 3) CESR proposed the following recommendations regarding related party transactions:

In order to ensure consistency with the disclosures made by companies subject to IAS and with international standards, CESR proposes that issuers that are not subject to IAS/IFRS are expected, nevertheless, to disclose information on transactions entered into by legal or natural persons referred to in the IAS/IFRS applicable standard.

511. The transparency Directive establishes a general obligation for all issuers of shares, whether they have to prepare the half-yearly report in accordance with IAS or not, to include in the interim management report disclosure of major related party transactions.

DRAFT TECHNICAL ADVICE

Concept of Related Party Transactions

512. CESR has considered that the definition of related party transactions should be consistent in the yearly and half-yearly reports.

513. Therefore, companies that have to prepare consolidated accounts should apply the same definition in annual and half-yearly reports, as provided in IAS 24, Related Party Disclosure.

514. Issuers of shares who do not have to prepare consolidated accounts are not required to apply for the IAS/IFRS. Instead, they are required to apply national financial reporting standards derived from the different accounting Directives). However, the Transparency Directive and the accounting Directives do not provide definition of related parties or related parties transactions is provided. CESR does not consider it necessary or appropriate to develop a new definition of related party transactions for the purpose of the implementation of the Transparency Directive. CESR believes that a reference should instead be made to IAS 24 which already provides appropriate definition of related party transactions.

515. Third country issuers that use GAAP that has been determined to be equivalent to IFRS should apply the definition of Related Party Transactions provided by these standards.

516. Draft CESR advice: in order to ensure comparability of the information provided to investors on regulated markets, and considering the provisions of the Prospectus Regulation, CESR believes that companies which are not required to prepare consolidated accounts should also use the definition of Related Party Transactions currently provided by IAS 24.

517. It is worth indicating that this consistency is supported by the responses of the call for evidence that CESR published on 29 June 2004 regarding the European Commission's mandate on the Transparency Directive".

The concept of "major" related parties' transactions

518. The Article 5(4) of the Transparency Directive requires issuers of shares to include major related parties' transactions in their interim management report.

519. The purpose of half-yearly financial report is to allow investors to make a more informed assessment of the issuer's situation. Considering that the investors have the possibility to access to the most recent annual financial statements and annual reports of the issuers, CESR considers it of little relevance to provide information on all the related party transactions disclosed in the most recent annual report. The half-year financial report should instead describe the most significant events that have an impact on the financial position and performance of the issuer since the last annual report.

520. Draft CESR advice: in their interim management reports, issuers of shares should disclose the following elements as "major related parties transactions":

a. Related parties transactions that have taken place in the first six months of the financial year, and that have materially effected the financial position **or** the performance of the enterprise in this period.

b. **Any changes** in the related parties transactions described in the last annual report that could have a material effect on the financial position **or** performance of the enterprise **in the first six months of the financial year**

521. In this approach, CESR considers that the concept of materiality (for transactions to be considered) is the same in annual and half yearly reports. Therefore, the concept of "major" transactions does not introduce a different definition of material transactions, but only implies some limitations in terms of disclosures about such transactions, as described above.

SECTION 3 - AUDITORS' REVIEW OF HALF-YEARLY REPORT

Extract from the mandate from the European Commission to CESR

3.3.2 Half-yearly financial report (Article 5.5)

DG Internal market requires CESR to provide technical advice on possible implementing measures on the following issues

(1) clarification of the nature of the auditors' review of the half-yearly report, with the objective of ensuring a common understanding for investors on the level of assurance that investors can at least expect from the auditor's review referred to in Article 5 (4). The Commission invites CESR to notably consider existing national standards as well as the international standards on auditing developed by the International Auditing Standards Board (such as ISRE 2400 (*Engagement to review financial statements*)).

Extract from level 1 text

Article 5(5) of the Transparency Directive establishes that: "*If the half-yearly financial report has been audited, the audit report shall be reproduced in full. The same shall apply in the case of an auditors' review. If the half-yearly report has not been audited or reviewed by auditors, the issuer shall make a statement to that effect in its report*".

Draft CESR advice

Background

522. The Fourth Council Directive 78/660/EEC of 25 July 1978 , on the annual accounts of certain types of companies, the Seventh Council Directive 83/349/EEC of 13 June 1983 on consolidated accounts, Council Directive 86/635/EEC of 8 December 1986 on the annual accounts and consolidated accounts of banks and other financial institutions and Council Directive 91/674/EEC of 19 December 1991 on the annual accounts and consolidated accounts of insurance undertakings require that the annual accounts or consolidated accounts are audited by one or more persons entitled to carry out such audits.

523. The Eighth Council Directive 84/253/EEC of 10 April 1984 on the approval of persons responsible for carrying out the statutory audits of accounting documents deals primarily with the approval of statutory auditors in Member States. The Directive contains some provisions on registration and professional integrity; it does not include provisions on how a statutory audit should be conducted.

524. The European Commission has proposed a new Directive on statutory auditing of annual and consolidated accounts. The objectives are to ensure that investor and other interested parties can depend on the accuracy of audited accounts. The proposal broadens the scope of the former Eighth Council Directive, providing a comprehensive legal framework on how statutory audits should be conducted and what audit infrastructure Member States should have in place to ensure audit quality. As stated in the proposal, all statutory audits prescribed by Community law should be carried out in accordance with International Standards on Auditing (ISA).

525. At present, ISAs (International Standards on Auditing) are established by the International Auditing and Assurance Standards Board (IAASB), a private organisation. In order to be able to endorse International Standards on Auditing, the Commission needs to examine whether the standards are accepted internationally and whether they have been developed with proper due process, public oversight and transparency. Furthermore, the standards must be of high quality and conducive to the European public good.

526. The Commission is reflecting on a final decision whether, and to what extent, to endorse ISAs. This will largely depend on establishment of satisfactory governance arrangements relating to the operation of the IAASB.

527. The new Directive is currently under discussion and it will take time before it comes into force. At the moment there is no comprehensive set of European rules on how audits be conducted. Moreover the Commission proposal only deals with statutory should auditing, which is required by Community law; no provisions will be established for the interim report auditing or review.

528. The Fourth Directive only establishes how the audit report has to be prepared (Article 51 a). This Article requires that the report includes:

> "an audit opinion which shall state clearly the opinion of the statutory auditors as to whether the annual accounts give a true and fair view in accordance with the relevant financial reporting framework and, where appropriate, whether the annual accounts comply with statutory requirements; the audit opinion shall be either unqualified, qualified, an adverse opinion or, if the statutory auditors are unable to express an audit opinion, a disclaimer of opinion".

529. Regarding international standards on auditing, IFAC has issued the "International Standard on Review Engagements 2400" (previously ISA 910). This standard provides guidance on the auditor's professional responsibilities when an engagement to review financial statements is undertaken and on the form and content of the report that the auditor issues in connection with such a review.

530. In June 2003 IFAC issued for comment a proposed international standard on auditing related to "Review of Interim Financial Information Performed by the Auditor to the Entity". This document is still under review.

CESR's approach

531. CESR considers it important to point out that it has not been (nor can it be) mandated to establish which standards an auditor should comply with for conducting a review of half-yearly reports. Therefore, the results of this work can will mainly serve as an indication to the market and the Commission as to the existence (if any) of any convergence between Member Sates in relation to the standards on basis which an auditor's review is carried out.

532. In order to provide technical advice on the nature of the auditors' review of the half-yearly report, with the objective of ensuring a common understanding for investors on the minimum level of assurance that investors can expect from the auditor's review referred to in Article 5 of the Transparency Directive, CESR considered the existing regulations and the practises followed in the different jurisdictions as well as the existing national and international standards on auditing developed by the profession in order to ascertain whether there is or not there any form of convergence.

533. To this end CESR conducted a survey amongst all of its members with the aim of learning the existing regulations and practises followed in terms of auditors' review of the half-yearly report with the following results:

a) *Requirement of review or auditing of half yearly reports (voluntary vs. compulsory review)*

There are differences between Member States regarding whether an auditors review has to be done on a voluntary or mandatory basis.

From the results of the survey, CESR concludes that in the majority of cases, an auditors' review is done on a voluntary basis.

b) *Nature of audit review of half yearly reports (limited review vs. full audit)*

CESR looked into the nature of the review, i.e. whether the half yearly report is submitted for auditing or review.

CESR concludes from the results of its survey that when a half yearly report is submitted for auditing, in the majority of cases a limited review is conducted.

c) Use of general auditing principles at national levels when conducting a review

CESR looked into whether or not standards are applied when an auditor conducts a review. It found that a large majority of Member Sates use the "International Standard on Review Engagements (ISRE) 2400 - Engagements to review financial statements" issued by IFAC or a national's adaptation of it.

d) The form of conclusion that is produced at the end of the examination of half yearly reports and level of assurance given in the review and level of assurance conveyed

CESR looked into the level of assurance given in the audit review and the form of the conclusion included in the review.

From its survey, CESR found that when a review is conducted it leads to a level of assurance that is either moderate, or less compared to a full scope audit[25].

In addition, CESR found that the conclusion is usually expressed in the form of a negative assurance [e.g. "Based on our review, we are not aware of any material modification that needs to be made to the accompanying interim financial information for it to be in accordance with [identified financial reporting framework].

Conclusion

534. CESR draws the following conclusions from this survey:

- *There is a great deal of convergence towards the way in which reviews are conducted. For the most part a limited review is conducted on a voluntary basis, the form of conclusions is a negative assurance and the level of assurance is moderate, which is less than a full scope audit. CESR believes that these elements could be considered as useful reference for clarifying the nature of an auditor's review of half-yearly report.*

- *The large majority of Member States use the standard issued by IFAC or an adaptation of it at national level. However, it is not for CESR to determine whether or not this standard is adequate for the purposes of investor protection.*

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[25] ISRE 2400 issued by IFAC defines as "moderate" the level of assurance that the information subject to review is free from material misstatement. While this definition has been adopted by a number of European countries, others use different terminology (eg. A level of assurance "less" than that of an audit), which has the same meaning as "moderate" in this context.
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CHAPTER IV – EQUIVALENCE OF THIRD COUNTRIES INFORMATION REQUIREMENTS

(Article 19 of Transparency Directive – Third Countries)

Extract from the mandate:

DG Internal Market requests CESR to provide technical advice on possible implementing measures on the following issues:

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

(1) the principle that the competent authority of the home Member State should use in order to establish a list of third countries the domestic law, regulations or administrative provisions provide for equivalent information requirements (excluding financial statements and the conditions for consolidating financial statements). In particular, CESR is invited to consider the principles for determining equivalence with regard to:

(a) annual management reports (annual reports under the 4th Company Law Directive);

(b) half-yearly (interim) management reports under Article 5;

(c) statements to be made by the responsible person under Articles 4 and 5;

(d) interim management statements under Article 6;

(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;

(f) individual accounts established under the law of a Member State;

(g) transparency about major holdings of voting rights or financial instruments; and

(h) information on general meetings under Articles 13 and 14.

(2) a list of third countries which ensure the equivalence of the independence requirements laid down in this Directive in relation to management companies or investment firms as provided for under Article 19(3c) (related to Articles 11(3a) and 11(3b). CESR is invited to focus its assessment at this stage to the rules applicable to management companies/investment firms located in those third countries it considers being the most relevant from the point of view of European capital markets.

Extract from Level 1 text

Article 23

Third countries

1. Where the registered office of an issuer is in a third country, the competent authority of the home Member State may exempt that issuer from requirements under Articles 4 to 7 and Articles 12(6), 14, 15 and 16 to 18, provided that the law of the third country in question lays down equivalent requirements or such an issuer complies with requirements of the law of a third country that the competent authority of the home Member State considers as equivalent.

   However, the information covered by the requirements laid down in the third country shall be filed in accordance with Article 19 and disclosed in accordance with Articles 20 and 21.

2. By way of derogation from paragraph 1, an issuer whose registered office is in a third country shall be exempted from preparing its financial statement in accordance with Article 4 or Article 5 prior to the financial year starting on or after 1 January 2007, provided such issuer prepares its financial statements in accordance with internationally accepted standards referred to in Article 9 of Regulation (EC) No 1606/2002.

3. The competent authority of the home Member State shall ensure that information disclosed in a third country which may be of importance for the public in the Community is disclosed in accordance with Articles 20 and 21, even if such information is not regulated information within the meaning of Article 2(1)(k) of this Directive.

4. In order to ensure the uniform application of paragraph 1, the Commission shall, in accordance with the procedure referred to in Article 27(2), adopt implementing measures

   i) setting up a mechanism ensuring the establishment of equivalence of information required under this Directive, including financial statements, and information, including financial statements, required under the law, regulations, or administrative provisions of a third country;

   ii) stating that, by reason of its domestic law, regulations, administrative provisions, or of the practices or procedures based on international standards set out by international organisations, the third country where the issuer is registered ensures the equivalence of the information requirements provided for in this Directive.

   The Commission shall, in accordance with the procedure referred to in Article 27(2), take the necessary decisions on the equivalence of accounting standards which are used by third country issuers under the conditions set out in Article 30(3) at the latest five years following the date referred to in Article 31. If the Commission decides that the accounting standards of a third country are not equivalent, it may allow the issuers concerned to continue using such accounting standards during an appropriate transitional period.

5. In order to ensure uniform application of paragraph 2, the Commission may, in accordance with the procedure referred to in Article 27(2), adopt implementing measures defining the type of information disclosed in a third country that is of importance to the public in the Community.

6. Undertakings whose registered office is in a third country which would have required an authorisation in accordance with Article 5(1) of Council Directive 85/611/EEC or, with regard portfolio management under point 4 of section A of Annex I to Directive 2004/39/EC [Markets in Financial Instruments Directive] if it had its registered office or, only in the case of an

investment firm, its head office within the Community, shall also be exempted from aggregating holdings with the holdings of its parent undertaking under the requirements laid down in Article 12(4) and (5) provided that they comply with equivalent conditions of independence as management companies or investment firms.

7. In order to take account of technical developments on financial markets and to ensure the uniform application of paragraph 6, the Commission shall, in accordance with the procedure referred to in Article 27(2), adopt implementing measures stating that, by reason of its domestic law, regulations, or administrative provisions, a third country ensures the equivalence of the independence requirements provided for under this Directive and its implementing measures.

535. CESR sets out below its proposed changes to its advice in relation to this mandate following consultation. The responses to the first consultation were generally supportive of CESR's advice. Some respondents asked for flexibility regarding the time frames for third country issuers. CESR does not consider this possible as it would include positive discrimination of third country issuers. In CESR's view equivalence refers to substance of information given and not the time limits.

536. For reasons of clarity CESR presents its advice in full. It should be clarified that the text under A – H does form part of CESR's advice. CESR has made a minor addition to its advice under G2.

537. Following the list of issues that are set out in mandate, a first section will deal with equivalence as regards issuers, and a second section will deal with equivalence as regards with UCITS management companies/investment firms.

SECTION 1 – EQUIVALENCE AS REGARDS ISSUERS

INTRODUCTION

538. In order to provide the advice set out in the mandate, it is first necessary for CESR to explain its understanding of the following terms that are used above in the mandate:

- Equivalence,
- Principles,
- List of third countries.

CESR understanding of the term "equivalence"

539. In order to provide its advice, CESR has considered the need to define the word "equivalence", or at least to give additional guidance about its meaning in this context. CESR considers it to be crucial for the consistency of financial and other transparency requirements under European legislation that equivalence should be assessed in the same manner in the context of GAAP and non-GAAP requirements. In this respect, the same general definition and objective of the word "equivalence" as used in the mandate and in the concept paper on equivalence of certain third country GAAP and enforcement aspects (ref CESR 04-305 and CESR 04-392), should be used for the purposes of this mandate.

540. The paragraph 2.3 of the EC mandate on GAAP equivalence states that "when assessing as to whether financial statements prepared under third country GAAP provide a true and fair view of the issuer's financial position and performance, the priority should lie on assuring the protection of investors".

541. The paragraph 3.2 a) of the EC mandate on GAAP equivalence invites CESR "to undertake a global assessment as to whether the financial statements prepared under the third country GAAP [mentioned above] provide equivalently sound information to investors when those investors make

investment decisions on regulated markets across Member States. Investors should be able to take economic decisions on the basis of understandable, relevant, reliable, and comparable information about the issuer's assets and liabilities, financial position and profit or loss".

542. CESR acknowledges that the concepts developed as regards GAAP equivalence may not fit non-GAAP disclosure requirements. Nevertheless, CESR proposes to use the quintessence of those concepts in establishing its advice in relation to the equivalence of third country issuers for non-GAAP transparency requirements.

543. Consequently, CESR considers that "equivalence" as regards transparency requirements for third country issuers:

- does not mean "identical to" the transparency requirements set out under third country issuer's laws, regulations or administrative provisions;

- can be declared when the requirement under third country issuer's laws, regulations or administrative provisions enables investors to make similar decisions as if they were provided with the requirement under the Transparency Directive.

544. In using this approach, it is necessary for CESR to consider the concepts underlying the objectives of each main requirement under the Transparency Directive.

545. Nevertheless, as GAAP and non-GAAP requirements are different subjects, it is necessary for CESR to develop different approaches in order to provide its advice to the Commission.

CESR understanding of Principles for determining equivalence

546. In addition to the conceptual approach of equivalence set out above, CESR has considered the fact that the mandate from the EC invites it to develop "principles". CESR has examined each main requirement listed in Article 23(1) of the Transparency Directive in order to determine if it is possible to set up principles based on the conceptual approach of equivalence. CESR believes that this approach has the advantage of avoiding on the one hand a set of high level principles that competent authorities could use in order to grant equivalence on a general point of view to third countries transparency frameworks and on the other hand a list of detailed rules, that could give the form of equivalence without any guaranty of substance.

CESR understanding of the list of third countries

547. The mandate from the Commission suggests that, using a common approach, competent authorities may establish lists of third countries in which the domestic law, regulations or administrative provisions provide for equivalent information requirements. Over the course of time, CESR anticipates that competent authorities will be sharing information and views as to whether certain third countries are or are not deemed to be equivalent and how they have applied the approach established at Level 2. In doing so, an EU list of third countries who will be deemed to be equivalent will be created.

Other general considerations

548. Based on the conceptual approach of equivalence, CESR is the opinion that:

- competent authorities of home Member States will be able to grant equivalence on certain items listed in Article 23(1) of the Transparency Directive and not on others, based on the result of an item by item assessment;

- equivalence relates to the substance of information given according to the transparency requirements under third countries law, regulations and administrative provisions. Consequently, no exception should be given as regards the time limits set by the Directive within which the transparency requirement is to be met.

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549. Equivalence as regards issuers will be governed by the following principles:

– *Equivalence* does not mean "identical to" the transparency requirements set out under third country issuer's laws, regulations or administrative provisions and can be declared when the requirement under third country issuer's laws, regulations or administrative provisions enables investors to make similar decisions as if they were provided with the requirement under the Transparency Directive;

– Equivalence can be declared when general disclosure rules provide users with understandable and broadly equivalent assessment of issuers' position.

– Equivalence pronouncements will not change unless there is a fundamental change in the relevant third country or EU requirements;

– Competent authorities of home Member States will be able to grant equivalence on certain items listed in Article 23(1) of the Transparency Directive and not on others, based on the result of an item by item assessment;

– Equivalence relates to the substance of information given according to the transparency requirements under third countries law, regulations and administrative provisions. Consequently, no exception should be given as regards the time limits set by the Directive within which the transparency requirement is to be met.

Question

Q26 Do you agree with these principles?

PRINCIPLES FOR ESTABLISHING EQUIVALENCE OF THE ITEMS SET OUT IN THE MANDATE

550. In developing its approach, CESR has considered each of the items listed in the mandate from the EC to determine the principles that should be complied with by third countries legislation in order to enable the competent authority of the home Member State to consider the third country issuer as meeting equivalent Transparency Directive requirements and therefore be exempted form meeting the detailed Transparency Directive requirements.

A. Annual management reports;

551. In order for a third country issuer to be deemed to be meeting equivalent requirements to those set out in Article 4 (2) (b) of the Transparency Directive, the annual management report of any issuer has to include at least the following[26] :

- a fair review of the development and performance of the issuer's business and of its position, together with a description of the principal risks and uncertainties that it faces. The review shall be a balanced and comprehensive analysis of the development and performance of the issuer's business and of its position, consistent with the size and complexity of the business;

- to the extent necessary for an understanding of the issuer's development, performance or position, the analysis shall include both financial and, where appropriate, non-financial key performance indicators relevant to the particular business;

- an indication of any important events that has occurred since the end of the financial year;

- indications of the issuer's likely future development.

B. Half-yearly (interim) management reports;

552. In order for a third country issuer to be deemed to be meeting equivalent requirements to those set out in Article 5(4) of the Transparency Directive, the interim half-yearly management report of any issuer has to include at least the following:

(a) a review of the period covered;

(b) indications of the issuer's likely future development for the remaining six month of the financial year;

(c) for issuers of shares and if not already disclosed on an ongoing basis, major related parties transactions.

In order for a third county issuer to be deemed to be meeting equivalent requirements it is also necessary that the third country's laws, regulations or administrative provisions require at least a condensed set of financial statements in addition to the management report.

C. Statements to be made by the responsible person under Articles 4 and 5

553. In order to meet the objective of accountability underlying the requirement of Articles 4 and 5 of the Transparency Directive in terms of statements made by persons responsible, the law, regulations or administrative provisions of a third country should make somebody within the issuer clearly responsible for:

(a) the compliance of the financial statements with the applicable reporting framework or set of accounting standards and;

(b) the fairness of the management review included in the management report.

554. Consequently, a third country issuer will be deemed to be meeting equivalent requirements to those set out under Articles 4(2)(c) and 5(2)(c) if somebody is made responsible for the annual and half-yearly financial information by the third country's legal framework.

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[26] Based on Article 46 of the Fourth Company Law Directive. Some features of that Article have not been kept for the following reasons:
- Information relating to environmental and employee matters in letter 1(b), because it is not as such necessary for investor's protection;
- Letter 1. (c) because it is explanatory material of letters 1(a) and 1(b);
- Letters 2.(c) and 2. (e) because it should be covered by GAAP information;
- Letter 2. (d) because it should be covered by information on major holdings;

Letter 2. (f) because it is too detailed and already covered by 1(a).
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D. Interim management statements under Article 6

555. In order for a third country issuer to be deemed to be meeting equivalent requirements to those set out in Article 6 of the Transparency Directive:

556. Those issuers who under the requirements of national legislation, the rules of the regulated market or of their own initiative, publish quarterly financial reports will be deemed as providing information that is equivalent to the requirements set out under Article 6.

557. All other issuers will need to apply the requirements of Article 6 of the Transparency Directive in order to be considered as meeting equivalent requirements.

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

558. In order to provide its advice to the Commission in relation to this item, there are two issues that need to be looked at:

1) the meaning of the word "parent"; and

2) the objective of this requirement

1) the meaning of the word "parent"

559. It appears first necessary to ensure that there is a common understanding of what is meant by the word "parent company" for this item of the mandate. As there is no definition of "parent company" in the Transparency Directive, CESR looked at the existing EU legislation for a definition.

560. In determining what the meaning of "parent company" is, CESR has made use of the word "parent undertaking" as used in Directive 83/349/EEC of 13 June 1983 on consolidated accounts. Article 1 of this Directive imposes on Member States to "require any undertaking governed by its national law to draw up consolidated accounts and a consolidated annual report if that undertaking (a parent undertaking) […]". In the aim of responding to the mandate from the EC, CESR proposes to define the individual accounts of a parent company as the standalone accounts of the issuer.

2) the objective of this requirement

561. CESR also considered the objective of the requirement of the publication of individual accounts of the issuer when its consolidated accounts are available. This objective has to be assessed differently, depending on the type of securities issued.

562. In order to grant equivalence, EU competent authorities will have to determine if the following elements are addressed by the third countries legislations on the basis of individual accounts:

- for issuers of shares, dividends computation and ability to pay dividends,
- for all issuers, minimum capital and equity requirements and liquidity issues.

563. In the case they are, competent authorities will not require a complete set of accounts, but will require additional audited disclosures giving information on the individual accounts of the issuer as a standalone, relevant to the issue in question (for instance, amount, computation and availability of the retained earnings if the rules governing dividends are based on the individual accounts of the issuer). Those disclosures may be prepared under local GAAP.

564. As regards dividends, competent authorities will have to ensure consistency with information provided under Article 17(2)(d) of Transparency Directive which states that the issuer shall publish notices or distribute circulars concerning the allocation and payment of dividends (…).

F. Individual accounts established under the law of a Member State

565. In order to establish whether or not a third country issuer is meeting equivalent Transparency Directive requirements for the purposes of Articles 4(3), CESR considers it is important to ensure that there is consistency with the Commission Regulation (EC) N° 809/2004 on prospectuses, in particular item 20.1 of Annex I (Minimum Disclosure Requirements for the Share Registration Document) and item 13.1 of Annex IV (Minimum Disclosure Requirements for the Debt and Derivative Securities Registration Document), both dealing with Historical Financial Information to be included in a prospectus.

566. In meeting this objective, CESR considers that a non EU issuer that is not required to prepare consolidated accounts should prepare its individual accounts according to the international accounting standards adopted pursuant to the procedure of Article 3 of Regulation N° 1606/2002 or to a third country's national accounting standards equivalent to these standards. If such financial information is not equivalent to these standards, it must be presented in the form of restated financial statements.

567. If the individual accounts are prepared according to a third country's national accounting standard, they must include at least:

- balance sheet;
- income statement;
- accounting policies and explanatory notes.

568. The individual accounts must be audited independently.

G. Transparency about major holdings of voting rights or financial instruments

569. This section of the paper deals with point 1(g) of the above mandate namely, establishing principles in relation to:

"transparency about major holdings of voting rights or financial instruments"

570. CESR explained in the consultation that in order to provide its advice to the Commission in relation to this aspect of the mandate, CESR considers it important to point out that although the wording of the mandate is very generic, and suggests that principles for establishing the equivalence of all the Directive requirements about major holdings of voting rights or financial instruments need to be established by CESR, its mandate is limited to the specific major holdings of voting rights and financial instrument provisions set out in Article 23(1).

571. Article 23(1) establishes which parts of the Directive a competent authority is allowed to exercise its discretion about when assessing a third county issuer's equivalence to the Directive requirements.

572. On examination of Article 23(1), the majority of the major holdings of voting rights or financial instruments requirements in the Directive (which are set out in Articles 9-13) are not included in Article 23(1), and as such, CESR's mandate is limited to the following provisions of the Directive: Articles 12(6), 14, and 15. Set out below is a discussion about each of these Articles and the principles for establishing a third country issuer's equivalence to them.

573. The responses to the consultation in this area did not support the proposal that time limits cannot be subject to a test of equivalence. CESR has given additional consideration to this issue and concludes it is not possible to be more flexible than it has been. The suggestion that setting time

frames to a test of reasonableness is not considered to be adequate to provide the necessary certainty as to when notification obligations are triggered. In addition setting time frames other than those established by the Directive would required a separate test to determine what this other time frame should be.

574. For this reason CESR has made no changes to its advice in relation to time frames but has made some changes for further clarification when necessary.

G1. Article 12(6) – Explanation

575. This Article states that:

> *"Upon receipt of the notification under paragraph 1, but no later than three trading days thereafter, the issuer shall make public all the information contained in the notification."*

576. The objective of this Article is to establish the time frame within which the issuer, having received the major holding notifications from the shareholder, natural person or legal entity (which are triggered by the requirements of Articles 9 or 10) has to make this information available to the public.

577. In relation to this requirement, CESR considers that it has been mandated to establish what can be an equivalent time frame within which a third country issuer has to make such a notification public, taking into consideration the timeframe within which this issuer under its domestic law is already required to make such notification public.

578. In establishing what an equivalent time frame can be, the following needs to be considered:

a) other time frames in the Directive and whether or not an equivalent time frame has been established for third country issuers;

b) what the purpose of Article 12(6) is;

a) other relevant time frames in the Directive and whether or not an equivalent time frame has been established for third country issuers

579. There are no other relevant timeframes in the Directive relating to the disclosure of major holdings that can be subject to an equivalence test. For example, Article 12(2), which also establishes a time frame within which the notifications or acquisitions of major holdings has to be made, is not the subject of Article 23(1).

580. In addition, as stated in paragraph 549 above, equivalence relates to the substance of information given, and no exception should be given in relation to time limits set by the Directive within which the transparency requirements are to be met. CESR is therefore not proposing to establish an "equivalent" time frame for third country issuer's in relation to other provisions of the Directive.

581. As such, it appears that there can be no "equivalence" in relation to the time limit established in Article 12(6). However, as with the other parts of the equivalence mandate, in order to establish its advice, CESR needs to consider the purpose of Article 12(6).

b) what the purpose of Article 12(6) is

582. The purpose of Article 12(6) is to establish the time frame within which notification of an acquisition, disposal, or change in a major holders' holding of voting rights in an issuer whose shares are admitted to trading on a regulated market is made public. This is set at three trading days.

583. However, the requirement of Article 12(6) only relates to the time within which the issuer has to make this notification public, but the overall purpose of the Article is to establish the maximum

timeframe within which the notification that is first made to the issuer by the shareholder, natural person or legal entity is to be made public.

584. In establishing its advice, CESR therefore has to take into consideration the fact that under the provisions of Article 12(2), the shareholder, natural person or legal entity has four trading days within which to notify the issuer, which overall means that notification of an acquisition, disposal or change in holding is made public within a maximum total of seven trading days (that is on the assumption that the original notification is made within the four trading day period) after the date on which the shareholder, natural person or legal entity learns (or should have learned)[27] of the acquisition or disposal, or the Article 9(2) event.

585. CESR recognises that it may be the case that third country issuers are already obliged to publish such notifications in their market within set time periods, which may be different to those set out in Article 12(6). For example, an issuer may have to make such notification public, once received, within one trading day.

586. In addition, under the requirements of Article 17(1), a third country issuer of shares is obliged to ensure equal treatment for all holders of shares that are in the same position. As such, in establishing whether or not the Article 12(6) time frame can be different for such issuers, CESR also needs to take into consideration the implications of imposing an obligation on issuers who have dual listing of shares in both their third country and in Europe, to make the notification public within a timeframe that may lead shareholders and investors receiving the same information at different times.

587. For example, a third country issuer under its domestic laws has a notification structure whereby it receives the notifications within a one trading day period, but has five days within which to make such notification public. If the issuer has to make the notification to the market under the Transparency Directive requirements within the four trading day period, in doing so, the issuer is making a notification in the EU market before it is required to do so in its domestic market, and is thus not meeting its obligations to ensure equal treatment for all holders of shares who are in the same position.

588. Taking all of this into consideration, as the purpose of the Article 12(6) is to ensure that the notification is made to the public within a seven trading day period (that is on the assumption that the original notification is made within the four trading day period), CESR concludes that provided that this seven trading day notification deadline is met by a third country issuer, the issuer itself may be able to make its notification to the market within a different number of trading days to that set out in Article 12(6).

589. For example, a third country issuer can under its own domestic law, have six trading days within which to make the notification public. However, the notification to the issuer has to be made within one trading day. In such a case the overall objective of the notification having to be made within the total of seven trading days is still met.

590. CESR also considered whether or not equivalence in relation to Article 12(6) could apply to a situation where the shareholder, natural person or legal entity made the notification to the public, and the issuer or the competent authority (where a competent authority makes public such a notification under the provisions of Article 13) did not. ‘

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[27] For a discussion about what "learnt" or “should have learnt” means – please see section 5 of Chapter 1 of this consultation paper.
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591. In such circumstances, provided that the notification gets to the public within the seven trading day deadline it should not matter that it is not the issuer or the competent authority that is making this notification.

592. However, because the Article 21 obligations (to disclose regulated information in a manner that ensures fast access to such information on a non-discriminatory basis, throughout the European Union, as well as to the central storage mechanism) cannot be the subject of the test of equivalence, it is not possible for the shareholder, natural person or legal entity to take on the Article 21 obligations. Whenever the shareholder, natural person or legal entity makes the notification public, CESR does not consider this to be equivalent to the mechanisms established under the Directive for disclosing information under Article 21.

DRAFT TECHNICAL ADVICE

593. Third countries will be considered as having equivalent requirements to those set out in Article 12(6) provided that:

a) the notification and publication period (i.e. the period of time upon which the notification is to be made to the issuer and is to be made public) is shorter than seven trading days. The notification has to be made within the shorter time frame; or

b) the notification and publication period (i.e. the period of time upon which the notification is to be made to the issuer and is to be made public) is in total a seven trading day period, but the time frames between notification to the issuer and the subsequent making of this notification public are different to those set out in Articles 12(2) and 12(6).

G2. Article 14 – acquisition and disposal of own shares – Explanation

594. This Article states that:

> *"Where an issuer of shares admitted to trading on a regulated market acquires or disposes of own shares, either itself or through a person acting in his own name but on the issuer's behalf, the home Member State shall ensure that the issuer shall make public the proportion of own shares as soon as possible, but not later than four trading days following such acquisition or disposal where that proportion reaches, exceeds or falls below the thresholds of 5% or 10% of the voting rights. The proportion shall be calculated on the basis of the total number of shares to which voting rights are attached."*

595. The purpose of this requirement is to impose a notification obligation upon an issuer when it acquires or disposes of its own shares and in doing so the percentage of voting rights it holds reaches, exceeds or falls below the threshold of 5% or 10%. In these circumstances, the issuer has a four trading day time period within which to notify the public of this.

596. As explained above, as a general principle, CESR does not consider it prudent to allow third country issuers to be able to make notifications within longer time periods than those set out in the Directive. In contrast to the situation discussed in relation to Article 12(6), there is no flexibility that CESR can exercise in establishing an equivalent timeframe within which this has to be done, as the objective of the requirement is to make this notification public within the four trading day deadline, and time starts to run from the time that the issuer makes an acquisition or disposal. There are no other time frames that are relevant.

597. CESR therefore considers that there can be no equivalence in relation to the four trading day timeframe within which the notification has to be made, but there is another element of this requirement that may be different but can be considered as being equivalent.

598. The element that can be considered as being equivalent relates to how many own shares an issuer can hold. If under its domestic requirements a third country issuer can only hold a maximum of less then 10 % of own shares to which voting rights are attached, and this lower percentage holding triggers a notification requirement upon acquisition or disposal of own shares, such a requirement will be considered as meeting equivalent notification requirements under Article 14.

599. For example, a third country issuer under its domestic laws and regulations is only allowed to hold a maximum of 8% of own shares to which voting rights are attached, and the issuer holds 6% and acquires 2 %, thus reaching the 8% maximum. If this triggers a notification requirement, such notification can be considered as equivalent to the maximum of 10% threshold under Article 14.

DRAFT TECHNICAL ADVICE

600. A third country will be considered as having equivalent requirements to those set out in Article 14 if:

a) an issuer is only allowed to hold up to a maximum of 5% of its own shares to which voting rights are attached, and this maximum threshold triggers a notification requirement. This notification requirement can be deemed equivalent to both the 5% and 10% trigger thresholds set out in Article 14; or

b) an issuer is allowed to hold between 5% and 10% of own shares to which voting rights are attached and a notification requirement is triggered whenever this level, and the 5% threshold, is triggered. These requirements can be deemed equivalent to the 5% and 10% thresholds of Article 14.

601. If a third country issuer is required, under its national requirements, to disclose holdings in own shares to which voting rights are attached at lower and different thresholds to those established under Article 14, there will be no equivalence unless one of the above mentioned circumstances apply.

602. There are no additional notification requirements under the Transparency Directive above the 10 % threshold even if issuers are allowed to hold more than 10 % of own shares under their national law. Therefore if an issuer is allowed to hold more than 10 % it will have to make a notification of this at 10 %, and then comply with its own national legislation.

G3. Article 15 - notification following increase or decrease in capital – Explanation

603. This Article states that:

> *"The home Member State shall at least require the disclosure to the public by the issuer of the total number of voting rights and capital (for the purpose of calculating the thresholds provided for in Article 9) at the end of each calendar month during which an increase or decrease of such total number has occurred."*

604. The purpose of this Article is to impose an obligation upon issuers whenever they have either increased or decreased the total amount of share capital and/or voting rights to disclose this to the public. Irrespective of when the increase or decrease takes place, this notification has to be made at the of the calendar month when the increase or decrease occurs, which means that the issuer may have up to a 30 calendar days within which to disclose this

605. CESR considers that if a third country issuer is required under its domestic laws to make such notifications at a different point in the month, so for example, in the middle of the month, or x number of trading days after the increase of decrease, then it can be said to be meeting an equivalent requirement to that set out in Article 15.

DRAFT TECHNICAL ADVICE

606. Provided the third country issuer is required to make a notification to the public within 30 calendar days after it has increased or decreased its share capital and/or voting rights, the third country shall be considered as having equivalent requirements to those set out in Article 15.

H. Information on general meetings under Articles 17 and 18 – Discussion

607. As CESR has not been given any mandates in relation to the provisions of Article 17 and 18, in order to establish its advice to the Commission relation to how a third country issuer meets equivalent requirement, it is first necessary for CESR to consider what the purpose of this mandate is.

608. CESR considers that the purpose of the mandate regarding information on general meetings is to ensure that, according to a third country legislation, any investor in shares or debt securities receives all the information that he or she needs in order to exercise his or her rights under the shares or debt securities in question.

609. The issue of how information from a third country issuer gets to the investor in order for the investor to be able to exercise its rights is already dealt with under the provision of Article 23(1) that obliges third country issuers to file the information in accordance with Article 19 and disclose it in accordance with Articles 20 and 21. As such, all that CESR is required to establish for the purposes of this mandate is what the content of the information about general meetings needs to be.

610. As regards the content of information on general meetings, CESR considers that it is necessary for an investor in share or debt securities to know the place, time and agenda of general meetings. Consequently, equivalence should be granted to third country legislations containing provisions for publication of those three items.

Question

Q27 Are you satisfied with the draft technical advice considering both the need for flexibility and the requirements of the text of the Directive?

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

Extract from the mandate

DG internal markets requests CESR to provide technical advice on possible implementing issues:

a list of third countries which ensure the equivalence of the independence requirements laid down in this Directive in relation to management companies or investment firms as provided for under Article 19(3c) (related to Articles 11(3a) and 11(3b). CESR is invited to focus its assessment at this stage to the rules applicable to management companies/investment firms located in those third countries it considers being the most relevant from the point of view of European capital markets.

Relevant level 1 provisions:

Article 23(6)

Undertakings whose registered office is in a third country which would have required an authorisation in accordance with Article 5(1) of Council Directive 85/611/EEC or, with regard portfolio management under point 4 of section A of Directive 2004/39/EC [Markets in Financial Instruments Directive] if it had its registered office or, only in the case of an investment firm, its head office within the Community, shall also be exempted from aggregating holdings with the holdings of its parent undertaking under the requirements laid down in Article 12(4) and (5) provided that they comply with equivalent conditions of independence as management companies or investment firms.

INTRODUCTION

611. In relation to this mandate, CESR asked a number of detailed questions in order to establish what the test of equivalence should be for parent undertakings whose management companies and or investment firms are registered in the 3rd country.

612. Overall, respondents were positive about CESR's proposals in this area, although there were some particular areas of concern or requests for clarification that were raised, which have, as discussed below resulted in CESR making some changes to its draft advice.

613. In summary the key points that have come out of the consultation are:

A) That there is no need to establish a test of equivalence in relation to 3rd country incorporated entities and that therefore the test of independence for such entities should be the same as that established for EU incorporated entities.

B) That the references to authorisation in Article 23(6) were as explained by CESR

C) Changes to the advice as a result of the consultation

614. CESR discusses these points below

A) There is no need to establish a test of equivalence in relation to 3rd country incorporated entities

615. CESR proposed 2 alternatives in relation to the test of independence that should be applied for 3rd country incorporated entities.

616. The first was that there was no need to establish a test of equivalence because as a general principle, it considers that the only conditions that need to be imposed under the Transparency Directive for the purposes of the exemption are those relating to links/internal relationships between the parent undertaking and the management company or the investment firm and a general requirement for a notification to the competent authority of the issuer.

617. On this basis, CESR concluded that establishing a test of equivalence for third country investment firms and management companies may not be necessary, because the framework under which the companies and firms operate is not in itself enough to ensure that they meet the test of independence.

618. An alternative approach was that the rules on independence applicable to management companies/investment firms located in third countries considered as most relevant for European capital markets should be undertaken, and that Management companies /investment firms located in third countries that have rules on independence equivalent to the requirements of the Transparency Directive would benefit from a general presumption of independence. Nevertheless, they would still be required to meet the test of independence as the materiality of this presumption would need to be verified on a case-by-case basis.

619. Overall, consultees agreed with the first approach and did not consider there was any added value to the 2nd approach.

620. On this basis, CESR proposes to use the first approach in providing its advice to the Commission about this mandate, which means that there will be no test of equivalence in relation to third country incorporated entities.

B) Reference to authorisation in the Level 1 text

621. CESR explained that it considers the following provision of Article 23(6) to be relevant in relation to the reference to authorisation:

a) the reference to the nature of the authorisation of the investment firm or management company;

b) the requirement that the management company or investment firm complies with equivalent conditions of independence as required by management companies and investment firms laid down in Article 12(4) and 12(5).

a) The reference to the nature of the investment firm or Management Company's "authorisation"

622. CESR considers that the reference to "authorisation" is to the activity itself that the management company and or investment firm carries out in relation to which an exemption can be granted, which under European legislation requires authorisation.

623. This is not a reference to the nature of the authorisation that the management company or investment firm has under its third countries domestic laws, regulations or administrative requirements.

624. CESR considers that a management company or investment firm that is registered in a third country is not required to be authorised under the third countries domestic laws, regulations or administrative requirements in order to conduct management activities or portfolio management activities and get the benefit of the exemption, provided that it is conducting the same activities that would require authorisation under UCITS or MiFID for which an exemption from the need to aggregate holdings is provided for under the Transparency Directive.

625. It is assumed that the controlled undertaking of the parent undertaking which wishes to make use of the exemption will be supervised by the third country competent authority.

626. CESR asked conslutees whether or not they agree with these proposals. There was unanimous agreement to these proposals, and therefore CESR does not consider it necessary to make any changes to them.

b) The requirement to comply with equivalent conditions of independence as management companies and investment firms do under Articles 12(4) and 12(5)

627. CESR explained that it has been mandated to establish what a parent undertaking of a management company and or investment firm that is incorporated in the 3rd country have has to do in order to get the benefit of the exemptions set out in Articles 12(4) and 12(5).

628. CESR explained in detail in paragraphs 612-617 of the December consultation paper that it did not consider it necessary to establish different requirements for management companies and investment firms in order for their parent undertakings to benefit from the exemptions in Articles 12(4) and 12(5), CESR does not consider that it is necessary to establish different requirements for management companies and investment firms that are registered in a third country in order for their parent undertakings to get the benefit of the same exemptions.

629. Respondents agreed with this proposal, and therefore CESR is not proposing to make any changes to the discussion it made in paragraphs 612-617 of the consultation.

Requirements for management companies and investment firms registered in a third country

630. As explained in the December consultation paper, for the same reasons that CESR does not consider it necessary to establish different requirements for management companies and investment firms in order for their parent undertakings to benefit from the exemptions in Articles 12(4) and 12(5), CESR does not consider that it is necessary to establish different requirements for management companies and investment firms that are registered in a third country in order for their parent undertakings to get the benefit of the same exemptions.

631. As a general principle, CESR considers that the only conditions that need to be imposed under the Transparency Directive for the purposes of the exemption are those relating to links/internal relationships between the parent undertaking and the management company or the investment firm and a general requirement for a notification to the competent authority of the issuer. Conultees agreed with these proposals, and then the corresponding changes that have been made for EU incorporated entities discussed in Section 6 of Chapter one of this paper, CESR is not proposing to make any changes to its original proposals.

632. CESR therefore considers that a management company or investment firm registered in a third country must follow the same requirements that management companies and investment firms registered in the EU, must follow, which are the following:

a) that the management company or investment firm is free to exercise the **voting** rights attached to the assets it manages;

b) that the management company or investment firm has to disregard the interests of the parent undertaking and any other party whenever conflicts of interest arise;

c) that the parent undertaking must be able to demonstrate on request that the organizational structures of the parent undertaking and the management company or investment firm are such that the voting rights are exercised independently. This can be demonstrated in a number of ways, for example, by having implemented written policies and procedures reasonably designed to prevent the distribution of information between the parent undertaking and the management company or investment firm that relate to the exercise of voting rights and investment decisions over securities traded; and

d) that the parent undertaking must be able to demonstrate on request that the persons who decide how the voting rights are to be exercised are not the same for the parent

undertaking and the management company or investment firm and that these act independently from one another,

but will be able to demonstrate that it fulfils such requirements in ways that a competent authority considers equivalent to those established for management companies and investment firms registered in the EU.

633. In addition to the above, it is important to point out that in order to benefit from the exemption, the parent undertaking of a management company or investment firm registered in a third country will be required to follow the same declaration procedure as that established for parent undertakings of management companies and investment firms that wish to benefit from the exemptions in Article 12(4) and 12(5) which are:

Declaration to the competent authority

634. CESR considers that in circumstances where a parent undertaking intends to use the exemption in respect of an investment firm or management company within the scope of Article 23(6), it should declare to the competent authority of the Transparency Directive, i.e. the competent authority of the issuer of the shares that it intends to use the exemption, in order that the competent authority knows who wants to make use of the exemption.

635. The content of this declaration and the procedure should be the same as that established for the parent undertaking of EU registered management companies and investment firms as discussed in section 6 of chapter 1.

636. Although CESR did not ask any specific questions abut the above proposals, it is clear from the responses that these were supported. CESR therefore proposes to include the above as part of the explanatory text that it gives to the Commission.

C. Changes to the draft advice as a result of the consultation

637. In addition to the discussion above, there were a number of drafting comments that were made, which CESR agrees with. Some of these relate to comments made abut the advice in this section, some relate to comments made about the test of independence for management companies and investment firms discussed in Section 6 of Chapter 1.

638. Consultees asked CESR to confirm that the following provisions that apply for EU incorporated entities, also apply to 3rd country incorporated entities:

a) that the exemption applied when the where the exercise of voting rights is delegated to a third party provided that the third party exercises the voting rights independently from the parent undertaking

b) That the exemption applies in relation to the financial instruments under Article 13.

639. This has been included in the revised draft advice below.

640. For ease of reference, drafting changes are highlighted in old, and the explanation of these changes are in italics.

REVISED DRAFT TECHNICAL ADVICE

641. Provided that the following are met, the parent undertaking of a management company or investment firm registered in a third country is not required to notify its aggregated holdings with the holdings managed by its undertakings if:

a) the management company or investment firm is free to exercise the **voting** rights attached to the assets it manages in all situations

b) the management company or investment firm has to disregard the interests of the

parent undertaking and any other party whenever conflicts of interest arise;

c) the parent undertaking must be able to demonstrate on request that the organizational structures of the parent undertaking and the management company or investment firm are such that the voting rights are exercised independently; and

d) the parent undertaking must be able to demonstrate on request that the persons who decides how the voting rights are to be exercised are not the same for the parent undertaking and the management company or investment firm and that these act independently from one another.

642. The drafting change in 641 (a) reflects concerns raised about the ability to exercise rights attached to assets, which should be restricted to the ability to exercise voting rights, as discussed in section 6.

643. In addition to the above, it is important to point out that in order to benefit from the exemption, the parent undertaking of a management company or investment firm registered in a third country will be required to follow the same declaration procedure as that established for parent undertakings of management companies and investment firms registered in the EU that wish to benefit from the exemptions in Articles 12(4) and 12(5).

Declaration to the competent authority

644. CESR considers that in circumstances where a parent undertaking intends to use the exemption, it should make a declaration to the competent authority of the Transparency Directive. **This declaration only needs to be made once and does not need to be made on an issuer by issuer basis.**

645. The declaration shall have the following content:

a) A statement from the parent undertaking to the competent authority as defined under the Transparency Directive that it does not interfere in any way in the exercise of the voting rights held by the management company or investment firm;
b) A statement from the parent undertaking that it can demonstrate that its management companies or investment firms exercise the voting rights attached to the assets that they manage independently from it;
c) The names of the parent undertaking's subsidiary management companies or investment firms. The parent undertaking will have an ongoing obligation to update the list of the management companies or investment firms in case of any change in the list (e.g. when a new management company or investment firms is established or ceases to exist).

646. The Parent undertaking can chose:

(i) either to submit the declaration at the start of the implementation of the Transparency Directive; or

(ii) to submit the declaration whenever they want to make use of the exemption

The notion of indirect instructions

647. Direct instructions are the instructions given by the parent undertaking or other controlled companies to the management company or investment firm and specify how the voting rights shall be exercised in particular cases (particular shareholders' meetings, particular voting and particular issues). **Indirect instructions are any instruction regardless of the form even if general that limits the discretion of the management company or investment firm in relation to the exercise of the voting rights in order to serve specific interests of the parent undertaking or another controlled undertaking of the parent undertaking.**

The exemptions in relation to financial instruments (as determined by Article 13)

648. In order for the parent undertaking to be able to benefit from the exemption in relation to financial instruments, it has to make the declaration to the competent authority of the issuer of the relevant underlying shares but only include the information contained in paragraph 645 c) above. It must also comply with the requirements set out in paragraphs 646 above.

649. If the parent undertaking wants to benefit from the exemption from the requirement to notify aggregated holdings under Article 9, 10 and 13, it can if it chooses submit a single declaration to the relevant competent authority.

Use of third parties to exercise voting rights

650. The provisions of Articles 12(4) and 12(5) also apply in cases where the exercise of the voting rights is delegated by the management company or investment firm under the relevant requirements of the UCITS Directive and MiFID as applicable, to a third party provided that the third party exercises the voting rights independently from the parent undertaking of the management company or investment firm.

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

(Article 19(4) of Transparency Directive – home Member State control)

Extract from the mandate from the European Commission to CESR

DG Internal Market requests CESR to provide technical advice on possible implementing measures on the procedural arrangements in accordance with which an issuer may elect its "Home Member State" under Article 2(1) (i) (ii).

In this respect, CESR is invited to notably consider the following issues: (a) coordination of filings between the competent authority elected by the issuer under Article 2(1) (i) (ii) and several competent authorities elected under the Prospectus Directive and (b) applicable regime in case of delisting from the regulated market of the Home Member State whilst continuing being listed in other Member States.

Extract from Level 1 texts

The above mandate deals with the practicalities of how an issuer elects its home Member State for the purposes of the Transparency Directive Under Article 2(1)(i)(ii): *"for any issuer not covered by (i), the Member State chosen by the issuer from among the Member State in which the issuer has its registered office and those Member States which have admitted its securities to trading on a regulated market on their territory. The issuer may choose only one Member State as its home Member State. Such choice shall remain valid for at least three years unless its securities are no longer admitted to trading on any regulated market in the European Union;"*

Introduction

651. CESR has been mandated to give advice in relation to procedural arrangements related to the Home Member State (Article 2(3)b) and the competent authority (Article 19(4))

652. CESR is not proposing any changes to its advice in this section. However it is asking an additional question. The advice is therefore not changed as a result of the first consultation.

653. There are two issues in relation to this matter that the Commission has asked CESR to consider:

- coordination of filings between the competent authority elected by the issuer under Article 2(1) (i) (ii) and several competent authorities elected under the Prospectus Directive; and
- applicable regime in case of delisting from the regulated market of the home Member State whilst continuing being listed in other Member States.

654. In establishing its advice, CESR considered the following in relation to the above mandate:

a) Why is the advice necessary and what is its purpose?
b) Possible options.

Discussion

Coordination of filings between the competent authorities elected by the issuer under Article 2(1) (i) (ii) and several competent authorities elected under the Prospectus Directive

Why is the advice necessary?

655. The advice is necessary because the issuer's home competent authority under the Prospectus Directive and its home competent authority under the Transparency Directive will not in all circumstances be the same.

656. As such, although each Directive sets out the nature of the filings that the issuer has to make to its home competent authority, there needs to be some form of communication between these different competent authorities' because of the linkages between these two Directives.

657. It is envisaged that under the provisions of Articles 17 and 18 of the Transparency Directive, it will be necessary for the home competent authority of the issuers under the Transparency Directive to ensure that information filed with the competent authority's under the Prospectus Directive is to be made easily accessible which can be achieved through the central storage mechanism.

658. Under the Prospectus Directive – this information will be the Prospectus (and any supplements to it under Article 16 of the Prospectus Directive) and the notifications under Article 10(1) of the Prospectus Directive.

659. For this reasons, CESR has been mandated to advise how the filing of the same information under 2 different Directives is to be co-ordinated.

Proposal:

660. As the issuer is the one who is the originator of the information, the information goes to the Prospectus Directive competent authorities (in order to meet the Prospectus Directive obligations), and also gets made available to the central storage mechanism. CESR expects, anyway, that competent authorities will be granted easy and unrestrictive access to the storage mechanisms set up at national level, therefore allowing for a better coordination. How this will work will depend upon how the goal of easy access for investors to this information is achieved.

Applicable regime in case of delisting from the regulated market of the home Member State whilst continuing being listed in other Member States.

Why is the advice necessary?

661. This section of the mandates relates to situations where the issuer has its securities admitted to trading on regulated markets in more then one EU jurisdiction; and

i) the issuer's securities are delisted in one or more of these jurisdictions; or

ii) the issuer's securities are no longer traded in the regulated market of the issuer's Home Member States under the Transparency Directive as envisaged under the provisions of Article 2(1)(i)(ii) of the Transparency Directive; or

iii) the issuer can chose another competent authority under the provisions of Article 2(1)(i)(ii) of the Transparency Directive as the three year time limit has expired.

662. On reflection CESR considers that the issuer should make a declaration about its original choice of competent authority for Transparency Directive purposes, because making a notification about a change of home competent authority when there was no original notification about the choice made can be confusing.

Question

Q28 Do you agree with the proposal that an issuer should make a notification when it chooses its competent authority?

DRAFT TECHNICAL ADVICE

663. In relation to all of the above situations, CESR consider that the issuer can elect its home Member State under Article 2(1)(i)(ii) by choosing between those Member States where its securities either remain admitted to trading on a regulated market (in the case of securities having been delisted) or any other Member State where the issuer has its securities admitted to trading on a regulated market.

664. In the case of a change of home Member State, the issuer should make a notification of this change which is to be disclosed to the public in the manner set out by Article 21 so that the market knows who the relevant competent authority for Transparency Directive purposes is.

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