COMMITTEE OF EUROPEAN SECURITIES REGULATORS

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# FREQUENTLY ASKED QUESTIONS REGARDING THE TRANSPARENCY DIRECTIVE: COMMON POSITIONS AGREED BY CESR MEMBERS

*2nd version – updated in October 2009*

## INTRODUCTION - The context and status of this 'Q and A':

**EU legal framework:**
The Transparency Directive 2004/109/EC ("TD") became effective on 20 January 2007. The related Commission's Level 2 Directive 2007/14/EC ("L2D") became effective on 8 March 2008. In addition to the binding Level 1 and Level 2 directives, the Commission has issued a non-binding Recommendation 2007/657/EC on the electronic network of officially appointed mechanisms for central storage of regulated information.

Together the two directives create a common basis for periodic information, major shareholding notifications and dissemination and storage of regulated information. Under the TD, each issuer has only one home Member State whose rules will be applied irrespective in which Member State the issuer's securities are admitted to trading on a regulated market. Pursuant to Article 3 of the TD, the home Member State is allowed to impose more stringent requirements than those laid out in the TD.

**Level 3 work to provide supervisory convergence in day-to-day implementation across the EU and clarity for market participants:**

As a result of the TD and the L2D, the scope for interaction between competent authorities has increased. Because of the EEA-wide applicability of the home Member State rules, it is essential that supervisors achieve convergence across the EU in their approach to handling the day-to-day implementation of the two directives.

**This 'Q and A' publication (Ref. CESR/09-965)** is intended to provide market participants with responses in a quick and efficient manner, to 'everyday' questions which are commonly posed to the CESR secretariat or CESR Members. CESR responses do not contain standards, guidelines or recommendations, and therefore no prior consultation process has been followed. It is CESR's intention to operate in a way that will enable its Members to react quickly and efficiently if any aspect of the common positions published need to be modified or the responses clarified further. The views of the Commission's Services on some of the issues discussed have been sought. However, the Commission's Services note that only the European Court of Justice can give a legally binding interpretation of provisions of EU legislation. Moreover, the views expressed in the paper do not bind the European Commission as an institution, and the Commission would be entitled to take a position different to that set out in this 'Q and A' guide in any future judicial proceedings concerning the relevant provisions.

It should be noted that Article 3 of the TD allows home Member State to impose additional or more stringent requirements. These agreed common positions reflect the practical implementation of the provisions of the TD and the L2D. Additional or more stringent national requirements have been highlighted in footnotes to answers.

This document will be updated regularly. After each question an indication of the date of its first publication (or latest amendment) has been included to ease the identification of the new Q&A.

**The CESR group meets regularly to discuss the questions that have been raised by competent authorities and market participants. Market participants that have identified a question of general importance, may send it directly to the relevant competent authority they deal with or to the CESR secretariat (vkajala@cesr.eu). Furthermore, CESR would welcome feedback from market participants on those issues already identified in the document as common positions among its members. The frequency of the future publications will depend on the number of new questions identified and the time it takes to analyze the issues raised and to find common positions.**

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| **1. Determination of the home Member State for 3rd country issuers in case of delisting and admission to trading in another member state** | **TD Art. 2(1)(i) and 21(3)** | **October 2009** |

Q: Company A is a third country issuer whose shares are admitted to trading on a regulated market of one Member State (MS1). Company A is delisting from the regulated market of MS1 and applying for admission to trading on a regulated market of another Member State (MS2).

Pursuant to the definition of the home Member State given by the TD, MS1 is the home Member State and the competent authority of MS1 is the home competent authority, since the issuer is required to file the annual information document (Art. 10 of the Prospectus Directive 2003/71/EC) with this authority.

Once the securities have been delisted from the regulated market of MS1 and admitted to trading in MS2, and since Art. 10 of the PD is silent on this, MS1 will remain the Home Member State and all regulated information (periodic information, major shareholdings notification and price sensitive information) will still have to be filed with the competent authority of MS1 although the securities will not be traded anymore in MS1 but in MS2.

Is it possible to change the home Member State of company A from MS1 to MS2 in the above situation?

*Although CESR considered that it would seem logical to change the home Member State in the above situation, it was acknowledged that Article 2(1)(i) of the TD does not allow the change of home Member State for third country share issuers. CESR considered the current situation unsatisfactory in this regard. The Commission Services informed that in the review of the Prospectus Directive (PD) the European Commission has proposed the deletion of Article 10 of the PD. If the article will be deleted, the home Member State provisions in the TD would also be affected. A satisfactory solution to the problem could therefore be found in connection with the PD review.*

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| **2. Additional information in annual and half yearly financial reports** | **TD Art. 4–5** | **April 2009** |

Q: Should issuers be allowed to include additional elements in the annual and half yearly financial reports, other than those required in articles 4 and 5 of the Directive (such as key figures, chief executive's statement, news, financial calendar etc)?

*A: Additional information in annual and half yearly financial reports is allowed as long as it does not render the information misleading.*

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| **3. Interim management statements (IMS) – purpose of an IMS** | **TD Art. 6** | **October 2009** |

Q: What is the purpose of an IMS?

*A: More timely and reliable information about the performance of an issuer of shares on a regulated market during the financial year requires a higher frequency of interim information. The TD requires issuers of shares to produce two IMS, one each within the two periods of six months either side of the half year in order to provide information in the periods between the half-year and annual financial reports. However, those issuers who publish quarterly financial reports, under either national*

*legislation or the rules of the regulated market or on their own initiative in accordance with such legislation or rules, are not required to publish an IMS.*

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| **4.** | **Interim management statements (IMS) – material events and transactions** | **TD Art. 6** | **October 2009** |

Q: What is a 'material' event or transaction?

*A: Material events would include any announcements made previously under directive 2003/124/EC[1] Article 1, which outlines the definition of inside information and the timescales for announcing such information publicly, as any news that was 'price sensitive' under this definition would also be deemed material under the TD. They may also include news or details that may reasonably be expected to affect investment decisions that investors make regarding the issuer. For example, they may include the addition or loss of a large customer (or contract), a significant falling or rising of sales, a merger agreement, financial results above or below expectations, a change in the issuer's dividend policy etc (this is not an exhaustive list).*

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| **5.** | **Interim management statements (IMS) – financial data in an IMS** | **TD Art. 6** | **October 2009** |

Q: Should financial data be employed in an IMS?

*A: The IMS was designed to be primarily a narrative document, and was implemented as an alternative to requiring quarterly financial statements. The intention was, therefore, that financial data would not be a requirement; however it is for the issuer to decide for themselves how to comply with their obligations. So long as the IMS meets the requirements there is no stipulation as to what information should be employed[2]. Depending on the nature, scale and complexity of the issuer, financial data may be used in order to meet the issuer's obligations under Article 6.*

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| **6.** | **Interim management statements (IMS) – description of financial position and financial performance** | **TD Art. 6** | **October 2009** |

Q; How can an issuer describe their financial position or financial performance?

*A: In terms of financial position issuers could include information (either narrative or numerical, see question 5) on their balance sheet, gearing, assets, liabilities, debt ratios, dividend yield, etc. In terms of financial performance it may also be useful to discuss key performance indicators (KPIs) such as like-for-like sales, revenues, order books, production, etc. As these are often sector-specific in nature they may provide valuable frames of reference for investors. However issuers choose to describe the financial position they should be careful that they are consistent in the information they employ. They should ensure that there is sufficient comparison either with previous IMS, or with other periodic financial information, such that the investor is able to effectively assess this information.*

[1] Implementing Directive 2003/6/EC of the European Parliament and of the Council as regards the definition and public disclosure of inside information and the definition of market manipulation.
[2] The CMVM notes that in Portugal it is required to provide financial data within the IMS.

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| **7. Interim management statements (IMS) – delaying disclosure of inside information** | **TD Art. 6; MAD Art. 6[3]** | **October 2009** |

Q: Is it possible to delay announcements in order to publish inside information within a planned IMS?

*A: An approaching IMS does not exempt issuers from their continuing obligations; therefore issuers are reminded that it is not acceptable practice to delay the announcement of inside information in order for this to be announced within a forthcoming IMS, unless the issuer has a legitimate interest to delay the disclosure of the inside information and fulfils the requirements laid down in Article 6(2) of the Market Abuse Directive. Such delay in releasing inside information could lead to formal investigation as a potential breach under market abuse legislation of the Member State.*

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| **8. Interim management statements (IMS) – disclosure requirements where no material events have taken place** | **TD Art. 6** | **October 2009** |

Q: If no material events have occurred within the period is the issuer required to state this?

*A: Should there have been no material events in the relevant period, there would appear to be no obligation on the issuer to make any comment to this effect, as Article 6 states that an explanation should be provided for those events and transactions that have taken place. However, this does not discharge the issuer's obligation to announce an IMS, as they would still need to provide commentary on their financial position and financial performance during the period.*

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| **9. Interim management statements (IMS) – requirement to provide information up to the date of publication of the IMS** | **TD Art. 6** | **October 2009** |

Q; How should the issuer comply with the obligation to provide information up to the date of publication of the IMS?

*A: Issuers must consider how best to achieve this based on the nature of their IMS. If an issuer is primarily employing financial data it may be difficult for accurate figures to be available at the date of publication, therefore it may be helpful for them to provide a narrative description of whether this has materially changed in the intervening period prior to publication. If producing a purely narrative-based IMS this obligation may be less difficult comply with.*

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| **10. Class by class disclosure** | **TD Art. 9(1)** | **April 2009** |

Q: Pursuant to Article 9(1) of the TD "*[t]he voting rights shall be calculated on the basis of all the shares to which voting rights are attached even if the exercise thereof is suspended.* ***Moreover this information shall also be given in respect of all the shares which are in the same class and to which voting rights are attached****."*

[3] Directive 2003/6/EC of the European Parliament and of the Council on insider dealing and market manipulation (market abuse).

Is the provision concerning "class by class disclosure" an autonomous obligation? In other words, must a notification be made when the person reaches, exceeds or falls below the relevant thresholds in terms of a single class of shares (e.g. ordinary shares) calculated on the basis of all shares of that class issued, or it is only an additional disclosure requirement which arises **only** in the case in which an obligation of notification is met in terms of **all** the shares with voting rights held calculated on the basis on all the voting share issued?

*A: The calculation of notification thresholds will be made on the basis of all the shares with voting rights attached. The class by class disclosure is therefore not considered as basis for calculation of thresholds but only as an additional disclosure requirement in cases where the notification obligation has arisen.*

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| **11. Major shareholding notification – acquisition of a shareholder** | **TD Art. 9(1)** | **October 2009** |

Q: Company A is a major shareholder in an issuer X whose shares are admitted to trading on a regulated market. Company B, which previously does not hold any shares or voting rights in X, acquires control in company A. Should B notify its holdings in issuer X even though the holdings of A in issuer X remain the same?

*A: As B indirectly acquires voting rights of issuer X, it has to notify its holdings in X. As required by Article 12(1) of the TD, the chain of controlled undertakings through which voting rights are effectively held, must be disclosed in the notification.*

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| **12. Disclosure of major holdings in case of joint investors' account** | **TD Art. 9 and 10** | **October 2009** |

Q: Shall the owners of a joint investors' account (an account for two persons that are considered co-owners of the securities contained in the joint account), in order to calculate their thresholds, aggregate the proportion of voting rights attached to their personal accounts to the proportion of voting rights attached to the shares of the joint account? How do these persons notify their participation to the joint account?

*A: CESR notes that legal implications of a joint account vary among Member States, since the issue is also linked with national civil law. Therefore, there are different requirements in the Member States, such as:*

- *a) voting rights held in a joint account have to be aggregated to voting rights held in individual accounts in full and both owners of the joint account are to disclose their holdings in full;*
- *b) the notification requirement depends on the terms of the account or agreements relating to the use of voting rights; or*
- *c) holdings in joint account are aggregated to voting rights held in individual account only in proportion to the ownership.*

*In any case, attention has to paid to whether the owners of the joint account have adopted, by concerted exercise of voting rights, a lasting common policy towards the management of the issuer in question (Art. 10 (a) of the TD).*

*Whenever an obligation to notify holdings arises, the person(s) making the notification should distinguish the holdings in the notification.*

| 13. Netting of long and short positions | TD Art. 13 | April 2009 |
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Q: A person holds a long derivative position (i.e. it has bought a call whose underlying shares have voting rights attached representing 6% of the issuer's voting rights) and at the same time it holds a short position (i.e. it has bought a put whose underlying shares have voting rights attached representing 3%). The conditions of both instruments are similar (strike price and maturity). Should the long position be notified?

*A: CESR considers that the long position should be notified, and that netting of long and short positions is not allowed.*

| 14. Aggregation of financial instruments | TD Art. 13 | April 2009 |
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Q: Bank A buys warrants in order to hold them in the trading book. These warrants can be considered as financial instruments within the meaning of Article 13(1) of the TD. Should Bank A aggregate the warrants to other financial instruments (giving the right to acquire shares of Z with voting rights attached) to calculate if they have reached any threshold?

*A: Provided that the trading book exemption in article 9.6 of the TD cannot be applied, if Bank A buys these warrants it should aggregate them to other financial instruments within the meaning of Article 13(1) of the TD.*[4]

| 15. The requirement to make regulated information public | TD Art. 21(1) | April 2009 |
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Q1: Is the obligation to make regulated information (as defined in Article 2(1)(k) of the TD) public fulfilled if the issuer only discloses the regulated information *in a manner ensuring fast access to such information on a non-discriminatory basis,* or must the issuer also *disseminate* the information *throughout the Community?*

*A1: The Articles in the TD which impose an obligation to the issuer to make public regulated information (e.g. Articles 4, 5, 6, 12(6) …) have to be read together with Article 21(1) providing an interpretation for the phrase 'make public'. The requirement to make regulated information public is fulfilled when the information is disclosed by dissemination in accordance with Article 21 of the TD and Article 12 of the L2D. In some Member states, competent authorities have issued additional rules/guidance on the modalities under which regulated information has to be made public.*

Q2: Does making the regulated information available to the OAM meet the criteria of making regulated information public?

*A2: No. Making regulated information available by filing it with the OAM does not meet the criteria of making regulated information public. The OAM is in charge of the storage of regulated information. The storage of regulated information (filing with the OAM) and making public regulated information are two separate obligations imposed on the issuer.*

[4] The AMF notes that in France the discussion in relation to this question is ongoing. Therefore, France has not given its position at this stage.

| 16. Responsibilities of the host Member State | TD Art. 21(3) | April 2009 |
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Q: According to Article 21(3) of the TD the host MS shall ensure disclosure of regulated information in accordance with Article 21(1) of the TD if the securities are only admitted to trading in the host MS. In this case the dissemination of the regulated information will be done under the legal regime of the host MS. Article 19(1) of the TD demands that an issuer who discloses regulated information files that information with the Competent Authority in its home MS. Since the home MS necessarily differs from the host MS (cf. to Art. 2(1)(i) and (j) of the TD) the CA of the host MS may not know that the issuer is required to disclose/has disclosed certain information and which particular information has to be disclosed/has been disclosed. How can the CA of the host MS ensure that the issuers fulfil their obligations in these cases?

*A: According to the TD, in case the securities are not admitted to trading in their home Member State, the applicable regime depends on the number of host Member States where the securities have been admitted to trading:*

| *Securities admitted to trading* | *Rules on dissemination* | *Who does the enforcement?* |
|---|---|---|
| *Only in one host MS* | *Those of the host MS* | *The host CA* |
| *In several host MSs* | *Those of the home MS* | *The home CA* |

*Some CESR Members informed that their Member States have implemented a solution in their national legislation where the issuer has an obligation to file all regulated information also with the host CA. In other Member States the Competent Authorities involved agree on a case by case basis on how to apply Article 21(3) of the TD.*[5]

| 17. Dissemination of regulated information | L2D Art. 12 | October 2009 |
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Q: Many issuers use service providers for the dissemination of regulated information. In some Member States, these service providers are required to be approved by the competent authority, whereas in other Member States such authorisation is not required.

Article 12 of the L2D sets the minimum standards for the dissemination of regulated information in order to "ensure that investors, even if situated in a Member State other than that of the issuer, have equal access to regulated information" (first sentence of recital 16 of the L2D). Pursuant to Article 12(4) of the L2D "the issuer (…) shall not be responsible for systemic errors or shortcomings in the media to which the regulated information has been communicated."

When the issuer uses a service provider for dissemination of regulated information, will the service provider be covered by the definition of media? If not, what kind of recovery procedures for system failures should a service provider have in order to ensure the dissemination of regulated information in a manner ensuring fast access to such information on a non-discriminatory basis as required by article 21(1) of the TD?

*A: The second sentence of recital 16 of the L2D states: "Issuers should ensure that those minimum standards [for the dissemination of regulated information] are met, whether by disseminating the*

[5] The CNMV notes that in Spain these case by case agreements are necessary because the Spanish Securities Market Act does not explicitly provide for the situation where securities are admitted to trading in only one host Member State other than the home Member State. Although there is a presumption for the application of the home State general regime on the dissemination rules and its enforcement, nothing in the Spanish applicable regime prevents from the dissemination of information also to the host CA.

*regulated information by themselves or by entrusting a third party to do so on their behalf." Therefore, a service provider cannot be considered being covered by the exemption of article 12(4) of the L2D.*

*CESR considers that the issuer is ultimately legally responsible for ensuring that its obligations under Article 21 of the TD are met. Therefore, their responsibilities in relation to dissemination are only met when information reaches the media, even if a service provider is used.*[6]

*In its Level 2 Advice (ref. CESR/05-407) CESR has set out standards for issuers using a service provider. CESR considers that whenever issuers make use of service providers to meet their obligations under Article 21 of the TD, the issuers should ensure that the service provider meets the requirements set out in paragraphs 47–59 of the Level 2 Advice. Pursuant to these standards, the recovery service of a service provider must be available during the operational hours of the service provider (i.e. 24 hours a day, seven days a week) in order to ensure the timely receipt and dissemination of regulated information to media.*

[6] Paragraph 9 of CESR's advice (ref. CESR/05-407).