THE COMMITTEE OF EUROPEAN SECURITIES REGULATORS

Ref.: CESR/04-512c

CESR's advice on possible implementing measures of the Transparency Directive

Part II:

- Notifications of major holdings of voting rights
- Half-yearly financial reports
- Equivalence of third countries information requirements
- Procedural arrangement whereby issuers may elect their 'Home Member State'

December 2004

INTRODUCTION

Background

On 30th 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 11th May 2004 and agreed with the amendments adopted by the Parliament. Formal adoption and translation into the official languages of the Directive is expected to take place later this year.

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.

This 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 requirements** 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. A first progress report is expected from CESR in February 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 decided to publish two separate consultation papers setting out its draft advice and thinking on these different issues (ref CESR/04-511 and CESR/04-512c).

A first consultation paper (ref CESR 04-511), which had been released for public consultation on 28 October 2004 , sets out 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. This first consultation paper also included a draft progress report on the conditions for officially appointed mechanisms for storage of information and on possible electronic networks of information about issuers.

This document is the second consultation paper, presenting 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'

Public consultation

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 have been published on CESR's website (www.cesr-eu.org) and have formed a very helpful source and have assisted greatly in the preparation of this consultation paper.

The public consultation on the present paper will close on Friday 4th March 2005. Responses to the consultation should be sent via CESR's website (www.cesr-eu.org) in the section "Consultations".

A public hearing for this consultation paper will be held in Paris, at CESR premises, on Thursday 17th February 2005 from 14.30 to 17.30. Registration can be made via the CESR website (www.cesr-eu.org) under the section "Hearings".

CESR draws consultees' attention to the fact that references to articles of the Transparency Directive made in this consultation paper are to 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).

Consultees should be aware that the numbering of the article of this Directive is expected to change in further versions of the Directive.

CESR

INDEX

		Paragraphs
Chapter I	**Notifications of major holdings of voting rights**	**1 to 483**
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	2 to 20
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	21 to 55
Section 3	The determination of a calendar of "trading days" for the notification and publication of major shareholdings	56 to 81
Section 4	The determination of who should be required to make the notification in the circumstances set out in article 10 of transparency directive	82 to 155
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	156 to 179
Section 6	The conditions of independence to be complied with by management companies, or by investment firms, and their parent undertakings to benefit from the exemptions in articles 11.3a and 11.3b	180 to 271
Section 7	Standard form to be used by an investor throughout the community when notifuing the required information	272 to 384
Section 8	Financial Instruments	385 to 483
Chapter II	**Half-yearly Financial Reports**	**484 to 525**
Section 1	Minimum content of half-yearly financial statements not prepared in accordance with ias/ifrs	484 to 500
Section 2	Major related parties transactions	501 to 512
Section 3	Auditors' review of half-yearly report	513 to 525
Chapter III	**Equivalence of transparency requirements for Third countries issuers**	**526 to 623**
Section 1	Equivalence as regards issuers	526 to 595
Section 2	Equivalence in relation to the test of independence for parent undertakings of investment firms and management companies	596 to 623
Chapter IV	**Procedural arrangements for election of "Home Member State"**	**624 to 635**

CESR

CHAPTER 1 - NOTIFICATIONS OF MAJOR HOLDINGS OF VOTING RIGHTS

(*Section I of Chapter III of the Transparency Directive – Information about major holdings – art. 9 to 12)*

1. The European Commission's mandate requested CESR to provide a technical advice for implementing measures on the following eight issues related to the requirements set out by the Transparency Directive for information about major holdings of voting rights:

   (i) The maximum length of "the usual short settlement cycle" to which reference is made in Article 9(3a) 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(3b);

   (iii) To determine a calendar of "trading days" for all Member States for notification purposes under Article 11(5);

   (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 11(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 11.3a and 11.3b;

   (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 11a(a); 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(3a) 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

2. Under the provisions of the Transparency Directive, the notification period for major shareholding transactions will be shortened from the existing timeframes set out in articles 89.1 and 91 of Directive 2001/34/EC of 28 May 2001 on the admission of securities to official stock exchange listing and on information to be published on those securities.

3. Under the existing provisions, the notification to the issuer and the competent authority and the subsequent disclosure of this to the market may take up to 16 calendar days. Under the provisions of the Transparency Directive this timeframe will be significantly reduced.

4. One of the important issues is to know whether shares and other financial instruments acquired for the sole purpose of clearing and settlement have to be notified.

5. Article 9(3a) of the Transparency Directive, makes reference to a "usual short settlement cycle" and CESR has been mandated to provide technical advice to the Commission about:

   a) what the maximum length of the "usual short settlement cycle" to which reference is made in Article 9(3a) in the case of both shares and financial instruments that are traded on both the regulated market and outside the regulated market; and

   b) whether or not the "T+3 principle" that is used in the field of clearing and settlement is appropriate in determining what the "usual short settlement cycle" should be.

DISCUSSION

The objective of the provision

6. Article 9(3a) 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:

CESR

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.

7. CESR considers that in the circumstances described above, no notification requirement is triggered because the shares are not being used to control the company in any way.

8. In establishing what the short settlement cycle should be, CESR first considered what circumstances will be covered by this exemption. For this, CESR has analysed:

   a) what clearing and settling means, in the context of the above mentioned provision; and

   b) whether or not the same principle applied to shares traded on a regulated market should also apply to the same shares if traded outside a regulated market; and

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

9. In addition, CESR took 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[1].

10. After considering these aspects, CESR questioned what should, under the described circumstances, be considered as the "usual short settlement cycle".

<u>(a) What clearing and settlement means</u>

11. 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."[2]

   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:

---

[1] IOSCO, Recommendations for securities settlements, Nov. 2001;- Communication of the Europeancommission 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

"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."

12. 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.

13. 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(3a), 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;

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.

<u>(b) Whether or not the same principal applied to shares traded on a regulated market should also apply to shares traded outside a regulated market</u>

14. If the shares are admitted to trading on a regulated market, they may also be traded outside the regulated market. CESR has been asked to consider whether the T+3 principle in the field of clearing and settlement also applies to such trading.

15. 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.

16. CESR advice does not intend that the clearing and settlement procedures should be aligned in both regulated and outside regulated market, but only means that when the exemption is to be used, this timeframe must be followed.

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

17. In the mandate CESR is asked to define the maximum length of the "short settlement cycle" with reference to shares and financial instruments traded in or outside regulated markets.

18. This is because acquisitions or disposals of certain financial instruments are deemed relevant for the purposes of Articles 9 and 10 of Transparency Directive. So, when Article 11of this Directive a 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 11a.

19. CESR believes that the same principles applicable to shares should apply to other financial instruments relevant under Article 11a.

DRAFT TECHNICAL ADVICE

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

QUESTIONS
Q1 Do you agree that, considering the definitions already set out by other bodies, CESR does not need to define what clearing and settlement means for the purpose of the exemption under Article 9(3a) of the Transparency Directive?
Q2 Do you agree with the proposed technical advice? If not, please provide reasons for your answer and state what period of time you consider to be appropriate for these purposes and why.
Q3 Do you consider that "short settlement cycle" can mean the same in relation to shares or other financial instruments, or are there, in your view, circumstances that should make CESR differentiate shares from other financial instruments? Please provide reasons for your answer.

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(3b) 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

21. A market maker is defined, under the Transparency Directive, as "a person who holds himself out in the financial markets on a continuous basis as being willing to deal on own account by buying and selling financial instruments against his proprietary capital at prices defined by him" (Article 2(1)(la))[3].

22. The Transparency Directive has granted market makers a limited exemption from the obligation to disclose major holdings. This exemption is limited to the 5% threshold, which is a significant one for a market maker acting as such. At Level 1 the exemption is given on the basis that the market maker is acting as such and therefore does not:

a) intend to intervene in the management of the company; or

b) exert any influence on the issuer to buy such shares or back the share price.

23. CESR is asked to provide the European Commission with advice relating to what control mechanisms should be established for market makers that want to benefit from the exemption.

24. These control mechanisms will have to meet the requirements of Article 9(3b) 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(3b));

[3] The MIFID contains a similar definition (Article 4/8).

CESR

b) that the market maker is authorised by its home Member State competent authority under MiFID to act as an investment firm (Article 9(3b)(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(3b)(b)).

DISCUSSION

25. In order to establish what the appropriate mechanism should be CESR first needs to establish what each of the above requirements mean.

a) acting in the capacity of a market maker

26. A market maker is defined under Article 2.1 as:
"“market maker” means a person who holds himself out on the financial markets on a continuous basis as being willing to deal on own account by buying and selling financial instruments against his proprietary capital at prices defined by him;"

27. Acting in the capacity of a market maker means that the market maker is acting as a market maker as defined above.

b) that the market maker is authorised by its home Member State competent authority under MiFID to act as an investment firm

28. This part of the requirement requires that the market maker has been authorised under MIFID. On a detailed analysis of MiFID, it is clear that there is no specific authorisation for market making activity. MiFID authorises investment firms to conduct a number of activities, one of which is “dealing on own account”, which CESR interprets for Transparency Directive purposes to include market making.

29. CESR considers it important to note that this activity is completely different from the activities of a credit institution or investment firms to which reference is made in Article 9(3c) of the Transparency Directive.

30. MiFID sets out a number of requirements that have to be complied with in order to be authorised as an investment firm.

31. In accordance with MIiID, competent authorities shall implement appropriate methods to monitor that investment firms comply with the requirements applicable on authorisation (Article 16(2)) to be an investment firm and assess compliance with the operating conditions under which they were granted the authorisation as well as the ongoing operating conditions provided for under MIFID.

32. Therefore, according to MiFID, competent authorities will have to implement methods to supervise compliance with the rules established under that Directive but these control mechanisms do not deal with the issue of whether or not the investment firm is meeting the requirements of the limited exemption set out in Article 9(3b) of the Transparency Directive.

33. Therefore CESR considers it necessary to establish some form of control mechanism for Transparency Directive purposes.

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.

34. 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 of the management of the issuer

35. There are many different ways in which a market maker could intervene in the management of the company. CESR considers 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.

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

36. 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.

DRAFT TECHNICAL ADVICE

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

37. 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.

38. 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.

39. As such, CESR considers 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.

       CESR considers that the only way an investment firm can conduct a number of different activities at the same time and get the benefit from the exemption is to keep these activities 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 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.

40. 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.

41. 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.

42. 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.

43. 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 20 to obtain information and documents from the investment firm.

QUESTIONS
Q4 What do consultees think of the proposed methods of controlling the market maker activities with regards the exemption provided?
Q5 Do consultees envisage other control mechanisms which could be appropriate for market makers who wish to make use of the exemption?

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

44. 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.

45. 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));

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

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

46. 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.

47. 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

48. CESR considers it important to point out that Member States may impose more restrictive measures that those set out above by exercising its powers under Article 20 of the Transparency Directive.

Who should be the relevant competent authority?

49. 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.

50. There are two possible options: either the competent authority that authorised the investment firm to act as such under the MiFID, or the home competent authority of the issuer of the shares under the Transparency Directive.

51. Under the Transparency Directive, it is the competent authority of the issuer whose shares 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.

52. In addition, under the MiFID, the determination of home competent authority may result in a number of different competent authorities depending on a number of different situations. CESR considers it vital that there is absolute certainty as to which is the competent authority for the purposes of this exemption will be and therefore this is not a viable option.

53. In contrast, under the Transparency Directive, it is clear that there can be only one competent authority as set out in Recital 18 of the Transparency Directive, as such certainty in this respect is guaranteed.

54. 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.

55. In either case 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.

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

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 11(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 11(4):
> 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 11(4a) :
>
> A home Member State may exempt issuers from the requirement in paragraph 4 if the information contained in the notification is made public by its competent authority, under the conditions laid down in Article 17, upon receipt of the notification, but no later than three trading days thereafter.
>
> Article 11(b)
>
> 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

56. The Transparency Directive imposes an obligation on shareholders who acquire or dispose of shares that are admitted to trading on a regulated market and to which voting rights are attached, to notify the issuer of the proportion of voting rights it holds as a result of :

    a) an acquisition or disposal of shares; or

    b) events changing the breakdown of those voting rights.

57. Under the requirements of Article 9 of the Directive, the notification requirement to the issuer is triggered when the percentage of the shareholder's acquisition or disposal results in the

shareholder holding a proportion of voting rights in the issuer that reaches, exceeds or falls below the following thresholds:

5%, 10%, 15%, 20%, 25%, 30% (or one-third), 50%, 75% (or 66%).

58. These notification requirements 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 the circumstances set out in Article 10.

59. The Directive sets out a number of detailed provisions that stipulate the time frame within which these notifications, once triggered, have to be made:

a) Under the requirements of Article 11(2) in both cases, the notification to the issuer has to be made as soon as possible, but <u>no later than four trading days</u> after the shareholder (referred to in Article 9), or the natural person or legal entity (referred to in Article 10) either:

i) learns about the acquisition or the disposal or the possibility to exercise voting rights, or (taking into account the circumstances), should have learnt of the acquisition, disposal or possibility to exercise voting rights, regardless of the date on which the acquisition, disposal or possibility to exercise voting rights takes effect; or

ii) is informed about an event that changes the breakdown of voting rights as set out in Article 9(2).

b) under the requirements of Article 11(4), the issuer has to make public all the information contained in the notification that it receives from the shareholder (referred to in Article 9) or the natural person or legal entity (referred to in Article 10) but <u>no later than three trading days</u> after it receives the notification;

c) under the provisions of Article 11(4a), the issuer's home Member State may exempt the issuer from its publication requirements under Article 11(4) if this information is made public by its competent authority upon receipt of the notification, but <u>no later than three trading days thereafter;</u>

d) under the requirements of Article 11b(1) when an issuer of shares admitted to trading on a regulated market acquires or disposes of its own shares, it has to make public the proportion of its own shares that it has acquired or disposed of as soon as possible, but <u>no later than four trading days</u> following such acquisition or disposal where that proportion reaches, exceeds or falls below the thresholds of 5% or 10% of the voting rights.

60. As can be seen, in all of the 4 requirements set out above, reference is made to "trading days". It is for this reason that CESR has been mandated to establish a calendar of trading days.

<u>DISCUSSION</u>

61. In formulating its advice, CESR has considered a number of issues:

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; and

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

<u>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?</u>

CESR

62. 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.

63. Time requirements are :

D + 4 (four) trading days concerning the notification
(D + 4) + 3 (three) trading days concerning the publication

64. In the above timeframes, "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 of this Consultation Paper).

65. As there is no single calendar of trading days throughout the EU (each Member State has a different one essentially because of different national bank holidays) persons who must notify, issuers and competent authorities need a clear and general rule they can use in order to calculate the time within which the disclosure of these notification requirements has to be made.

66. The creation of 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 (for example, automatic loss of voting rights attached to the shares in excess of the thresholds later notified) and/or penalties.

67. In addition, because there is no standard set of calendar rules across member states, CESR considers it important to create this rule so that no form of calendar arbitrage is possible. However, CESR also needs to take into account that some shareholders intentionally delay their disclosures for as long as possible for strategic reasons (for example, if they want to take over a listed company, they may want to keep their business development strategy secret for as long as possible).

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

68. Several options are set out below :

Calendar of the location where the trade takes place:

69. *This criterion introduces the issue of the determination of the trading place, especially when a transaction is not executed on a regulated market but outside the stock exchange.*

70. *Often, this is the location where the agreement between the parties, regarding the number of shares traded and the price of transaction, takes place. However, this location could vary depending upon the private laws of the countries in which the shareholders are located.*

71. *CESR therefore considers that there are 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:

72. 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.

73. 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.

CESR

Calendar of the state where the shareholder is located

74. 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.

75. CESR therefore does not consider this to be a viable option.

Calendar of trading days of issuer's home Member State

76. This seems to be 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.

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

78. 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.

DRAFT TECHNICAL ADVICE

79. 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 11, CESR considers that the best option is to use the calendar of trading days of the issuers' home Member State.

80. In addition, CESR considers that it is prudent for the competent authority to publish which calendar applies to its regulated markets.

81. 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;

b) issuers' Home Member State. Each Member State could draw up a list of issuers it controls (admitted on its regulated markets).

<u>QUESTION</u>

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

CESR

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 Transparecny 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;

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

(g) 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.

CESR

INTRODUCTION

82. As a general principle, CESR considers it important to point out that there is a clear distinction between Article 9 and Article 10 of the Transparency Directive. Article 9 imposes obligations on those who acquire and dispose of shares, and Article 10 imposes obligations on those who are entitled to acquire, dispose of or exercise voting rights attached to these shares.

83. 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.

84. 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 who need to make notifications on major entitlements to voting rights.

85. In addition, 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 in relation to the requirement to aggregate holdings of shares and voting rights for the purpose of determining when a notification requirement is triggered.

86. CESR considers that aggregation is required in three main situations:
    a) aggregation of shareholdings;
    b) aggregation between voting rights under Article 10 and shareholdings;
    c) aggregation in relation to the voting rights that can be exercised under Article 10.

<u>a) aggregation of shareholdings</u>

87. A controlling natural person or legal entity will be required to notify under the Transparency Directive if the acquisition or disposal of the shares to which voting rights are attached results in voting rights that reach, exceed or fall below the thresholds in Article 9.

<u>b) aggregation between voting rights under Article 10 and shareholdings</u>

88. A natural person or legal entity who is entitled to acquire, to dispose of, or to exercise voting rights under Article 10 and at the same time holds shares, has to aggregate his holdings, if the voting rights attached to the shares and the voting rights held under Article 10 combined exceed the thresholds in Article 9. Such natural person or legal entity will be required to notify under the Directive the aggregate number of voting rights held.

89. For example, a natural person holds in total 6% of the voting rights (thus triggering a notification requirement), 3% as a shareholder and 3% under an agreement under Article 10(b). If there was no aggregation, the separate holdings of 3% would not be notifiable as each is below the 5% threshold.

c) aggregation in relation to the voting rights that can be exercised under Article 10

90. Under the provision of Article 10, aggregation is required:
    a) by a natural person or legal entity that falls under any of the cases described under the provisions of Article 10(a)-(g) or a combination of them;
    b) by natural persons or legal entities who have concluded an agreement under Article 10(a) (aggregation of their holdings of voting rights);

c) by controlled undertakings (Article 10(e)) (aggregation of their holdings of voting rights by their controlling natural person or legal entity).

DISCUSSION

91. In order to establish its advice, CESR considers it necessary to:

a) clarify who (the shareholder or the natural person or legal entity referred to in Article 10 or both) has to make the notification;

b) determine whether a natural person or legal entity who has to make a notification can appoint another person to comply with the notification obligation;

c) determine whether in cases of joint notification duty, one single notification is acceptable.

a) clarify who has to make the notification

92. In order to establish who should make the notification in relation to each of the circumstances that are covered by Articles 10(a)-(g), it is necessary to go through each of them

93. There is currently a lack of consensus amongst CESR members as to which is the correct approach that should be used in determining who should make the notification under each of the circumstances set out in article 10 (a)-(g), and therefore CESR sets out below an explanation of who should make the notification using the 2 different approaches.

94. The first approach (approach A) is that it would be the natural persons or legal entities that are entitled to exercise the voting rights that have the obligation to make the notification if the proportion of voting rights reaches, exceeds or falls below the thresholds set out in article 9.

95. The second approach (approach B) is that the parties involved in all the situations set out in the article 10(a)-(g) have the obligation to make the notification if any one of them reaches, exceeds or falls below the thresholds.

96. The rationale behind these differences in approach are explained in more detail in paragraphs 140-142 below.

Article 10(a) of Transparency Directive

97. *"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;"

98. 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.

99. 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.

100. CESR considers that under both approaches all parties to the agreement are responsible for making the notification because, under approach A, as a result of entering into the agreement each party to the agreement, is entitled to exercise voting rights, and under approach B, 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.

101. 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.

102. CESR considers it important to point out that in addition to the above notification requirement being triggered upon entering into the agreement, all parties to the agreement are responsible for making a subsequent notification when the agreement itself comes to an end, 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.

Article 10(b) of Transparency Directive

103. *"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;"

104. 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.

105. In these circumstances under approach A CESR considers that it is the natural person or legal entity that acquires the voting rights and is entitled to exercise them under this agreement that is required to notify.

106. In these circumstances under approach B CESR considers that in addition to the natural person or legal entity that acquires the voting rights and is entitled to exercise them under this agreement, it is also the natural person or legal entity who is transferring temporarily the voting rights for consideration who is also required to notify, if in transferring the voting rights the natural person or legal entity's holding of voting rights falls below a relevant threshold.

107. In addition, CESR considers it important to point out that in addition to the above notification obligation, under approach A when the agreement comes to an end, the natural person or legal entity who acquired the voting rights and was entitled to exercise them has to make a notification; and in this situation under approach B, in addition to that natural person or legal entity, the natural person or legal entity to whom the voting rights are being returned will also be required to make the notification if, as a result of this, the natural person or legal entity reaches or exceeds the relevant threshold.

Article 10(c) of Transparency Directive

108. *"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:*

CESR

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;"*

109. 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").

110. 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.

111. Under approach A, 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. Under approach B, in addition to the collateral holder being required to make a notification, the collateral lodger who when lodging the collateral with the collateral holder transfers the shares and voting rights to the collateral holder, is required to make a notification if as a result of transferring the shares and voting rights, the voting rights now held as a result of the transfer fall below the relevant thresholds.

112. In addition to these notifications, CESR considers it important to point out that under approach A, when the shares and/or voting rights attaching to the shares are returned by the collateral holder to the collateral lodger, the collateral holder has to make subsequent notifications. Under approach B, in addition, to the notification that the collateral holder has to make, the collateral lodger also has to make subsequent notifications.

<u>Article 10(d) of Transparency Directive</u>

113. *"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;"

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

 a) Under approach A, CESR considers that, 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.

 b) Under approach B, CESR considers that in addition to the natural person or legal entity who has the life interest, the natural person or legal entity who is disposing of the voting rights is also obliged to make a notification if in doing so he falls below a relevant threshold.

 c) In addition CESR considers it important to point out that 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 both approaches.

<u>Article 10(e) of Transparency Directive</u>

115. *"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;"

CESR

116. Article 10(e) applies to situations where a controlled undertaking is required to notify under the situations described in Article 10 (a)-(d), as identified under approach A or approach B as discussed above. The article requires the controlling natural person or legal entity to make a notification regardless of whether or not it holds voting rights itself.

117. 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

118. In circumstances where the controlled undertaking(s) is (are) required to make a notification under Article 10(a)-(d) as per approach A or B above, the controlling natural person or legal entity is also required to make a notification under Article 10(e).

119. 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 11(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).

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

121. Pursuant to Article 11(1)(aa), 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

122. There are circumstances where either the controlled undertakings or the controlled undertaking(s) and the controlling natural person or legal entity may not 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.

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

124. Pursuant to Article 11(1)(aa), the notification shall include the chain of controlled undertakings through which voting rights are effectively held.

Article 10(f) of Transparency Directive

125. *"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;"

126. 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".

127. 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.

128. Under approach A 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.

129. Under approach B, in addition to the deposit taker being required to make a notification, the depositor is also required to make a notification if as a result of depositing the shares with the deposit taker the number of voting rights held by the depositor falls below a relevant threshold.

130. In addition to these notifications, CESR considers it important to point out that under approach A, when the voting rights attaching to the shares are returned by the deposit taker, the deposit taker has to make a subsequent notification. Under approach B, upon the return of the voting rights, in addition to the deposit taker being required to make a notification, the original depositor will also have to make a notification if as a result of the return of the voting rights the depositor reaches or exceeds a notification threshold

Article 10(fa) of Transparency Directive

131. *"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:*
(fa) voting rights held by a third party in its own name on behalf of that person or entity;"

132. 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.

133. CESR considers that under both approaches A and B it is the natural person or legal entity that controls the voting rights, irrespective of the name in which they are held, who should make the notification.

134. CESR considers it important to point out that when the voting rights are no longer held by the third party in its own name on behalf of that person or entity, a notification requirement can be triggered.

Article 10(g) of Transparency Directive

135. *"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 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."

136. 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.

137. In these circumstances, under approach A it is the proxy holder who has to make the notification, as he has control over the voting rights.

138. Under approach B, in addition to the proxy holder, the shareholder who has given his proxy to the proxy holder will also be required to make a notification if in doing so he falls below a relevant threshold.

139. CESR considers it important to point out that when the proxy holders discretion ends, under approach A the proxy holder will be required to make a notification, under approach B, in addition to the proxy holder, the shareholder who gave the proxy holder discretion will also be required to make a notification if by returning the voting rights the shareholder has reached or exceeded a relevant threshold.

Explanation of the difference in approaches

Approach A:

140. Approach A is based on the principle that it is the person that is entitled to exercise the voting rights that has to make the notification. Under approach A, no other person will be required to make the notification because :

- he is not transferring shares, only voting rights or control over voting rights, and as such the Article 9 obligation does not apply;
- in some circumstances, where the differences in approach exist, he cannot be considered to be a person disposing of voting rights or control over voting rights and at the same time a natural person or legal entity as meant under the circumstances in Article 10:

For example:

- Under Article 10(b) the third party transferring the voting rights temporarily for consideration to a person or entity does not notify under Article 9 since it is not transferring shares and does not notify under Article 10(b) because it cannot be the third party holding the shares while at the same time being the person or entity that is required to notify under Article 10(b).
- Under Article 10(d) the person who is granting the life interest does not notify under Article 9 since it is not transferring shares and does not notify under Article 10(d) because it is the person or entity that has the life interest who is required to notify and not the owner of the shares.
- Under Article 10(f) the person who is depositing shares does not notify under Article 9 since it is not transferring shares and does not notify under Article 10(f) as the wording refers to "shares deposited with that person". It is the person who can exercise the voting rights at its discretion in the absence of specific instructions from the shareholders who has to notify and not the shareholders who deposit the shares. A person can not deposit shares to itself.
- Under Article 10(g) the person who is giving a proxy does not notify under Article 9 since it is not transferring shares and does not notify under Article 10(g) because it is the person who can exercise voting rights at its discretion in the absence of specific instructions from the shareholders who has to notify and not the shareholders who give the proxy.

Approach B:

141. Approach B is inspired by a different interpretation of the Article 10. In the first sentence of Article 10, reference is made to "a natural person or legal entity" to the extent it is entitled to

acquire, dispose of, or exercise voting rights" (the title of Article 10 also states "acquisition or disposal"). Therefore, in situation listed in Article (a)-(g) there could be, in each case acquisitions or disposal of major proportions of voting rights that could trigger notification requirements. By covering situations of acquisitions and disposal, approach B believes that the information given to the market ensures full transparency of ownership structure and control of voting rights in traded companies. In fact, if Article 10 applies only to acquisition there could be cases where the market does not get the full information.

142. For example: X holds shares 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. Under both approaches, Y is not required to make a notification under Article 10 because although Y has the right to exercise the voting rights a notification threshold has not been reached. Under approach A, although X crosses a threshold falling below 10% of the voting rights, X is not required to make a notification , because his total shareholding remains unchanged even if the percentage of the voting rights that X can now exercise has changed. Under approach B, X is required to make a notification because he falls below the 10% notification threshold, and notification of the fact that X can only exercise 7% and not 11% of the voting rights is considered to be necessary in order to achieve full transparency under approach B's interpretation of Article 10.

b) determine whether a natural person or legal entity can appoint another person to comply with the notification obligation.

143. 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 shareholder, natural person or legal entity to make the notification on its behalf.

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

145. 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 shareholder, natural person or legal entity does not make the notification, then the legal obligation to notify still remains with the original shareholder, natural person or legal entity.

c) in cases of joint notification duty is one single notification acceptable?

146. For the purposes of situations where the duty to make a notification lies with more than one shareholder, natural person or legal entity, CESR considers that it should be possible for this duty to be satisfied by making one single notification.

147. In cases where more than one shareholder, natural person or legal entity is required to make a notification, there would be duplicate notifications made by different parties and this could confuse the market. A single notification will provide greater clarity to the market. In addition, a single notification will reduce the reporting burden on the shareholders, natural persons or legal entities.

148. For clarification purposes CESR wants to point out that when a parent undertaking makes a notification on behalf of its controlled undertaking(s), pursuant to Article 11(3) of the Transparency Directive, it shall also make a single notification (a parent undertaking notification).

149. Finally, CESR wants to point out that the use of one single notification does not release the persons involved in it from their respective obligation to make the notification.

CESR

DRAFT TECHNICAL ADVICE

Table Setting Out Who Has To Make the Notification under Each Approach

Circumstances	Who has to make the notification under approach A	Who has to make the notification under approach B
Art. 10(a)	All parties to the agreement	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	The natural person or legal entity that acquires the voting rights and is entitled to exercise them under the agreement; 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	The collateral holder, if it controls the voting rights attached to the shares it holds and declares its intention to exercise them; 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	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; 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) When the controlled undertaking has no notification duty at an individual level : the controlling natural person or legal entity	When the controlled undertaking has a notification duty at an individual level : the controlling natural person or legal entity and the controlled undertaking(s) When the controlled undertaking has no notification duty at an individual level : the controlling natural person or legal entity

CESR

Circumstances	Who has to make the notification under approach A	Who has to make the notification under approach B
Art. 10(f)	The deposit taker, if he can exercise the voting rights attached to the shares deposited with him at his discretion	The deposit taker of the shares, if he can exercise the voting rights attached to the shares deposited with him at his discretion; 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(fa)	The natural person or legal entity that controls the voting rights	The natural person or legal entity that controls the voting rights
Art. 10(g)	The proxy holder, if he can exercise the voting rights at his discretion in the absence of specific instructions from the shareholders	The proxy holder, if he can exercise the voting rights at his discretion in the absence of specific instructions from the shareholders; AND the shareholder who has given his proxy to the proxy holder if by giving the proxy he falls below a relevant threshold

150. In addition to the above, whenever changes to the circumstances described in article 10(a)-(g) above take place, which results in changes to the amount of voting rights attributable to the natural person or legal entity that was required to make the notification, a subsequent notification requirement is triggered.

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

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

153. Such an appointment does not release the shareholder, natural person or legal entity from its obligation to make a notification.

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

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

QUESTIONS

Q8 Do you agree that aggregation is required in three main situations? Please give your reasons if you do not agree.

Q9 Do you agree with the possibility to appoint another person to comply with the notification duty? Please give your reasons if you do not agree.

Q10 Do you agree with the possibility of making a single notification in case of joint notification duty? Please give your reasons if you do not agree.

Q11 With which of the approaches set out above in relation to each of the circumstances set out in articles 10(a)-(g) above do you agree with. Please give reasons.

Q12	Do you agree that a subsequent notification requirement is triggered when there are changes to the circumstances described in Article 10(a)-(g)? Please give your reasons.
Q13	Do you agree with the draft technical advice?

CESR

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 11

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

156. The mandate requires CESR 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."

157. CESR considers it important to point out that it has only been mandated to consider those situations that arise under Article 9 because of the reference to "acquistion or disposal of shares to which voting rights are attached" and not the situations covered by Article 10, which deals with situations relating to the acquisition, disposal or exercise of voting rights.

CESR

158. In addition, for clarification purposes CESR considers it important to point out that Article 11(2a) ("should have learned") does not apply to events changing the breakdown of voting rights, such as capital increases or reductions, which are covered by Article 11(2b).

159. Article 11 (2)(a), deals with two situations:

a) learns of the acquisition or disposal or of the possiblity to exercise voting rights….; or

b) should have learned of it.

DISCUSSION

160. CESR has only been mandated to deal with the second situation namely, "should have learned of it", but in order to be able to clarify the meaning of this, it is necessary to first establish when an aquisition or disposal actually takes place, and then to establish when a natural person or legal entity learns of the acquistion or disposal.

When does an acquisition or disposal actually take place?

161. The concepts of acquisition or disposal refer to the execution of a contract to buy or sell securities. Such execution takes place when the natural person or legal entity transfers (in the case of a disposal) or receives (in the case of an acquisition) legal ownership of the securities in question. The time when this occurs may differ according to applicable national laws, rules and regulations.

162. Generally speaking a natural person or legal entity learns of an acquisition or disposal when he or she receives notification of the execution of the transaction by an accepted means of communication.

163. In circumstances where a natural person or legal entity gives instructions to buy or sell to his broker, one could argue that the relevant time is when the natural person or legal entity gives the instruction to buy or sell to his broker. However, this poses many practical problems, as instructions are not always acted upon, and very often are not acted upon immediately.

164. If a notification requirement were to be triggered solely based on the instructions given, holdings that in reality do not exist may be reported on causing confusion and false information flow in the market instead of transparency. For example:

a) A shareholder could instruct his broker to buy 10% of a listed company which is 99% owned by another company. This would result in a notification duty which would clearly be absurd as it would not be possible for the broker to carry out the instruction;

b) A shareholder could instruct his broker to acquire 7% of a listed company through an "all or nothing" order whereby the investor will not be acquiring any shares if the broker does not complete the order in full. If the broker is not able to fill the order no shares would be acquired, and as such a notification at the point of giving the instruction would be misleading to the market.

What does "should have learned" mean?

165. Article 11(2a) ("should have learned") deals with situations where the natural person or legal entity does not have actual knowledge of an acquisition or disposal but due to the circumstances actual knowledge is replaced by deemed knowledge.

166. Moreover, it is within the scope of Article 11(2a) ("should have learned") to determine at what time the period of four trading days for the notification to the issuer starts.

When does "should have learned" apply to a natural person or legal entity?

CESR

167. As a general principle, CESR considers that if a natural person or legal entity does not receive actual knowledge of the execution of the transaction the notification deadline of four trading days shall start on the day after the date the natural person or legal entity is deemed to have knowledge of the execution of the transaction.

168. There are many situations where the natural person or legal entity may not have "actual knowledge" of when a transaction has been executed and the date from which the notification obligation is triggered. However, CESR considers that the most tangible situation where a natural person or legal entity will not have "actual knowledge" in practice is when a notification of the execution of a transaction, or the carrying out of an instruction, is not given to the natural person or legal entity for whatever reason and the only "actual knowledge" is that an instruction or execution order was given in relation to an acquisition or disposal of shares.

169. CESR considers it necessary to point out that natural persons and legal entities always have a duty of care that must be exercised when acquiring or disposing of major holdings.

170. In order to respond to the mandate, CESR considers it necessary to also establish what duty of care should be exercised by a natural person or legal entity that acquires or disposes of major holdings

171. On consideration of this issue, CESR has concluded that in light of the fact that the minimum threshold for the trigger of a notification requirement under the Transparency Directive starts at 5% CESR considers that this duty of care should be very high, and that it should be as follows: .

a) that a natural person or legal entity follows up on instruction that it has given; and

b) that a natural person or legal entity takes active steps to establish whether or not and when the instruction was carried out.

DRAFT TECHNICAL ADVICE

172. Taking into account this duty of care, CESR considers there are 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:

a) on the date when the transaction is actually executed; or
b) on the day after the transaction was actually executed.

a) On the date when the transaction is actually executed

173. This date is considered to be appropriate for the following reasons:

(i) it ensures that natural persons and legal entities are treated equally when establishing when the notification obligation is triggered;

(ii) it is in line with one of the objectives of the Transparency Directive which is to reduce the timeframe within which acquisitions and disposals of major holdings should be disclosed;

(iii) it eliminates the potential for abuse by natural persons or legal entities to extend the timeframe within which acquisitions or disposals of major holdings will be disclosed;

(iv) taking into consideration the period of time within which transactions are cleared and settled and the time period set out in the Transparency Directive within which a notification to the issuer has to be made, the natural person or legal entity will be able to ascertain from his or her account, within the timeframe of the Directive, that the transaction was executed, therefore no additional time needs to be granted.

CESR

b) On the day after the transaction was actually executed

174. 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.

175. 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.

176. 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.

177. 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.

178. There is a lack of consensus amongst CESR members as to which option should be recommended to the European Commission, which is why both are set out.

179. CESR recognises that both these options are 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 dealines set out in the Directive and the competent authority is trying to establish why.

QUESTIONS

Q14 Which of the options set out above do you consider should be recommended to the European Commission. Please give reasons for your answer

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

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

CESR

SECTION 6

THE CONDITIONS OF INDEPENDENCE TO BE COMPLIED WITH BY MANAGEMENT COMPANIES, OR BY INVESTMENT FIRMS, AND THEIR PARENT UNDERTAKINGS TO BENEFIT FROM THE EXEMPTIONS IN ARTICLES 11.3A AND 11.3B.

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 11 (3a) 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 11 (3b) 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

Article 11(3a) – management companies

180. The Transparency Directive (Article 11(3a), 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 11(3a), first paragraph).

181. According to the second paragraph of Article 11(3a), 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.

CESR

Scope

182. According to Article 2(1)(la) 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).

183. 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);"

184. There are 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.

185. The first view is that only management companies authorised under the UCITS Directive can benefit from the exemption provided for under Article 11(3a) for the reasons detailed below.

186. The exemption refers to "holdings managed by the management company under the conditions laid down in the UCITS Directive". Under the UCITS Directive (Article 4), no UCITS shall carry on activities as such unless it has been authorised by the competent authorities of the member state in which it is situated. The competent authorities may not authorise an UCITS if the management company does not comply with the preconditions laid down in the UCITS Directive. A management company is defined in the UCITS Directive as any company, the regular business of which is the management of UCITS in the form of unit trusts/common funds and/or investment companies (collective portfolio management of UCITS), this includes the functions mentioned in Annex II.

187. The Transparency Directive makes reference to the definition of management company in the UCITS Directive and through this definition to the UCITS Directive in its entirety which are the holdings managed under the conditions of the UCITS Directive.

188. Under the first view, it is considered that the provision of Article 11(3a) refers to the holdings, which are covered by the UCITS Directive and are managed by the management company as defined in the Transparency as well as in the UCITS Directive. In fact, only the holdings that are regulated under the UCITS Directive are covered by EU law and can also be covered by the provisions of the Transparency Directive.

189. Under Articles 5 and 1a(3) of the UCITS Directive, the management company is authorised by the competent authority of its member state, i.e. the member state in which the management company has its registered office. In addition, it is important to note that under the transitional provisions of article 2 of Directive 2001/107/EC, all asset managers carrying out business under UCITS directive would be required to be authorised as from 13 February 2007[5].

190. The second view is 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.

191. Article 11(3a) of the Transparency Directive makes reference to the parent undertaking of a management company with holdings managed by the management company under the conditions laid down in Council Directive 85/611/EEC.

[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] Reference should also be made to articles 2.2 and 2.3 of Directive 2001/107/EC which provide transitional provisions whereby asset managers which were previously operating under the old regime, whill have to adapt themselves to the new one.

192. Under Article 2(1)(la) of the Transparency Directive, the definition of a management company makes reference to the definition of management company under the UCITS Directive but does not state that a management company must be authorised under the UCITS Directive in order to make use of the exemption under Article 11(3a) of the Transparency Directive.

193. This is in contrast to the exemption for investment firms under Article 11(3b) of the Directive which specifically requires an investment firm to be authorised under the MiFID. In light of this clear difference in approach with regards eligibility to use the exemptions one can draw from it that a management company does not need to be authorised under the UCITS Directive in order to make use of the exemption.

194. Further the definition of management company under the UCITS Directive is generic, referring to "*any* company, the regular business of which is the management of UCITS..."

195. Therefore, the purpose of the exemption under Level 1 is provided on the basis that the management company exercises the voting rights independently from the parent undertaking. The provision of the exemption is based on the test of independence as established through CESR Level 2 measures and not on the basis of the authorisation provided to the management company under the UCITS directive other than a clear statement in Article 11(3a) that the management company in question must manage the assets/holdings under the conditions laid down for such management as set out in the UCITS Directive.

196. Under the second view, it is not considered that it was the intention that a parent undertaking who met the test of independence should be required to aggregate because its management company, although meeting the requirements of the conditions set out in UCITS Directive, was authorised to conduct its management activities under national legislation and not the UCITS Directive.

QUESTION

Q17 Which of the above approaches do you think most appropriate? Please give reasons for your answer.

Article 11(3b) – investment firms

197. The Transparency Directive (Article 11(3b), first paragraph) has granted **the parent undertaking** of an investment firm authorised under the Directive on markets in financial instruments (MiFID) an exemption from the requirement to notify aggregated holdings under Articles 9 and 10 of the Transparency Directive with the holdings managed by the investment firm on a client-by-client basis under specific conditions laid down in the Transparency Directive.

198. According to Article 11(3b), first paragraph of the Transparency Directive, in order for the parent undertaking to benefit from the exemption of this Article the following **three conditions** should be complied with:

a. Authorisation of the investment firm under MiFID;

b. Exercise of voting rights under instructions or independently from any other service that the investment firm provides;

c. Exercise of voting rights independently from the parent undertaking.

199. There are two references to independence in the text of Article 11(3b). The first reference relates to the independence of the portfolio management function from other functions the investment firm performs. The second reference relates to the investment firm exercising the voting rights attached to the shares in its portfolio independently from its parent undertaking. These are discussed in more detail under sections b) and c) below.

a) **Authorisation of the investment firm under MiFID**

200. The investment firm must be authorised under MiFID to provide the investment service of portfolio management under point 4 of Section A of Annex I to MiFID in order to get the benefit of this exemption. Article 4(1) defines an investment firm and Article 5(1) sets out the basis for the authorisation.

201. Under MiFID, *"portfolio management"* means managing portfolios in accordance with mandates given by clients on a discretionary client-by-client basis where such portfolios include one or more financial instruments (Article 4, paragraph 1(9) of MiFID).

b) **Exercise of voting rights under instructions or independently from any other service that the investment firm provides**

202. There are two alternatives to this test:

a. The first alternative is that the investment firm may only exercise the voting rights attached to such shares under instructions given by the client in writing or by electronic means. This refers to the case under which the investment firm has no discretion as to the exercise of voting rights;

b. The second alternative is that the investment firm ensures that individual portfolio management services are conducted in an independent manner from any other services under conditions equivalent to those provided for under the UCITS Directive by putting into place appropriate mechanisms. This alternative is relevant to the internal organisation/structure of the investment firm in the sense that it links the grant of the exemption to the fact that the investment company conducts the portfolio management services independently from the other services it provides.

203. In relation to the independence of the portfolio management function, independence refers to the provision of the portfolio management service as a whole and is examined within the same entity. Independence should exist between the different organisational units of the same entity.

204. As the UCITS Directive does not set out a specific test relating to the provision of independent services, CESR considers, for the purposes of the second alternative above, that the provisions under MiFID are the ones that need to be complied with by the investment firm. However, CESR recognises as well that this does not preclude additional provisions about the internal organisation of investment firms. It should be mentioned that the CESR Investment Management Group is actively working in this area.

205. However there are some provisions under the UCITS Directive which are relevant to establishing a test of independence. These are linked to the Conduct of Business Rules (Article 5h) and to the prudential rules for internal organization and controls (Article 5f), and these are analysed in detail in paragraphs 46 -51 of this paper.

206. Investment firms are regulated under MIFID, which contains similar conduct of business provisions (Article 19) and organisational requirements for compliance and conflicts of interests (Articles 13 and 18) to those set out under the UCITS Directive, this is highlighted below (paragraphs 37 – 39 and 47 - 50).

207. There is however one important difference between these two directives. Under the UCITS Directive although there are basic principles which have to be taken into account at a national level when drawing up the relevant regulations as set out under Articles 5h and 5f there is no requirement to harmonise theses at Member State level. Therefore, under the UCITS Directive, each member state may impose different regulations on management companies and investment firms in order to get the benefit of the exemption under the Transparency Directive.

CESR

208. In contrast, MiFID (under Articles 13.10 18.3 and 19.10) provides for implementing measures that aim at harmonisation at member state level. The consequence of this is that an investment firm who is authorised under MiFID to conduct portfolio management will need to comply with only one set of regulations in order to be able to conduct such activities across member states and get the benefit of the exemption under the Transparency Directive.

c) Exercise of voting rights independently from the parent undertaking

209. In order for the parent undertaking to benefit from the exemption, the investment firm must exercise its voting rights independently from the parent undertaking.

210. In relation to the independence of the investment firm from its parent undertaking, independence refers only to the exercise of the voting rights and is examined at the level of the group of companies. Independence should exist between two different entities i.e. the parent undertaking and the controlled undertaking, i.e. the investment firm.

211. According to Article 11(3b), second paragraph, the exemption is not granted to the parent undertaking and the principle of aggregation applies if:

a. the parent undertaking or another controlled undertaking has invested in holdings managed by this investment firm; and

b. the investment firm 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.

212. In contrast to the first paragraph of Article 11(3b) which refers to the "parent undertaking" as parent undertaking of the group of which the investment firm is a member, the second paragraph of Article 11(3b) covers two situations:

- the case under which the parent undertaking and investment firm both hold shares or voting rights attached to shares of the same issuer; and

- the case under which the "parent undertaking" (and other controlled undertakings) is a client of the investment firm. If in this case, the parent undertaking gives instructions in relation to the exercise of the voting rights of the shares which are managed by the investment firm, the investment firm cannot at the same time exercise its voting rights independently from the parent, and in this situation the exemption can not apply, However, if the parent undertaking gives complete discretion to the investment firm as to how the voting rights can be exercised and the investment firm ensures that individual portfolio management services are conducted in an independent manner from any other services then the exemption can apply.

DISCUSSION

Meaning of holdings referred to in Articles 11(3a) and (3b)

213. Articles 11(3a) and 11(3b) introduce an exemption from the requirement to notify aggregated holdings under Articles 9 (disclosure of major shareholdings) and 10 (disclosure of major proportions of voting rights). Article 11a extends the scope of the notification requirements of Article 9 to natural persons or legal entities who hold, 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. Thus, it results from the combination of the provisions of Articles 9, 11(3a), 11(3b) and 11a of the Transparency Directive that the provisions of Articles 11(3a) and 11(3b) of the Transparency Directive also apply to holdings of the financial instruments of Article 11a of the Transparency Directive.

CESR

214. In addition, according to Article 5(2) of the UCITS Directive, the management company may engage in additional management of other collective investment undertakings, which are not covered by the UCITS Directive under the conditions provided for in the same article (5(2)). CESR considers that the reference to holdings in Article 11(3a) relates to all the holdings managed by the management company under the provisions of the UCITS Directive irrespective of whether such holdings are UCITS as defined in the UCITS Directive. The test of independence is linked to the relationship between the parent undertaking and the management company, not the nature of holdings that the management company manages. Article 11(3a) of the Transparency Directive refers to the internal relationship between the parent undertaking and the management company.

215. 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 11(3a) and 11(3b);

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 11(3a) and 11(3b), first paragraph of the Transparency Directive; and

c. The notion of indirect instructions to which reference is made in the second paragraphs of Articles 11(3a) and 11(3b).

A. The level of independence

The general principle

216. The management company under the provisions of Article 5h of the UCITS Directive shall always act in the best interests of the UCITS it manages and the integrity of the market.

217. Similarly, under the MiFID, investment firms are required to act honestly, fairly and professionally in accordance with the best interests of its clients (Article 19, paragraph 1). This is further reiterated by CESR in its paper on harmonisation of Conduct of Business rules[6].

218. This principle is something that CESR believes is common practice amongst management companies and investment firms performing portfolio management.

219. Thus, management companies are bound by duties towards those on whose behalf assets are managed and investment firms are bound by duties towards their clients. Therefore, whenever the management companies and investment firms exercise voting rights, they cannot decide on the basis of other considerations such as the interests of their parent undertaking. This duty constitutes the basis of their independence.

The level of independence

220. CESR considers that the level of independence should be explored in the context of Chapter III of the Transparency Directive i.e. 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. There are many different ways the parent undertaking can exercise power over the management company or investment firm as to how the voting rights are to be exercised. This intervention is not limited to the cases of instructions given by the parent undertaking to the management company or investment firm in relation to a particular vote. It may also take the form of any interference that could influence the way in which the management company or investment firm exercises the voting rights.

221. CESR considers that the management company or investment firm should be free to exercise the rights attached to the assets it manages in all situations. For example, the right to freely

[6] CESR: "A European regime of investor protection – The harmonization of Conduct of Business Rules", April 2002, page 8

participate in security holders' meetings, the right to freely participate in minority shareholders' meetings, the right to contest decisions of the issuer, including the right to take legal action, to exercise all minority rights, etc. Independence should cover any possible use of the voting rights by the management company or investment firm.

222. In addition to the above points, the voting rights can be exercised either by the management company or investment firm itself or by a third party to whom the management company or investment firm has delegated the exercise of the voting rights. CESR considers that the provisions of Articles 11(3a) and 11(3b) 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. CESR considers that even in the case of delegation of the exercise of the voting rights to a third party, the management company or investment firm retains the final supervision/control over the exercise of such voting rights.

Existing regulatory frameworks

223. There are already extensive regulatory frameworks which deal with the way in which management companies and investment firms are organised and operate. These frameworks directly and indirectly deal with the exercise of the voting rights by management companies and investment firms.

224. Under the UCITS Directive and MiFID, management companies and investment firms are authorised by the competent authority of their home member state. The management company or investment firm has to comply with EU legislation as well as with the relevant laws, rules and regulations of its home member state.

Conditions imposed under EU and national regulation

Codes of conduct

225. Article 5h of the UCITS Directive provides for a Code of Conduct that will ensure that the management company:

a) acts honestly and fairly in conducting its business activities in the best interests of the UCITS it manages and the integrity of the market;
b) acts with due skill, care and diligence in the best interests of the UCITS it manages and the integrity of the market;
c) has and employs effective resources and procedures that are necessary for the proper performance of the business activities;
d) tries to avoid conflicts of interests and when they cannot be avoided, ensures that the UCITS it manages are fairly treated; and
e) complies with all regulatory requirements applicable to the conduct of the business activities so as to promote the best interests of its investors and the integrity of the market.

226. Similarly, Article 19 of MiFID sets up a number of principles that should be followed by investment firms when providing services. Article 19, paragraph 10 provides for implementing measures to ensure that investment firms comply with these principles.

227. In addition to this European legislation, there are Codes of Conduct at national level for both management companies and investment firms, which contain provisions relating to the management company or investment firm's obligation to conduct its activities solely in the best interest of those on whose behalf the assets are managed as well as in relation to conflicts of interests.

Internal organisation and controls

228. Under the UCITS Directive (Article 5f) a management company is required to put in place sound procedures and adequate control mechanisms. Moreover, it should be structured in such a way as to minimize the risk of conflicts of interests, which in practice may be done for example by creating and maintaining Chinese walls.

229. There are similar provisions for investment firms under MIFID, including a requirement to maintain and operate effective organisational and administrative arrangements, taking all reasonable steps to prevent conflicts of interest adversely affecting the interests of the clients (Article 3).

230. Moreover, CESR clearly stated in its paper on harmonisation of conduct of business rules the need for independence between the portfolio management company and its group *"An investment firm must take all reasonable steps necessary to ensure the independence of the portfolio management function and mitigate the risk of customers' interests being harmed by any conflict of interest, in particular by providing for the strict separation within the investment firm and its group"*[7]

Provisions relating to the exercise of voting rights

231. Many Member States regulations (see also the IOSCO surveys[8], impose disclosure requirements on management companies in relation to voting rights. These regulations generally emphasize that voting rights and other shareholder rights must be exercised in the best interest of those on whose behalf assets are managed. Some regulations require the Collective Investment Schemes (CIS) and their management companies to:

a. publicly disclose voting policies, actual practices in voting policies and actual practices in exercising voting rights either through a prospectus and/or annual report disclosure or through other public filings;

b. justify the position they took/supported when they exercised the voting rights or justify the non voting and explain significant deviations from policies;

c. disclose to the public how it actually voted in case the management company holds more than 2% of the outstanding securities of a particular issuer;

d. send on request to the investors summaries stating how the management company exercised the voting rights for a particular period;

e. disclose any possible conflicts of interests in the exercise of voting rights;

f. exercise the voting rights in the best interest of the investors and independently from the interests of the group of companies in which the management company is a member.

232. There are no extensive rules and regulations relating specifically to the exercise of the voting rights by the investment firms (other than some provisions requiring the inclusion of information about the exercise of voting rights in the written agreements between the investment firm and the client) as is the case for management companies.

233. All of the above conditions are either prerequisites for the grant of authorisation to the management company or investment firm or conditions the management company or investment firm should comply with in the course of its activities.

234. All of the examples of existing regulations stated above relate specifically to the management company or investment firm. CESR is not aware of any legislation, national or European,

[7] CESR: "A European regime of investor protection – The harmonization of Conduct of Business Rules", April 2002, page 25

[8] IOSCO 1: "Collective Investment Schemes as Shareholders: Responsibilities and disclosure", September 2003;
IOSCO 2: Collective Investment Schemes as Shareholders: Responsibilities and disclosure", May 2002 and
IOSCO 3: "Conflicts of Interests of CIS Operators, May 2000.

which imposes obligations on the parent undertaking of a management company or investment firm in order to guarantee the independence of the management company or investment firm in the way it exercises the voting rights.

B. Conditions the management companies and investment firms and their parent undertakings should comply with to benefit from the exemption

235. In establishing its advice, CESR considers it important to point out there are different references to independence for management companies and investment firms.

236. With regard to investment firms, the first is the reference to the conditions of independence that relate to the independence of portfolio management services from the other services provided by the same investment firm as set out in the second indent of Article 11(3b).

237. The second reference is to the independence of the investment firm in relation to its parent undertaking as set out in the third indent of Article 11(3b).

238. In relation to the first reference, as discussed above, MiFID provides for sufficient internal independence mechanisms and the competent authority under the Transparency Directive can rely on the competent authority of the investment firm under the MiFID in relation to this issue, as such for the purposes of this exemption, CESR does not consider it necessary to establish any additional conditions of independence.

239. The second reference also applies to management companies, and is discussed below.

240. CESR discussed the various conditions that can be provided and whether or not it is necessary to establish a form of control over the parent undertaking and the management company or investment firm before or after the parent undertaking uses the exemption or a combination of pre and post control.

241. As established above, the management companies or investment firms are 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.

242. Therefore CESR considers that it is not 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.

243. CESR considers 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.

244. In order for a parent undertaking to benefit from the exemption 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.

245. In addition to the above requirements, a CESR Member considers that in order for the parent undertaking to benefit from the exemption, the management companiy or investment firm should confirm in writting the statement of independence made by the parent undertaking.

QUESTION

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

CESR

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

246. 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; 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.

247. 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.

QUESTION

Q19 Do you consider that there should be other methods by which the parent undertaking demonstrates independence to those set out above? Please give your reasons and set out what these should be.

248. CESR notes that in addition to the above, there were a number of other suggestions that were made in the responses to the call for evidence as follows:

a. The appointment of a senior individual within the management company or investment firm with responsibility of help ensure the independence between the asset or UCITS manager and its parent undertaking, particularly the terms of the exercise of voting rights;

b. An annual report to the Board from that individual of the management company or investment firm on the policy and procedures established to maintain independence when exercising voting rights between the assets of the management company or investment firm and its parent undertaking.

QUESTION

Q20 What is your view about these suggestions, and do you consider any of them to be fundamental for the demonstration of independence? Please give your reasons.

b. Declaration to the competent authority

249. In order for the competent authority to know who wants to make use of the exemption, 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.

250. It is however important to point out that independence as well as the lawful use of the exemption is a factual situation and thus CESR does not consider any of these procedures/mechanisms to be "foolproof" in the establishment of independence. CESR considers that said procedures/mechanisms do not per se guarantee to the competent authority as defined under the Transparency Directive that the parent undertaking has in fact not influenced the exercise of the voting rights held by the management company or investment firm.

CESR

251. As such, the Transparency Directive competent authority in question will have to rely on information received from the market, the issuers, the management companies or investment firms themselves or any other market participant and as and when required, exercise its powers under Article 20 to obtain information and documents from the parent undertaking and/or the management company or investment firm.

252. CESR considers it prudent that whenever dealing with the case of possible abuse of the exemption, the competent authority of the issuer under the Transparency Directive may cooperate with the competent authority of the management company or investment firm in order to ascertain whether appropriate mechanisms of independence are in place.

253. The same conditions for independence that apply to management companies also apply to investment firms. The practical consequence of this is that by establishing the same conditions for management companies and investment firms those parent undertakings that have both types of entities will be able to establish the same procedures in order to ensure their independence from both entities and therefore benefit from the exemptions.

C. The notion of indirect instructions

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

255. CESR considers it important to point out that irrespective of whether or not the instructions in question are direct or indirect, if the parent undertaking instructs the management company or investment firm then it will not be able to benefit from this exemption.

256. CESR considers it important to point out that at Level 3 regulators should establish mechanisms through which parent undertakings could demonstrate that they have not used instructions to influence the way in which their management companies or investment firms have exercised voting rights.

QUESTION

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

The relationship between article 11a and the exemptions granted to the parent undertaking of management companies and investment firms

257. CESR thinks it important to point out that the parent undertakings exemption from the requirement to notify aggregated holdings with those of its management companies and investment firms also applies to any financial instruments (as determined under Article 11a) that it or its management companies and investment firms may also hold.

258. However, as the financial instrument does not have any voting rights attached to it (although the underlying shares to which it relates have) any test of independence that relates to the exercise of voting rights can not be applicable to such holdings.

259. CESR recognises that the when the shares to which the financial instruments relate are acquired, the requirements of independence and the conditions to be complied with in order to benefit from the exemption in relation to shares as discussed above will apply.

260. Therefore in order to benefit from the exemption under article 11(3a) or 11(3b) in relation to financial instruments the following requirements need to be met:

CESR

- that the management company and/or investment firm meets the relevant requirement of the UCITS Directive and MiFID

- the declaration to the same competent authority as is required under article 11a.

DRAFT TECHNICAL ADVICE

261. 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 or investment firm's independence from its parent

262. 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. 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 and investment decisions over securities traded.

263. 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.

264. 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

265. 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.

266. The declaration of holdings under Articles 9 and 10 of the TD 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).

CESR

267. The declaration shall be submitted to the competent authority under the Transparency Directive either at the start of the implementation of the Transparency Directive or at the latest within the time limit of Article 11 of the Transparency Directive (4 trading days) after the parent undertaking and/or management company and/or investment firms in aggregation crosses the thresholds of Article 9 of the Transparency Directive for the first time.

268. If the parent undertaking decides that it will no longer be eligible to benefit from the exemption, it should notify the competent authority as defined 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.

The notion of indirect instructions

269. 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 those that may influence the position of the management company in the exercise of the voting rights and can be general or vague as to their content and do not refer to specific voting, issue or decision.

The exemptions in relation to financial instruments (as determined by Article 11a)

270. 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 266 c above. It must also comply with the requirements set out in paragraphs 267 & 268 above.

271. If the parent undertaking wants to benefit from the exemption from the requirement to notify aggregated holdings under Article 9, 10 and 11a, it can if it chooses submit a single declaration to the relevant competent authority.

QUESTION

Q22 Do you agree with the technical advice? If not please give your reasons. Are there any circumstances that CESR should take into consideration that would necessitate different conditions being established for management companies and investment firms? Please give details and provide reasons

SECTION 7

STANDARD FORM TO BE USED BY AN INVESTOR THROUGHOUT THE COMMUNITY WHEN NOTIFUING 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 11 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;

(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;

(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.

INTRODUCTION

272. CESR has been mandated by the EU Commission 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. The form needs to cover the most frequent cases and consideration should also be given to the fact that this form is also to be used when the issuer has to file this information under the Article 15(3) requirements.

273. The content of the information as provided for under Article 11(1) of the Transparency Directive, is mandatory for Article 9 and 10 notifications, and as such must be included in all such notifications to the issuer of the underlying shares admitted to trading on a regulated market.

274. The notification requirements that are triggered by Article 11a and the standard form that is to be used for such notifications is the subject of a separate mandate which is discussed in Section 8 of this consultation paper.

275. CESR recommends the use of the standard form by those who have to notify as it provides the market with the required information in a standardised format, and may simplify the notification process for those having to make notifications across the EU as pointed out in the responses to the call for evidence.

276. Although CESR has been mandated to create a form that deals with the most frequent cases, it considers that the form can also be used for infrequent cases, or in cases where there are

additional requirements at national level through the provision of an additional information section.

277. CESR notes that in giving its advice, it has been asked to take into account existing national legislation and standards. In doing so, it is apparent that current national legislation and standards differ among Member States. CESR has endeavoured to take all these differences into account in formulating its advice, and sets out the minimum requirements, but points out that due to the application of Article 3, differences to this standard may exist at national level.

DISCUSSION

278. CESR discusses below what it considers is meant by each of the information requirements listed in Article 11(1) in relation to both Article 9 and Article 10 situations.

Article 9 situations

(a) the resulting situation in terms of voting rights

279. 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).

280. 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).

281. 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

282. 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.

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

284. 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

285. 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.

286. 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;

CESR

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

Other considerations

287. 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.

288. In addition to the above, in situations where a controlled undertaking has made use of the Article 11(3) exemption, and the parent undertaking is making the notification on behalf of the controlled undertaking, then 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)

289. In addition to the above, some CESR members consider it relevant to include

a) information about the total number of voting rights in issue attached to shares overall. This is important in order to know the basis upon which the calculation of whether or not the notification threshold was reached was made, and

b) if a previous notification has been made the new notification should include the total number and percentage of voting rights contained in the previous notification. This information is important because it makes it easier for the market to monitor the ongoing changes in the shareholding structure of the issuer.

QUESTIONS
Q23 Do you agree that it is necessary to disclose information about the total number of voting rights? Please give your reasons.
Q24 Do you agree that it is important to require disclosure of information about the previous notification? Please give your reasons.

290. Some CESR members believe that information about how the holder has acquired or disposed of the shares with voting rights attached and/or voting rights for example the acquisition was made through a purchase, inheritance, pledge, etc, should also be disclosed because this gives a complete view of the movements of voting rights and ensures transparency. For the same reasons, some CESR members believe that in the case of passive crossings under Article 9(2) of the Transparency Directive, the shareholder should disclose the corporate event that resulted in the changing of the breakdown his voting rights (for example the share capital increase) if he knows it.

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

291. Although the level one text only makes reference to "voting rights", some CESR members consider that this should include the number of shares to which voting rights are attached because there can be differences, e.g. pursuant to national Company Law, in the number of voting rights attached to each share and therefore information about both the number of shares and the number of voting rights attached to the shares is necessary in order to fully understand the shareholder structure of the company.

292. As such, some members propose that the following should be disclosed:

a) in relation to the triggering transaction, the number of 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; and

b) in relation to the resulting situation the total number of shares of each class/type that the shareholder holds after the triggering transaction.

293. Other CESR members do not consider that the number of shares should be disclosed because for market transparency purposes what is ultimately important is who can exercise the voting rights and not the number of shares that they hold. Requiring information about the number of shares is considered to be an unnecessary burden that may result in confusing information with no added benefit for the market.

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

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

294. 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.

295. 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).

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

296. Article 11(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[9] of the acquisition or disposal, or of the passive breach.

297. 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.

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

299. 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.

300. However, it is important to point out, that in relation to passive breaches, the 4 trading day period specified in Article 11(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 11c 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

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

[9] Please refer to section x of this consultation paper for further discussion.

CESR

302. Article 11(1c) states that the "identity" of the shareholder must be included in the notification. CESR considers it necessary to discuss the meaning of "identity".

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

Filing with the competent authority under Article 15(3)

304. For the sake of clarity, CESR notes that under Article 15(3) it is the shareholder who shall file the notification with the competent authority.

305. 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 15(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 20 of the Directive.

306. 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.

307. 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.

308. 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.

309. 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.

310. As such, for the purposes of Article 15(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.

311. 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.

Article 10 situations

312. Having established the requirements under each of the information requirements set out in Article 11(1) for Article 9, it is necessary to go through the situations in Article 10, (which is discussed in some detail in Section 4 of Chapter 1 of this consultation paper) and identify if there need to be any differences to the proposed notification requirements discussed above.

Article 10(a)

313. In relation to Article 10(a), and the disclosure requirements of Article 11(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

314. 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:

<u>In relation to the transaction that triggered the notification requirement</u>

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

316. 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.

317. 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;

c) 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.

318. 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.

319. 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.

320. 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.

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

321. In addition to these notification requirements, there is a lack of consensus amongst CESR members as to whether or not upon termination of the agreement there should also be a requirement to disclose each party to the agreements individual holdings after the agreement has been terminated.

322. CESR notes that this is irrespective of the fact that a notification is always due when a shareholder, natural person or legal entity crosses an Article 9 threshold.

QUESTION
Q28 Do you think that upon termination of the agreement, there should be a requirement to disclose each party to the agreements individual holdings after the termination? Please give your reasons.

CESR

323. In relation to other elements of Article 11(1) the same information as discussed under Article 9 above applies to the Article 10(a) situations.

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

324. 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

325. 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.

326. In case of passive breaches, paragraphs 297 to 299 apply.

(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

327. 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.

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

Articles 10(b)-(g)

328. After consideration of Articles 10(b)-10(g) and the requirements of Article 11(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(g), as well as an exemption to this general approach.

The general approach

(a) the resulting situation in terms of voting rights

In relation to the transaction that triggered the notification requirement

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

330. 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

331. 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(g), broken down by each class/type of share ;

332. 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)

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

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

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

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

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

336. In case of passive breaches, paragraphs 297 to 299 apply.

(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

337. 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.

338. 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.

339. 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 paragraphs 304 to 309).

Exemptions to this general approach

340. CESR acknowledges that under Article 10(g) situations it may occur that a significant number of underlying shareholders with a limited number of shares would have to be identified in the notification. CESR considers that a requirement to disclose the identity of all these shareholders would be burdensome and would not contribute to market transparency.

341. In order to take a pragmatic approach to this, CESR considers that in any case where a natural person or legal entity holds more than 10 proxies each of them representing less than 1% of the voting rights of an issuer, the identity of the underlying shareholders do not need to be disclosed. However, the total number of proxies needs to be disclosed.

QUESTION

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

CESR

342. As an example of the general approach being applied, taking Article 10(b), this would result in the following information being disclosed in the standard form:

(a) Resulting situation

- *Triggering transaction* : the number of voting rights being temporarily transferred from the third party that triggers the notification requirements (the triggering transaction)

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

- *Resulting situation after the triggering transaction*:

- *Totals per class/type of share:* the total number and percentage of voting rights held by the entity that has the duty to notify under Article 10(b), broken down by each class/type of share

- *Overall totals:* the total number and percentage of voting rights in relation to all classes and types of shares after the triggering transaction.

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

- The name(s) of the controlled undertaking through which the voting rights are held.

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

- The date of the transaction will be the date upon which the temporary transfer is effected

(c) the identity of the shareholder even if the later 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

- The identity of the person holding the voting rights and the identity of the person transferring temporarily the voting rights needs to be disclosed.
- The annex to the standard form will include the contact address and/or registered office of any natural person or legal entity identified in the standard form.

.

Other considerations that need to be discussed in relation to the standard form.

343. CESR considers it important to point out, that in addition to the requirements set out above, there are two additional items that need to be discussed when establishing the requirements of the standard form, which are:

a) Notifications of combinations of Article 9 and Article 10 situations;
b) How can additional information that those filling in the form may want to provide be catered for; and
c) The format that the notification itself has to be in.

a) Notifications of combinations of Article 9 and Article 10 situations

344. In order to provide transparency about the nature of a shareholder, natural person or legal entity's holding, CESR considers it necessary to distinguish between a holding of voting rights through actual shares (direct holdings) and holdings of voting rights though other means, for example, Article 10 situations (indirect holdings). It is important to point out that the reference to direct and indirect holdings is different to, and not to be confused with the use of these terms in Article 2(1)(e).

CESR

b) How can additional information that those filling in the form may want to provide be catered for

345. CESR notes that it is already common practice in a number of Member States to provide for additional information to be included in the form used to make a disclosure about major holdings. In addition, the responses to the calls for evidence also suggested that this should be provided for in order to cater for information that either person making the notification wishes to include, or to provide for a separate part of the standard form when additional requirements that a Member State may require, can be catered for.

346. CESR therefore proposes to include a separate section in the standard form for this additional information.

c) the format that the notification itself has to be in

347. The format that the notification itself has to be in, is not something that the text of the Directive deals with, although, Article 15(4) does envisage that the filing of the notification of major holdings in the home Member State enables filings by electronic means.

348. Although CESR has not yet been mandated to deal with this article, as there were a number of respondents to the call for evidence that raised this as an issue, CESR considers it important at this stage to point out that none of the requirements that have been discussed above, would prohibit the use of electronic means for this filing, including the requirements to file an annex with the relevant competent authority.

349. In addition, although the discussion above is format neutral, CESR does agree that the ability to use electronic means for both filing in and sending the standard form to the issuer and the relevant competent authority, it can obviously not advise that information sent to issuers has to be in electronic format, as there is no requirement in the directive that issuers have to be able to receive such notifications in electronic form.

DRAFT ADVICE

Requirements for Article 9

350. 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

351. 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.

352. 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.

353. 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.

354. In addition to the above, in situations where a controlled undertaking has made use of the Article 11(3) exemption, and the parent undertaking is making the notification on behalf of the controlled undertaking, then 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)

<u>(aa) the chain of controlled undertakings through which voting rights are effectively held, if applicable</u>

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

<u>(b) the date on which the threshold was crossed or reached</u>

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

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

358. 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.

<u>(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</u>

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

Filing with the competent authority under Article 15(3)

360. 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.

<u>Requirements for Article 10</u>

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

<u>Article 10(a)</u>

<u>(a) the resulting situation in terms of voting rights</u>

362. 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

363. 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.

364. 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.

365. 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.

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

366. 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

367. 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.

368. 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.

(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

369. 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)-(g)

370. For Articles 10(b)-(g) 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

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

372. 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

373. 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)-(g), broken down by each class/type of share ;

374. 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)

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

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

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

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

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

378. 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.

(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

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

380. 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.

381. In the case of Article 10 (g) in any case where a natural person or legal entity holds more than 10 proxies each of them representing less than 1% of the voting rights of an issuer, the identity of the underlying shareholders do not need to be disclosed. However, the total number of proxies needs to be disclosed.

Notifications of combinations of Article 9 and Article 10 situations

382. 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

383. 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

384. A standard form covering the most frequent cases and containing the elements listed in paragraphs 351-383 above could be presented as follows:

CESR

STANDARD FORM[10]

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*[11])
   [ ] an event changing the breakdown of voting rights (*please specify the corporate event if known*)
3. Identity of shareholder or natural person/legal entity entitled to exercise the voting rights
   a) Full name of the shareholder:
   b) Full name of the natural person/legal entity entitled to exercise the voting rights, if applicable[12]:
   c) Full names of all parties to the agreement, if applicable[13]:
4. Date on which the threshold was crossed or reached:
5. Threshold that has been crossed or reached:
6. Resulting situation in terms of voting rights[14]:

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 voting rights		% of voting rights	
		Direct	Indirect	Direct	Indirect
TOTALS					

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

Done at [place] on [date].

[10] This form is to be sent to the issuer and to be filed with the competent authority.
[11] For example: voting rights held through pledge, proxy, agreement,deposit, life interest, etc are examples of "indirect holding".
[12] In case of an acquisition or disposal of voting rights or of a notification of an event changing the breakdown of voting rights by a natural person/legal entity entitled to exercise the voting rights.
[13] In case of concerted exercise of voting rights.
[14] In case of combined holdings of shares with voting rights attached "direct holding" and voting rights "indirect holding", please split the voting rights number and percentage into the direct and indirect columns – if there is no combined holdings, please leave the relevant box blank.
[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, ….

CESR

ANNEX[16]

a) **Identity of the shareholder:**

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 natural person/legal entity entitled to exercise voting rights, if applicable[17]:**

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)	....

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

Full name	....
Contact address	....
	....
Phone number	....
Other useful information	

d) **Additional information**

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

[16] This annex is only to be filed with the competent authority.
[17] In case of an acquisition or disposal of voting rights or of a notification of an event changing the breakdown of voting rights by a natural person/legal entity entitled to exercise the voting rights.
[18] Whenever another person makes the notification on behalf of the shareholder or the natural person/legal entity entitled to exercise the voting rights.

CESR

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 11a
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

385. Under the provision of the Transparency Directive, the notification requirements stated in Article 9 shall also apply to natural persons or legal entities who hold 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.

386. CESR considers that the objective of this provision is to ensure transparency in situations that may result in changes to the shareholder structure of an issuer whose shares are admitted to trading on a regulated market.

387. CESR is required to give technical advice in relation to the following:

- types of financial instruments that are covered in Article 11a and their aggregation. To that end, CESR is invited to consider the definition of financial instruments established under the MiFID;

- the nature of the formal agreement to which reference is made in Article 11a;

CESR

- the contents of the notification to be made;
- to establish a standard form to be used throughout the Community for that purpose;
- the notification period;
- to whom the notification is to be made.

388. In order to provide the advice set out under the mandate, CESR also thinks that it is necessary to establish when a notification is due. CESR explains below in some detail its thinking in relation to the following:

- the relevant thresholds that trigger a notification requirement;
- when is a notification triggered.
- deadline within which the notification has to be made.
- basis upon which the voting rights attached to the underlying shares to which the financial instrument relates are to be calculated;

DISCUSSION

Relevant thresholds that trigger a notification requirement

389. Article 11a refers to Article 9 in relation to the requirements that have to be complied with when making a notification about financial instruments. CESR understands this to include the reference to the thresholds that are established under Article 9. This thinking is in line with the reference made in Article 11a to Article 9 and will also ensure both simplicity and consistency with the notification requirements under Article 9 which also apply to the Article 10 situations. To this end, CESR considers that the reference in Article 11a to Article 9 implies:

- a reference to the thresholds that are established under this Article;
- that the remaining provisions of the Article, such as the exemptions and passive crossings in accordance with the provisions of Article 9(2) apply to financial instruments under Article 11a;
- that the exemptions provided for in Articles 11(3a) and 11(3b) apply also to financial instruments, because Article 11a applies to direct and indirect holdings and it is impractical to aggregate direct and indirect holdings in financial instruments of parent undertakings in the Article 11(3a) and (3b) situations. This is discussed in detail in paragraph 257-260 of section 6 of Chapter 1 , of this consultation paper.

When is the notification triggered

390. CESR recognises that many differences may exist between the types of instruments that are considered to be financial instruments for the Transparency Directive purposes and considers it important to establish when a notification requirement in relation to these instruments is triggered.

391. In establishing what the appropriate time for triggering a notification requirement of these instruments should be, there are two different approaches about when a notification requirement should be triggered:

a) the notification should be triggered upon acquisition and disposal of the financial instrument; or

b) the notification should be triggered at a set point in time before the underlying shares can be acquired.

a) The notification should be triggered upon acquisition and disposal of the financial instrument

392. The first approach is that in establishing when a notification should be triggered, it is not necessary to take into consideration the variety of timeframes that may exist in terms of when the holder of the financial instrument will actually have the ability to exercise its right and acquire shares, or when the conversion time for these instruments actually occurs.

393. This is because, in establishing when a notification requirement should be triggered, it is important to try, where possible, to ensure consistency with the notification requirements established under Article 9 which also apply to the Article 10 situations. Therefore, there is an argument that the notification requirement should be triggered upon the acquisition, disposal or relevant threshold change in a natural person or legal entity's holding of financial instruments.

394. This approach should also make it simpler for the market to understand and to fulfill its notification obligations as the same rules will apply to all major holding notification requirements under the Directive.

395. In those member states where such a notification requirement exists for these instruments, this view has been followed and it works properly.

396. In addition, under this approach, there will be consistency in the way that all financial instruments are treated. There will be no differentiation between an instrument that can be exercised at any time throughout its duration, for example, a financial instrument that has an American style feature, and an instrument that can only be exercised at a fixed moment in time, for example, an instrument with a European style feature.

b) The notification should be triggered at a set point in time before the underlying shares can be acquired

397. In contrast to the first approach, some members of CESR consider that in establishing when a notification should be triggered, it is necessary to take into consideration the variety of timeframes that may exist in terms of when the holder of the financial instrument will actually have the ability to exercise its right and acquire shares, or when the conversion time for these instruments actually occurs.

398. This is particularly important in view of the number of instruments that may be covered by this notification requirement. If such a distinction is made, it may reduce the number of notifications that are made about a particular financial instrument. For example, there may be acquisitions and disposals of these instruments that occur and are not notifiable before the time set for notification, as these instruments have a long time period between the date that they may be acquired or disposed of, and the date when the instruments either convert or can be exercised, during which they may be acquired and disposed of may times.

399. Such a reduction in the number of notifications may help to ensure that the notifications that are made are regarded by the market as relevant because it is clear that nearer the time of conversion or exercise a notification has been made.

400. For heavily traded instruments that are not held until expiry or conversion, such a distinction may be an advantage in limiting the number of notifications that the market receives, thus reducing the number of notifications that have no reflection on any potential change in a company's shareholdings.

401. In order for this approach to work it would be necessary for CESR to establish the time before the exercise or conversion took place when the notification requirement should be triggered.

CESR

402. In order to establish this time, it is necessary to consider when it is important for market transparency purposes to know that a natural person or legal entity has acquired, disposed of, or has had a relevant change in its holdings of these instruments.

403. Those members of CESR supporting this approach consider that 3 months prior to conversion or exercise is the appropriate time for triggering a notification requirement.

404. It is important to point out that such an approach, may lead to difficulties in relation to instruments where the holder has the right to exercise his rights at any time during the life of the instrument, for example, instruments that have an American exercise features.

405. Those members of CESR that support this second approach consider that instruments with such a feature should have a notification requirement that is triggered upon the acquisition, disposal or change in the relevant holding of such instruments, because under such instruments, the holder can exercise his rights at any time, in which case, it is important for market transparency that the existence of this holding is disclosed.

406. There is an additional consideration that needs to be given to those instruments which are structured in such a way that the exercise or conversion can take place on fixed dates, but on multiple occasions during the instrument life – a "structured but fixed exercise period". For example, one can exercise or convert on March and/or September between 2005 & 2009.

407. For these instruments, those members of CESR that support this second view consider that the notification requirement can also be triggered within a set period of time before the first exercise or conversion date so taking the example, 3 months before the first possible exercise or conversion in March 2005.

QUESTIONS

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

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

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

Q35 In relation to the second view, do you agree that instruments that include an "American exercise period" feature should be notifiable upon the acquisition, disposal, or relevant change in holding of these instruments? Please give your reasons.

Q36 In relation to the second view, do you consider it appropriate to distinguish between those instruments with an American Exercise Period and those that have a "structured but fixed exercise period"? Please give your reasons.

<u>Deadline within which the notification has to be made</u>

408. CESR considers that irrespective of when the notification obligation is triggered in relation to these instruments, the deadline within which the notification has to be made should be the same as those established for the notifications under Articles 9 and 10.

409. CESR also considers that the notification timeframe for instruments under Article 11a should begin at the same time as it does for notifications of the Article 9 requirements which also apply to Article 10 situations.

410. As such, this timeframe should begin from the time established in Article 11(2) and the respective level 2 measures that relate to this Article (see section 5 of Chapter 1 of this consultation paper for discussion of these measures).

411. This will ensure consistency with the notifications made for Articles 9 and 10 purposes, therefore making it simpler for the market to understand and to fulfill its obligations and, at the same time, will provide transparency on holdings within an adequate timeframe.

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

The basis upon which the voting rights are to be calculated.

412. In establishing its advice to the Commission, CESR considers it important to establish (in view of the different features that these instruments may have), the basis upon which the calculation of voting rights attached to the underlying shares relating to these instruments is to be done.

413. There are two features of an instrument that may effect the calculation of voting rights.

a) the number of financial instruments that represent one underlying share (the cover ratio); and

b) the fact that the number of shares to which voting rights are attached may vary during the life of the relevant financial instrument.

414. In relation to both of these features, CESR considers it important to establish consistency in the way that voting rights under Articles 9 and 10 are calculated.

a) Cover ratio

415. Irrespective of what an instruments cover ratio is, the basis upon which the number of voting rights is to be calculated is in relation to the total number of voting rights attaching to the total number of shares that can be acquired upon exercise or conversion of the instrument.

b) Change in the number of shares to which voting rights are attached during the life of the financial instrument

416. CESR recognises that the number of shares to which voting rights are attached may vary during the life of the relevant financial instrument. CESR considers that the amount of voting rights to be considered when calculating if a notification threshold was crossed, is the amount of voting rights attached to shares in issue the last time that the underlying issuer made an Article 11c disclosure.

417. In case of an event referred to in Article 9.2 occurring subsequently, the holder should recalculate its holding and report accordingly if a threshold is crossed or reached.

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

Types of Financial Instruments

418. In the mandate relating to the establishment of which financial instruments fall within the definition of financial instruments covered by Article 11a of the Transparency Directive, CESR is invited to consider the definition of financial instruments under the MiFID. According to the

definition of financial instruments set out in Article 4.17 of MiFID, financial instruments are those specified in Section C of Annex I.

419. Article 11a of the Transparency Directive sets out a number of features that the financial instrument has to have in order to qualify as a financial instrument that triggers a notification requirement under the Transparency Directive. By using these features and applying it to the list of instruments set out in the MiFID, it is clear that not all the instruments set out in MiFID qualify as financial instruments for the purposes of Article 11a of the Transparency Directive.

420. CESR sets out below a discussion that identifies which of the instruments listed in the MiFID it considers should be within the scope of the financial instruments that are covered by Article 11a of the Transparency Directive.

421. Under the provisions of Article 11a of the Transparency Directive, in order to qualify as a financial instrument that triggers a notification requirement, the financial instrument must have the following features:

a) it entitles 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;

b) the holder is entitled to acquire such shares on its own initiative alone;

c) the entitlement to acquire is based in a formal agreement.

422. In order to identify which instruments are covered by Article 11a of the Transparency Directive, it is necessary to explain the meaning of each of these features.

a) Entitles 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

423. CESR considers that the word *entitled* means that the holder has a legal right that is not dependant on any external factors that may affect such right.

424. For example, X enters into an agreement with Y to acquire shares, and X's entitlement under the agreement depends on whether or not Z enters into an agreement with Y. In that case, X can not be considered to have a legal right that is not dependant upon an external factor.

425. CESR considers that *holder* means the natural person or legal entity who has the entitlement to acquire shares already issued to which voting rights are attached. The holder is, under Article 11a, the one upon whom the notification obligation falls.

426. For example, if X buys an instrument that gives him the right to acquire shares already issued of an issuer whose shares are admitted to trading on a regulated market, X is the holder under Article 11a of the Transparency Directive.

427. In addition, it is important to point out that the issuer of the instrument cannot be the holder at the time when the instrument is first issued. For example, if an investment bank issues a financial instrument, then upon the issue of this instrument, it is the purchaser who is the holder and not the issuer.

428. Article 11a has a specific reference to "indirect holding" that CESR considers necessary to clarify. For this purpose, CESR considers that an indirect holder is any natural person or legal entity that holds the instruments through another person or legal entity.

429. For example, a parent undertaking can be considered an indirect holder if its controlled undertakings hold such instruments.

CESR

430. Insofar as Article 11a refers to instruments that entitle someone to *acquire* shares, an instrument that entitles someone to sell or dispose of shares, such as a put warrant with physical delivery in existing shares, does not qualify as a financial instrument under Article 11a.

431. Financial instruments that qualify under Article 11a are those that relate to *shares already issued*. Although CESR does not consider this expression to necessitate additional explanation, CESR points out that instruments that entitle the holder to acquire shares that do not already exist at the time the holder enters into the agreement fall outside of the scope of Article 11a.

b) Own initiative

432. CESR considers *own initiative* to mean something that the holder does on its own, without the influence of any external factors. The following examples illustrate this feature.

- For instruments where there is optionality (such as an instrument where the holder may receive cash or an underlying share), the acquisition of the share is on *own initiative* of the holder if the right to decide to receive the shares is on the holder of the instrument. For instance, if the instrument holder, on maturity, has the right to decide whether to receive shares or cash, the instrument qualifies under Article 11a. If such decision is dependent upon the issuer of the instrument, then it does not qualify under Article 11a.

- If the decision about whether to deliver shares or cash can be made on the initiative or exercise of power of a third party (if it is an agreement), or is dependent upon external factors, the holder is not entitled to receive shares on its own initiative alone and therefore the instrument does not qualify under Article 11a.

- For example, where a financial instrument entitles the holder to receive cash or shares and the delivery of shares is dependent upon the share reaching a certain level, the instrument does not qualify under Article 11a because the acquisition of the shares does not depend on a decision to be made by the holder of the instrument, but on external factors (the price of the share at a certain moment in time).

- If an instrument entitles the holder to receive shares of a company to which voting rights are attached if the price of the underlying share reaches a certain level, then the holder cannot acquire the shares on its own initiative alone because it will only get the shares if those reach the established level and this is outside its control.

c) Formal agreement

433. In CESR's view, formal agreement means any agreement that is legally binding. 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 acknowledges that the issue of defining the law applicable to the contract is outside the scope of the mandate.

434. 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.

Application of the above to MiFID

435. CESR does not consider it necessary to define what a financial instrument is insofar Community legislation has a Directive – MiFID – that also covers this matter. CESR, therefore, refers to this Directive, its interpretation and implementing measures in the understanding of what a financial instrument is.

CESR

QUESTION	
Q39	Do you consider it necessary to define what the meaning of financial instruments is for the purposes of the Transparency Directive? Please give your reasons.

436. In applying the features that a financial instrument has to have in order to qualify as one **for the purposes of the Transparency Directive**, to the instruments listed C of Annex I of the MiFID, CESR considers that the following instruments do not qualify under Article 11a of Transparency Directive:

(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 then 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.

437. These instruments do not qualify because they do not contain all of the features discussed in paragraphs 418 - 435 above.

438. In relation to the other instruments namely:

(1)	Transferable securities
(4)	Options, futures, swaps, forward rate agreements and other derivative contracts relating to securities

439. These instruments will qualify as a financial instrument for the purpose of Article 11a if they have all the features discussed in paragraphs –418-435 above. For example, in relation to a transferable security such as a covered warrant, this will qualify under Article 11a if it has the characteristic of physical settlement of shares that are already issued, but will not qualify if it can only be settled in cash.

QUESTION	
Q40	Do you agree with the above? Please, provide reasons for your answer if you do not agree.
Q41	Do you consider it to be either necessary or possible to establish a list of instruments that qualify as financial instruments for Transparency Directive purposes? Please give reasons.

Aggregation between financial instruments

440. CESR has been mandated to give advice about aggregation between financial instruments.

441. In establishing its advice in relation to this issue, CESR considers that there are a number of different possibilities relating to how aggregation between these financial instruments can be

CESR

done. For example, aggregation between the same types of financial instruments, or aggregation between all financial instruments that may result in the acquisition of shares relating to the same underlying issuer, or aggregation between financial instruments that are acquired at the same time, or that expire or can be exercised at the same time.

442. In determining which of these possibilities should apply for the purposes of the Transparency Directive, CESR considers that the principle that makes the most sense from both a practical perspective and the perspective of market transparency is that aggregation is to be done in relation to all the financial instruments that a holder holds over the same underlying issuer.

443. As such, CESR considers that the holder has to aggregate and make a notification about all the instruments that qualify under Article 11a that it holds in relation to the same underlying issuer, in order to give a clear picture of its position in relation to that issuer.

444. For instance, if one holds securities that entitle the holder to acquire shares already issued of company X and also enters into an agreement to acquire shares of the same company (call option), both instruments have to be aggregated for the purposes of notification. CESR believes that this approach is consistent with the objective of the Directive to provide a complete picture of the situations that can give rise to changes in the shareholding structure of a listed company and will enable individual holders to be able to identify their potential and/or actual position in the shareholder structure of a particular company.

445. If a financial instrument relates to more than one underlying issuer (such as an instrument that entitles the holder to acquire shares of issuer A and issuer B), the instrument may trigger more than one notification as both potential entitlements included in the instrument will have to be aggregated with other financial instruments that relate to the same underlying issuer.

446. This approach will also ensure that the receiver of the notification (see paragraphs 468-472below) would not be getting information about the holders' holdings in other companies.

447. In relation to those financial instruments that have expired having not been exercised, CESR considers that these should be disregarded for the purposes of calculating ones total holding of financial instruments in any one issuer.

448. In relation to instruments that give the holder the right to sell the underlying shares, for example, a put warrant, as discussed above, these are not classifiable as financial instruments for Transparency Directive purposes. These are to be disregarded when an issuer is calculating its total holding of financial instruments in any underlying issuer. For example, if a holder has a call option giving it the right to acquire shares, and an equal but opposite put option in relation to the same underlying issuer, the two do not cancel themselves out, the put option is to be disregarded, and only the call option is to be used for aggregation purposes.

449. CESR understands that the level 1 text does not require aggregation between financial instruments relevant under Article 11a and shareholdings under Article 9 or voting rights under Article 10.

450. In fact, if one holds financial instruments that qualify under Article 11a and shares of the same issuer, one has to report the shareholdings and the holding of the financial instruments separately. Therefore, if one holds 3% of shares and voting rights in a certain issuer and also holds warrants that entitle him to acquire an additional 3% of shares to which voting rights are attached, no duty to notify is triggered because the holdings are not aggregated. If one holds 5% of shares and at the same time 3% of warrants, the holder has to report, under Article 9, the 5% holding in shares and no notification is required in relation to the warrants.

451. CESR notes that aggregation between Articles 9 and 11a may be required at national levels through the provisions of Article 3.

QUESTION

CESR

Q42	Do you agree with the above proposal? Please, provide reasons for your answer if you do not agree.
Q43	Are there reasons why certain financial instruments should not be aggregated? Please give reasons.

<u>The content of the notification to be made</u>

452. In order to establish what the content of the notification that is to be made for financial instruments under Article 11a, CESR has taken the following into account:

(i) the nature of the financial instruments to which reference is made in the Article;

(ii) the objective of the Directive (i. e. to achieve transparency in relation to instruments that entitle someone to acquire shares to which voting rights are attached); and

(iii) the content of the notification required in relation to Articles 9 and 10 (which is discussed in detail in section 7 of Chapter 1 of this consultation paper).

453. CESR considers it necessary and important to achieve clarity regarding the relevant information that is to be disclosed. This is essential because it will simplify the notification procedures and ensure more harmonisation in the information available to investors, and the market at large.

454. CESR considers that the notification under Article 11a should include the following information:

- 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 made the holder cross or reach the relevant threshold, including information on the date on which the threshold was crossed or reached and the number of voting rights that may be acquired as a result of the 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 11(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 if greater then a 5% holding;

- information about the moment when shares will or can be acquired (exercise period), 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;

- identity of the underlying issuer.

CESR

455. As pointed out in the call for evidence, CESR also considers that the standard form should include an additional box for any other information that the notifier wishes to include.

456. CESR considers the above information to be relevant because it is only with information about these particular features of the financial instrument and an indication of the date in the future when the voting rights might actually be acquired, that the market can properly understand the conditions upon which the voting rights attached to the underlying shares will or can be acquired and therefore, get a complete picture of the potential changes in the shareholder structure of a listed company.

457. CESR acknowledges that the above proposal does not include the identification of the specific financial instrument that the holder has acquired or disposed of. CESR considered whether this information should be included and concluded that it should not because:

(i) instruments with the same features may have different names in different jurisdictions and therefore inclusion of a name may confuse investors and the market;

(ii) as CESR proposes to notify holdings in financial instruments aggregated per underlying issuer, the name of the instrument that entitles the holder to acquire the shares is not relevant because the important part of the disclosure is to know that a particular holder of these instruments holds financial instruments which may at some point result in holding shares in a particular company

458. CESR also considered whether information such as the total amount of voting rights held before the transaction that triggered the notification requirement and the identification of each transaction entered into by the holder are important and relevant.

459. CESR concluded that this information is not relevant because it can be calculated from the total amount of voting rights held after the transaction (the resulting situation) and information about the transaction itself in terms of the amount of voting rights held previously.

460. In addition to the above, some CESR members consider it relevant to include

a. information about the total number of voting rights in issue attached to shares overall because this is important in order to know the basis upon which the calculation of whether or not the notification threshold was reached was made; and

b. if a previous notification has been made, the new notification should include the total number and percentage of voting rights contained in the previous notification. This information is important because it makes it easier for the market to monitor the ongoing changes in the shareholding structure of the issuer.

461. CESR also considers that a requirement to disclose the identification of each transaction that contributed to the notification being triggered would also be burdensome without adding any relevant information for market transparency purposes.

462. In addition to the above, in order to reflect the fact that there may be different underlying issuers in which a holder of a financial instrument may acquire voting rights in, CESR considers that one notification form should be used in relation to a holders holding in each underlying company. For example, if a holder holds a notifiable number of financial instruments in two separate companies, two standard forms should be used by the holder when making the notification.

463. From a practical perspective this also makes it easier for the holder to be able to send the notification to each underlying issuer without the need to duplicate the form and block out information about its holdings in company x when notifying company y. This also makes it easier when sending the notification to the relevant competent authority, which may be different.

CESR

464. CESR considered whether it would be relevant for the standard form to include a breakdown of the financial instruments per classes and concluded that this would be burdensome without adding relevant information because what ultimately is important is the information that the holder is entitled to acquire a certain amount of voting rights. In addition, CESR also thinks that there will be very few cases where there are different classes of the same financial instrument relating to the same underlying share.

465. CESR points out that the name of the issuer of the financial instrument itself should not be included in the standard form. CESR considers that this information is not relevant insofar the issuer of the financial instrument is not getting the information on the holdings nor is concerned in the potential change in the shareholding structure.

466. CESR points out that in relation to the issue of "identity", the same issues arise as discussed in paragraphs 337-339of section 7 of Chapter 1 of this consultation paper, and as such identity means full name with an individuals contact address or a legal entity's registered office being provided for separately in an annex which is filed with the relevant competent authority.

467. CESR debated whether the ISIN code of the underlying share should be included in the standard form. The ISIN code is a internationally recognizable way of identifying a security and may be considered to be more important than the name of the issuer, but it must be balanced with the fact that investors may not be easily aware of the ISIN number of the underlying shares and that the issuer may have different types of shares, so may result in large number of ISIN number needing to be disclosed.

QUESTION

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

Q45 Do you think that CESR should require more or less information than what is proposed above? Please give your reasons and specify what information you would delete or add

Q46 Do you consider that information on the total number of voting rights in issue and on the previous situation should be included? Please provide reasons for your answer

Q47 Do you consider the ISIN code of the underlying share to be relevant information to be included in the standard form? Please provide reasons for your answer.

<u>To whom the notification is to be made</u>

468. CESR considers that the standard procedure in relation to whom the notification is to be made according to the level 1 text is the following:

- Under Articles 9 and 10, the relevant holder notifies the issuer of the proportion of shares/voting rights held;

- Under Article 15(3) of the Transparency Directive, the holder shall file the notification with the competent authority of the home member state of the issuer;

- Upon receipt of the notification from the holder, the issuer makes the information public (Article 11(4) of the Transparency Directive), unless the issuer has been exempted under Article 11(4a) and the competent authority does it on the issuers behalf. At the same time, the issuer shall file that information with its competent authority (Article 15(1) of the Transparency Directive), unless exempted under Article 15.2.

469. CESR considers that the same procedures should apply to notifications made under Article 11a. By harmonizing these requirements, it should make it easier and simplify market

practices as holders will be following the same procedures for the notification of its holdings under Articles 9, 10 and 11a.

470. When considering to whom the notification should be made, CESR took into consideration the fact that two different issuers are often involved in the same underlying instrument: the issuer of the underlying shares and the issuer of the financial instrument.

471. In consideration of the objective of the provision, as discussed above, CESR thinks that the information required under Article 11a is only relevant to the issuer of the underlying shares and not to the issuer of the financial instrument.

472. Market transparency about these instruments is about being made aware of eventual changes in the shareholding structure of the issuer of the underlying share. Therefore, CESR considers that the holder of financial instruments should send the notification required under Article 11a to the issuer of the shares to which the financial instrument relates and to the competent authority of such issuer and not to the issuer of the financial instrument in question.

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

DRAFT TECHNICAL ADVICE

473. To qualify under Article 11a, 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 11a refers to instruments that entitle the holder to *acquire* shares, instruments that entitle the holder to sell shares do not qualify under Article 11a.

474. 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;

475. 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.

476. The holder of financial instruments is required, under Article 11a, to aggregate and notify all instruments held that qualify under Article 11a relating to the same underlying issuer.

477. If a financial instrument relates to more than one underlying issuer, the holder has to notify separately its holdings in each underlying share.

478. The deadlines for notification under Article 11a should be the same as those established for the notifications under Articles 9 and 10.

479. The notification obligations under Article 11a are triggered in accordance with the timeframes established in Article 11(2) and the respective level 2 measures.

480. 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 11c of the Transparency Directive. Whenever the issuer discloses additional information under Article 11c, the holder has to recalculate its holdings accordingly.

481. The notification under Article 11a 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 11(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

482. The holder of financial instruments that qualify under Article 11a has to notify its holdings to the issuer of the underlying share and the competent authority of such issuer.

483. The standard form for the notification of financial instruments could be presented as follows:

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].

[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 insturment 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].

CESR

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.

QUESTION

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

[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.

CESR

CHAPTER 2 – 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 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."

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*".

Discussion

484. 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.

485. 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.

486. 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.

487. 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.

488. 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.

489. 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).

490. 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.

491. 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.

492. Considering that a harmonisation 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 creates 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 set out in paragraph 498.

493. 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.

494. 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.

CESR

495. 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.

496. 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.

497. 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 CESR advice

498. 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.

499. 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;

CESR

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.

500. 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 harmonisation on periodic information.

QUESTION

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

SECTION 2 - MAJOR RELATED PARTIES TRANSACTIONS

1. Extract from Level 1 texts

Article 5.3a (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"

2. 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"

3. Prospectus regulations

501. In Commission Regulation n.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.

502. 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.

503. 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.

CESR

4. Draft CESR advive

Concept of Related Party Transactions

504. CESR considers that the definition of related party transactions should be consistent in the yearly and half-yearly reports.

505. 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.

506. Issuers of shares who do not have to prepare consolidated accounts are not required to apply 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.

507. 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.

508. Its 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".

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

The concept of "major" related parties transactions

509. Article 5.3a of the Transparency Directive requires issuers of shares to include major related parties transactions in their interim management report.

510. 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 have 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.

511. 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 and the performance of the enterprise in this period.

b. An update of the related parties transactions described in the last annual report that could have a material effect on the financial position and performance of the enterprise in that reporting period if not already included in the disclosure mentioned in the preceding sentence.

512. 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.

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

CESR

SECTION 3 - AUDITORS' REVIEW OF HALF-YEARLY REPORT

1. Extract from level 1 texts

Article 5. 4 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*".

2. 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*)).

3. Draft CESR advice

Background

513. 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.

514. 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.

515. 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).

516. 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.

517. 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.

518. 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.

519. 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*".

520. 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.

521. 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 approach

522. 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 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 of which an auditor's review is carried out.

523. 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[25] 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.

524. To this end CESR conducted a survey amongst all of its members with the aim of obtaining knowledge of existing regulations and practises followed regarding auditors' review of the half-yearly report. Results of this surevy are as follows:

a) Requirement of review or auditing of half yearly reports (voluntary vs compulsory review)

There are differences between Member Sates regarding whether an auditors review has to be done on a voluntary or mandatory basis.

25 Assurance means that the financial statements are free of any material misstatement

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[26].

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

525. 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.*

QUESTION
Q53 Do you agree with the approach proposed by CESR?
Q54 Do you consider that there is a need for the adoption at national level of a single standard to which audit reviews are conducted? Please give your reasons.

[26] 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.

CESR

CHAPTER 3 – 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.

CESR

Extract from Level 1 text

Article 19

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 11(4), 11b, 11c and 12 to 14, 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 15 and disclosed in accordance with Articles 16 and 17.

   1a. 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.

2. 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 16 and 17, even if such information is not regulated information within the meaning of Article 2(1)(k) of this Directive.

3. In order to ensure the uniform application of paragraph 1, the Commission shall, in accordance with the procedure referred to in Article 23 (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 23 (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 26 (3) at the latest five years following the date referred to in Article 27. 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.

   3a. In order to ensure uniform application of paragraph 2, the Commission may, in accordance with the procedure referred to in Article 23(2), adopt implementing measures defining the type of information disclosed in a third country that is of importance to the public in the Community.

   3b. 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/../EC of the European Parliament and of the Council [on markets in financial instruments] 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 Articles 11(3a) and 11(3b)

provided that they comply with equivalent conditions of independence as management companies or investment firms.

3c. In order to take account of technical developments on financial markets and to ensure the uniform application of paragraph 3b, the Commission shall, in accordance with the procedure referred to in Article 23(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.

Following the distribution of issues as presented in the EC 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

CESR

SECTION 1 – EQUIVALENCE AS REGARDS ISSUERS

1. INTRODUCTION

526. 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":

527. 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.

528. 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".

529. 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".

530. 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.

531. 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 a similar decision or reach a similar conclusion in terms of investment and disinvestment as if they were provided with the requirement under the Transparency Directive.

532. In using this approach, it is necessary for CESR to consider the concepts underlying the objectives of each main requirement under the Transparency Directive.

533. 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

534. 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 19(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

535. 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, a EU list of third countries who will be deemed to be equivalent will be created.

QUESTIONS
Q55 Do you agree with the proposed approach? If not, please give your reasons.
Q56 Do you consider that there is any other way to develop Level 2 implementing measures related to Article 19(1) of the Transparency Directive? Please explain your answer.

Other general considerations

536. 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 19(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
Q57 Do you agree with this interpretation of Article 19(1) of the Transparency Directive as regards time limits? Please give reasons for your answer.

CESR

2. Principles for establishing equivalence of the items set out in the mandate

537. 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;

538. 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[27] :

- 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;

- the issuer's likely future development.

539. In addition to the above, any issuer of shares has to include in the annual management report the following[28]:

- Financial Condition: a description of the issuer's financial condition, changes in financial condition and results of operations for each year, for which historical financial information is required, including the causes of material changes from year to year in the financial information to the extent necessary for an understanding of the issuer's business as a whole.

- Operating Results:

  - o information regarding significant factors, including unusual or infrequent events or new developments, materially affecting the issuer's income from operations, indicating the extent to which income was so affected;

  - o where the financial statements disclose material changes in net sales or revenues, a narrative discussion of the reasons for such changes;

---

[27] 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).

[28] Based on EC Regulation n° 809/2004 for implementation of the Prospectus Directive, Section 9 of Annex I

- information regarding any governmental, economic, fiscal, monetary or political policies or factors that have materially affected, or could materially affect, directly or indirectly, the issuer's operations.

B. Half-yearly (interim) management reports;

540. In order for a third country issuer to be deemed to be meeting equivalent requirements to those set out in Article 5(3) (a) of the Transparency Directive, the interim management report of any issuer has to include at least the following:

(a) an indication of important events that have occurred during the first six months of the financial year and its impact on the condensed set of financial statements;

(b) a description of the principal risks and uncertainties for the remaining six months 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

541. 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.

542. Consequently, a third country issuer will be deemed to be meeting equivalent requirements to those set out under Articles 4(2)(c) & 5(2)(c) if the annual and half-yearly financial information is signed by somebody that the third country's legal framework makes clearly responsible.

D. Interim management statements under Article 6

543. 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:

544. 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.

545. 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

546. 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"

547. 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.

548. 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

549. 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.

550. 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.

551. In the case they are, competent authorities will not require a complete set of accounts, but will require additional notes to the consolidated accounts 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).

552. As regards dividends, competent authorities will have to ensure consistency with information provided under Article 13(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

553. 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.

554. 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.

CESR

555. 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.

556. The individual accounts must be audited independently.

G. Transparency about major holdings of voting rights or financial instruments

557. 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"

558. 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, CESR's mandate is limited to the specific major holdings of voting rights and financial instrument provisions set out in of Article 19(1).

559. Article 19(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.

560. On examination of Article 19(1), the majority of the major holdings of voting rights or financial instruments requirements in the Directive (which are set out in Articles 9-11a) are not included in Article 19(1), and as such, CESR's mandate is limited to the following provisions of the Directive: Articles 11(4), 11b, and 11c. Set out below is a discussion about each of these articles and the principles for establishing a third country issuer's equivalence to them.

G1. Article 11(4)

561. 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."

562. 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.

563. 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.

564. 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 11(4) is;

a) other relevant time frames in the directive and whether or not an equivalent time frame has been established for third country issuers

565. 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 11(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 19(1).

566. In addition, as stated in paragraph 536 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.

567. As such, it appears that there can be no "equivalence" in relation to the time limit established in Article 11(4). However, as with the other parts of the equivalence mandate, in order to establish its advice, CESR needs to consider the purpose of Article 11(4).

b) what the purpose of Article 11(4) is

568. The purpose of Article 11(4) 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 3 trading days.

569. However, the requirement of Article 11(4) 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.

570. In establishing its advice, CESR therefore has to take into consideration the fact that under the provisions of Article 11(2), the shareholder, natural person or legal entity has 4 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 7 trading days (that is on the assumption that the original notification is made within the 4 trading day period) after the date on which the shareholder, natural person or legal entity learns (or should have learned)[29] of the acquisition or disposal, or the Article 9(2) event.

571. 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 11(4). For example, an issuer may have to make such notification public, once received, within one trading day.

572. In addition, under the requirements of Article 13(1), a third country issuer of shares is obliged to ensure equal treatment for all holders of shares who are in the same position. As such, in establishing whether or not the Article 11(4) 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.

573. For example, a third country issuer under its domestic laws has a notification structure whereby it receives the notifications within a 1 trading day period, but has 5 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 4 trading day period, in doing so,

[29] For a discussion about what "learnt" or "should have learnt" means – please see section 5 of Chapter 1 of this consultation paper.

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.

574. Taking all of this into consideration, as the purpose of the Article 11(4) is to ensure that the notification is made to the public within a 7 trading day period (that is on the assumption that the original notification is made within the 4 trading day period), CESR concludes that provided that this 7 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 11(4).

575. For example, a third country issuer can under its own domestic law, have 6 trading days within which to make the notification public. However, the notification to the issuer has to be made within 1 trading day. In such a case the overall objective of the notification having to be made within the total of 7 trading days is still met.

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

576. CESR also considered whether or not equivalence in relation to Article 11(4) 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 11(4a)) did not.

577. In such circumstances, provided that the notification gets to the public within the 7 trading day deadline it should not matter that it is not the issuer or the competent authority that is making this notification.

578. However, because the Article 17 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 17 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 17.

<u>Draft technical advice</u>

579. Third countries will be considered as having equivalent requirements to those set out in Article 11(4) 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 7 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 7 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 11(2) and 11(4).

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

<u>G2. Article 11b – acquisition and disposal of own shares</u>

580. This article states that:

CESR

"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."

581. 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 4 trading day time period within which to notify the public of this.

582. 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 11(4), 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 make this notification public within the 4 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.

583. CESR therefore considers that there can be no equivalence in relation to the 4 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.

584. 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 percent 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 11b.

585. 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 11b.

Draft technical advice

586. A third country will be considered as having equivalent requirements to those set out in Article 11b 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 11b; 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 11b.

587. 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 11b, there will be no equivalence unless one of the above mentioned circumstances apply.

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

G3. Article 11c- notification following increase or decrease in capital

588. 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."

589. 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

590. 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 11c.

Draft advice

591. 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 11c.

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

H. Information on general meetings under Articles 13 and 14.

592. As CESR has not been given any mandates in relation to the provisions of Article 13 and 14, 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.

593. 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.

594. 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 19.1 that obliges third country issuers to file the information in accordance with Article 15 and disclose it in accordance with Articles 16 and 17. 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.

595. 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.

CESR

CESR

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 19(3b)

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/../EC of the European Parliament and of the Council [on markets in financial instruments] 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 Articles 11(3a) and 11(3b) provided that they comply with equivalent conditions of independence as management companies or investment firms.

§1. Introduction

596. CESR has been mandated to provide a list of those third countries that have domestic laws, regulations or administrative provisions that ensure that there are equivalent independence requirements between the third country's parent undertaking and its management companies or investment firms to those established under the Transparency Directive.

597. In establishing its advice, CESR has been invited to focus on management companies and investment firms located in those third countries that it considers to be the most relevant from the point of view of the European capital markets.

598. Although the mandate makes specific reference to the creation of a "list" of third countries, CESR concludes at this stage that such a list may not be necessary considering the approach proposed below for third country management companies and investment firms is not based on an assessment of equivalence of third countries frameworks.

599. 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.

600. On this basis, CESR concludes at this stage 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.

601. An alternative approach would consist in examining, in addition, the rules on independence applicable to management companies/investment firms located in third countries considered as most relevant for European capital markets.

602. 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. If this alternative approach was retained, it is proposed to examine at this stage the independence rules applicable to management companies /investment firms in the US, Canada and Japan, three countries for which CESR is currently carrying out work on equivalence of the domestic accounting standards with IAS/IFRS.

QUESTION

Q62 Do you agree with the proposed approach? Do you consider that the alternative approach provides added value? Please give your reasons.

§2. Reference to authorisation in the Level 1 text

603. It is first necessary to discuss in some detail that provisions of Article 19(3b), which establishes the basis upon which a parent undertaking of a management company or investment firm that is registered in a third country is allowed to get the benefit of the exemption of not having to aggregate its holdings with those of its management company and/or its investment firm provided it meets the requirements of Articles 11(3a) and 11(3b).

604. It is important to point out, that unlike the other principles for establishing equivalence under this mandate, which relate to the competent authorities' discretion as provided for by Article 19(1), this exemption is absolute in a sense that provided that the investment firm or management company that is registered in a third country meets the test of independence, it gets the benefit of the exemption.

605. CESR considers the following provision of article 19(3) to be relevant:

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 11(3a) and 11(3b).

a) The reference to the nature of the investment firm or management company's "authorisation"

606. 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.

607. 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.

608. 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.

CESR

609. 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.

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

b) the requirement to comply with equivalent conditions of independence as management companies or investment firms do under Articles 11(3a) and 11(3b)

610. As discussed in Section 6, Chapter 1 of this consultation paper, CESR has been mandated to establish what a parent undertaking of a management company and or investment firm has to do in order to get the benefit of the exemptions set out in Articles 11(3a) and 11(3b).

611. CESR sets out below a discussion of these requirements for both management companies and investment firms.

§3. Requirements for management companies and investment firms registered in a third country

612. 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 11(3a) and 11(3b), 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.

613. As a general principle, and as discussed in Section 6, Chapter 1 of this consultation paper, 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.

614. 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 rights attached to the assets it manages in all situations. For example, the right to freely participate in security holders' meetings, the right to freely participate in minority shareholders' meetings, the right to contest decisions of the issuer, including the right to take legal action, to exercise all minority rights, etc. Independence should cover any possible use of the rights by the management company or investment firm;

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,

CESR

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.

615. 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 Articles 11(3a) and 11(3b) which are:

§4. Declaration to the competent authority

616. 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 193b, 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.

617. 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, Chapter 1 of this consultation paper.

§5. Draft advice:

618. 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 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.

619. 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 11(3a) and 11(3b).

Declaration to the competent authority

620. In circumstances where a parent undertaking intends to use the exemption, 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.

621. The declaration shall have the following content:

- 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;
- 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;
- 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).

622. The declaration shall be submitted to the competent authority under the Transparency Directive either at the start of the implementation of the Transparency Directive, or at the latest within the time limit of Article 11 of the Transparency Directive (4 trading days) after the parent undertaking and/or management company and/or investment firms in aggregation crosses the thresholds of Article 9 of the Transparency Directive for the first time.

623. If the parent undertaking decides that it will no longer be eligible to benefit from the exemption, it should notify the competent authority as defined 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.

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

CESR

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

(*Article 15 (4) of Transparency Directive – home Member State control*)

1. Extract from the mandate from the European Commission to CESR

624. 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 15 (4))

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.

2. 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;"*

3. Introduction

625. 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.

626. 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.

4. Discussion

4.1. 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

Why is the advice necessary?

CESR

627. 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.

628. 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's because of the linkages between these two directives.

629. 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.

630. 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.

631. 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:

632. 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, and is discussed in some detail in the progress report.

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

4.2. 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?

633. 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.

Draft technical advice

634. 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.

635. 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 17 (for details of how this is to be done see Consultation Paper on dissemination and storage of information (ref. CESR/04-511) so that the market knows who the relevant competent authority for Transparency Directive purposes is.

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

* * *