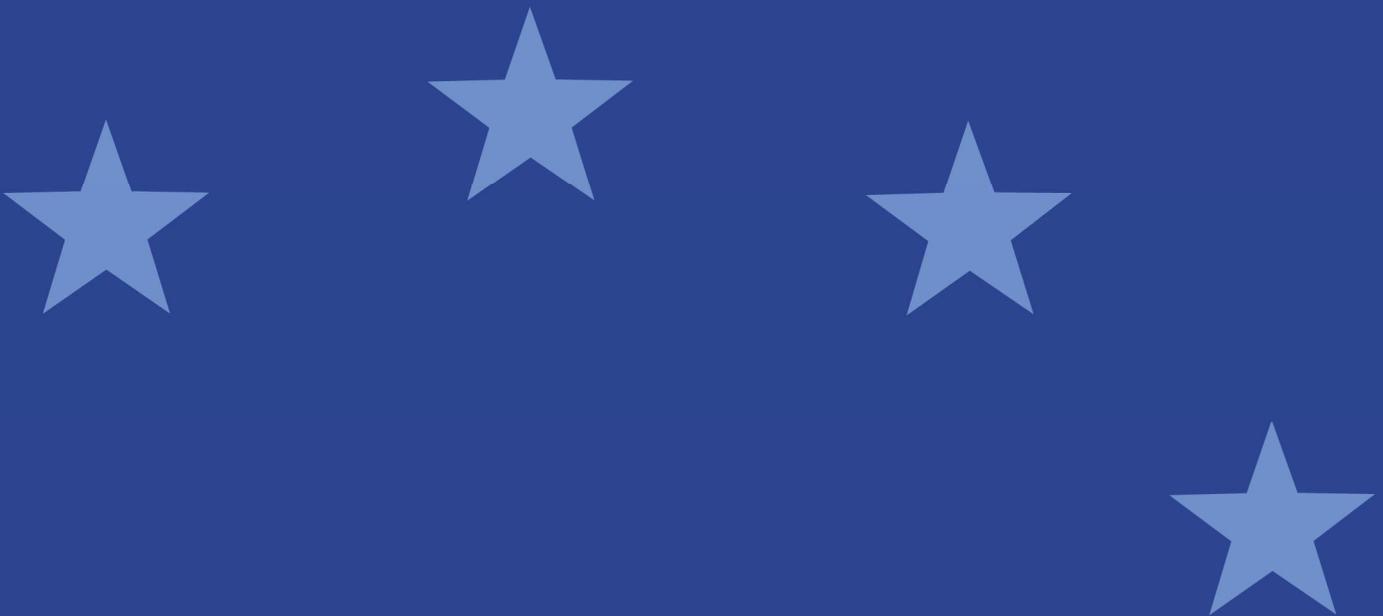




European Securities and  
Markets Authority

# Questions and answers

Transparency Directive (2004/109/EC)





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## I. Background

1. The Transparency Directive (TD)<sup>1</sup> created 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.
2. TD framework is made up of the following European Directives and Recommendation:
  - a. Directive 2004/109/EC, which was adopted in December 2004. It is a 'framework' Level 1 Directive which has been supplemented by technical implementing measures (see the Level 2 legislation in b. below).
  - b. Implementing Directive 2007/14/EC<sup>2</sup> (L2D).
  - c. Commission Recommendation 2007/657/EC.<sup>3</sup>
3. ESMA plays an active role in building a common supervisory culture by promoting common supervisory approaches and practices, and will continue to develop Q&As as and when appropriate.
4. This builds on the work done by ESMA's predecessor (CESR), which produced a series of questions and answers (Q&A) based on questions received through CESR's TD Q&A mechanism. The Q&As reflected common positions agreed by CESR Members. They were one of the tools used by CESR to elaborate on the provisions of certain EU legislation, thereby fostering supervisory convergence.

## II. Purpose

5. The purpose of this document is to promote common supervisory approaches and practices in the application of TD and its implementing measures. It does this by providing responses to questions posed by the general public and competent authorities in relation to the practical application of the TD.
6. The content of this document is aimed at competent authorities under TD to ensure that in their supervisory activities their actions are converging along the lines of the responses adopted by ESMA. However, these responses are also meant to give issuers and market participants indications as to good implementation of TD rules. The answers are intended to help issuers and market participants by providing clarity as to the content of the TD requirements, rather than creating an extra layer of requirements on them.

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<sup>1</sup> Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC, OJ L 390/38.

<sup>2</sup> Commission Directive 2007/14/EC of 8 March 2007 laying down detailed rules for the implementation of certain provisions of Directive 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market, OJ L 69/27.

<sup>3</sup> Commission Recommendation 2007/657/EC of 11 October 2007 on the electronic network of officially appointed mechanisms for the central storage of regulated information referred to in Directive 2004/109/EC of the European Parliament and the Council, OJ L 267/16.



### III. Status

7. The Q&A mechanism is a practical convergence tool used to promote common supervisory approaches and practices under Article 29(2) of the ESMA Regulation.<sup>4</sup>
8. Therefore, due to the nature of Q&As, formal consultation on the draft answers is considered unnecessary. However, even if they are not formally consulted on, ESMA may check them with representatives of ESMA's Securities and Markets Stakeholder Group, the relevant Standing Committees' Consultative Working Group or, where specific expertise is needed, with other external parties.
9. ESMA will review these questions and answers to identify if, in a certain area, there is a need to convert some of the material into ESMA guidelines and recommendations. In such cases, ESMA Regulation Article 16 procedures will be followed.
10. 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.

### IV. Questions and answers

11. CESR published its first TD Q&As in May 2009 and last updated them in October 2009. This document endorses the Q&As previously adopted by CESR<sup>5</sup>, adds one Q&A and updates one answer. It is intended to continually edit and update the Q&As as and when new questions are received. The date each question was last amended is included after each question for ease of reference.
12. Questions on the practical application of any of the TD requirements may be sent to the following email address at ESMA: [info@esma.europa.eu](mailto:info@esma.europa.eu).

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<sup>4</sup> Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC Regulation, 15.12.2010, L331/84.

<sup>5</sup> On the basis of Article 8(4) of the Rules of Procedure of the ESMA Board of Supervisors (ESMA/2011/BS/1), guidelines, recommendations, standards and any other Level 3 material issued by CESR continue in force until such time as they are readopted, replaced or revoked, having the status provided for under the Charter of the Committee of European Securities Regulators.

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### **Question 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)**

Date last updated: **March 2012 (\*)**

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**Question:** 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?

**Answer:** Before the deletion of the Article 10 of the Prospectus Directive it was acknowledged that Article 2(1)(i) of the TD did not allow the change of home Member State for third country share issuers. ESMA considered that situation unsatisfactory in this regard. A final solution to the problem would therefore be found in connection with the amendments to the Article 2(1)(i) proposed in the TD review.

*(\*) The answer has been marginally updated to reflect the current situation on 30 March 2012*

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### **Question 2: Additional information in annual and half yearly financial reports; TD Art. 4-5**

Date last updated: April 2009

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**Question:** 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.)?

**Answer:** 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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### **Question 3: Interim management statements (IMS) – purpose of an IMS; TD Art. 6**

Date last updated: October 2009

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**Question:** What is the purpose of an IMS?

**Answer:** 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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#### **Question 4: Interim management statements (IMS) – material events and transactions; TD Art. 6**

Date last updated: October 2009

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**Question:** What is a “material” event or transaction?

**Answer:** Material events would include any announcements made previously under directive 2003/124/EC<sup>6</sup> 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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#### **Question 5: Interim management statements (IMS) – financial data in an IMS; TD Art. 6**

Date last updated: October 2009

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**Question:** Should financial data be employed in an IMS?

**Answer:** 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.<sup>7</sup> 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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<sup>6</sup> 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.

<sup>7</sup> The CMVM notes that in Portugal it is required to provide financial data within the IMS.

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## **Question 6: Interim management statements (IMS) – description of financial position and financial performance; TD Art. 6**

Date last updated: October 2009

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**Question:** How can an issuer describe their financial position or financial performance?

**Answer:** 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.

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## **Question 7: Interim management statements (IMS) – delaying disclosure of inside information; TD Art. 6, MAD Art. 6<sup>8</sup>**

Date last updated: October 2009

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

**Answer:** 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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## **Question 8: Interim management statements (IMS) – disclosure requirements where no material events have taken place; TD Art. 6**

Date last updated: October 2009

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

**Answer:** 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

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<sup>8</sup> Directive 2003/6/EC of the European Parliament and of the Council on insider dealing and market manipulation (market abuse).

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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**Question 9: Interim management statements (IMS) – requirement to provide information up to the date of publication of the IMS; TD Art. 6**

Date last updated: October 2009

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**Question:** How should the issuer comply with the obligation to provide information up to the date of publication of the IMS?

**Answer:** 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 to comply with.

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**Question 10: Class by class disclosure; TD Art. 9(1)**

Date last updated: April 2009

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**Question:** 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.**”

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?

**Answer:** 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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**Question 11: Major shareholding notification – acquisition of a shareholder; TD Art. 9(1)**

Date last updated: October 2009

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**Question:** 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?

**Answer:** 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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### **Question 12: Disclosure of major holdings in case of joint investors' account; TD Art. 9 and 10**

Date last updated: October 2009

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**Question:** 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?

**Answer:** ESMA 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 be 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.

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### **Question 13: Netting of long and short positions; TD Art. 13**

Date last updated: April 2009

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**Question:** 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?

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

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#### **Question 14: Aggregation of financial instruments; TD Art. 13**

Date last updated: April 2009

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**Question:** 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?

**Answer:** 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.<sup>9</sup>

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#### **Question 15: Designation of an agent for the exercise of financial rights; TD Art. 17 and 18**

Date last updated: February 2011

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**Question a:** Articles 17 and 18 of the TD require issuers to ensure that all the facilities and information necessary to enable shareholders / debt securities holders to exercise their rights are available in the home Member State. Each issuer is also required to designate as its agent a financial institution through which shareholders / debt securities holders may exercise their financial rights.

Must the issuer appoint as its agent a financial institution domiciled in the home Member State? Or is it sufficient to appoint a financial institution domiciled in another Member State?

**Question b:** Before the TD was adopted, a similar provisions were included in Articles 65(2)(c) and 78(2)(b) of the Directive 2001/34/EC. However, there was an exemption for issuers providing financial services: “In particular, it [the issuer] must: (...) designate as its agent a financial institution through which holders of debt securities may exercise their financial rights, *unless the undertaking itself provides financial services.*”

Does the TD require issuers who are financial institutions to appoint as an agent a financial institution other than itself?

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<sup>9</sup> The AMF notes that in France the discussion in relation to this question is on-going. Therefore, France has not given its position at this stage.

**Answer a:** It is up to the issuer to ensure that facilities to exercise the (financial) rights of holders of shares / debt securities are available in the home Member State. However, the domicile of the agent does not have to be in the home Member State.

**Answer b:** No, issuers who are financial institutions may still appoint themselves as an agent.

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### **Question 16: The requirement to make regulated information public; TD Art. 21(1)**

Date last updated: April 2009

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**Question a:** 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?

**Question b:** Does making the regulated information available to the OAM meet the criteria of making regulated information public?

**Answer a:** 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.

**Answer b:** 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.

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### **Question 17: Responsibilities of the host Member State; TD Art. 21(3)**

Date last updated: April 2009

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**Question:** 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?

**Answer:** 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 CAs 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.<sup>10</sup>

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### Question 18: Dissemination of regulated information; L2D Art. 12

Date last updated: October 2009

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**Question:** 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?

**Answer:** 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 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.

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<sup>10</sup> 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.

ESMA 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.<sup>11</sup>

In its Level 2 Advice (ref. CESR/05-407) ESMA has set out standards for issuers using a service provider. ESMA 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.

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<sup>11</sup> Paragraph 9 of CESR's advice (ref. CESR/05-407).