THE COMMITTEE OF EUROPEAN SECURITIES REGULATORS

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

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

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INTRODUCTION

Background

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

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

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

Areas covered

CESR received on 29 June 2004 the official request from the Commission for technical advice on implementing measures of the Transparency Directive.

There were two elements in the request of the Commission.

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

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

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

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

The *second element* of the Commission's request was presented through a letter of the Commission to CESR, inviting CESR to present a progress report on the conditions for officially appointed mechanisms for storage of information and on possible electronic networks of information about issuers. CESR has delivered a Progress report on the Role of Officially Appointed Mechanism (Article 21(2)) and the Setting up of a European Electronic Network of Information about Issuers (Article 22) and Electronic Filing (Article 19 (4a)) to the Commission the on 30 March 2005.

CESR's deadline for delivering this advice is 30 June 2005.

CESR is pleased to hereby deliver its final advice to the Commission in this area.

Public consultations

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

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

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

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

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

The public consultation period regarding Consultation Paper (04-511) on dissemination and storage closed on 28 January 2005. In the consultation 53 answers were received. An open hearing was held on 7 December 2004.

The public consultation period regarding Consultation Paper (04-512c) ended on 4 March 2005. There were 40 answers to the consultation. A public hearing was held on 17 February 2005.

These consultations were the first consultations in the respective areas. CESR was very pleased to find a great deal of support for much of the advice given. As a matter of due process CESR chose to provide consultees with the opportunity to react to the changes to this draft advice. The re-consultation paper therefore included also areas were new questions were not asked and were CESR had already reached a suitable advice as it was likely to stand when the final advice was delivered to the Commission.

Following the first two consultations, CESR carefully considered all the answers from the consultees. CESR issued a compiled re-consultation paper on issues arising from both consultations on the 27 April with a consultation period until the 27 May 2005. CESR received 55 answers to this consultation.

When delivering its final advice CESR now also publishes a comprehensive Feedback Statement (CESR 05-408) taking into account all the responses given during the three consultation periods.

References

In this paper reference made to previous consultation papers is sometimes referred to as "The October Consultation Paper" for document CESR (04-511) on Dissemination and Storage and "The December Consultation Paper" for document (05-512c) on Notifications of major holdings of voting rights, half-yearly financial reports, equivalence of third countries information requirements and procedural arrangements whereby issuers may elect their "Home member State". For the re-consultation paper CESR 05-267 uses the expression "April Consultation paper" is sometimes used.

References to Articles in this document are made to the final version of the Directive. However the Articles referred to in the Commissions mandate, of which extracts are reproduced in this document,

refers to the numbering of the Directive in the unofficial version of 11 May 2004 of the Transparency Directive as published on European Commission website (http://europa.eu.int/comm/internal_market/securities/transparency/index_en.htm). This version of the Transparency Directive has also been posted on CESR's website (under Documents).

CESR

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CHAPTER I

Section 1

DISSEMINATION OF REGULATED INFORMATION BY ISSUERS

Extract from the mandate

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

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

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

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

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

Extract from Level 1 text

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

INTRODUCTION

1. The combined provisions of Article 21 and Article 22 of the Transparency Directive set forth the framework for a comprehensive system of dissemination and storage of regulated information.

2. Together with the option granted to competent authorities under the Transparency Directive, to post in their websites information that is filed with them (Article 19 (1) this will achieve a coherent system of disclosure of information.

3. The overriding objective of the Directive is to promote the integration of the European capital markets by improving investors' access to information disclosed by issuers. CESR has already

delivered a first report to the European Commission in relation to storage (CESR 05-150b) and is expecting to receive a mandate to deal with those issues.

4. This part of the advice deals with the minimum standards for the dissemination of regulated information.

5. In developing its thinking in this area, CESR considers that the following high level principles can be extracted from the recitals of the Directive as regards information disclosure:

(i) the increased importance of an European perspective, both for issuers and investors;

(ii) the need to improve investors access to information on a real time basis (and historically, from the storage);

(iii) the need to ensure free competition for issuers when disseminating regulated information.

6. CESR has also borne in mind that dissemination must incorporate high levels of security in order to minimize the risk of erroneous announcements being released or information leaking into the market and that information, especially inside information, needs to be released as soon as possible, and in accordance with the provisions of the relevant Directives.

7. Where certain regulated information is not time critical and of a large volume, it may be possible to disseminate that information using other methods, provided that the issuer disseminates an announcement through the service provider or appropriate media stating that the information has been published and where it is available. In any event, such information should be available in the storage mechanism within an appropriate time delay (i.e. by the following trading day).

8. CESR considers important to point out that issuers are free to disseminate regulated information in the way they consider best suited to their needs, either by themselves or by using the services of a service provider.

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

10. The advice sets out the standards and requirements that issuers have to fulfil to comply with the provisions of article 21 of the Directive.

11. The advice covers the requirements that an issuer has to comply with when it uses a service provider to disseminate regulated information. CESR considers that if service providers are used in the dissemination of regulated information on behalf of issuers, issuers must ensure that they fulfil certain requirements designed to ensure adequate dissemination and handling of regulated information and that issuers effectively benefit from free and transparent competition when choosing their service providers. In recognition of the fact that issuers have a Pan-European dissemination obligation under the directive, CESR has developed standards that issuers must ensure that service providers fulfil, to facilitate meeting the issuer's obligations under the Transparency Directive.

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

13. CESR has tried to reach a proper balance between the needs for clarity and certainty as to which dissemination standards have to be complied with and for ensuring a proper level of flexibility as requested by consultees. CESR considers that the advice sets out an adequate level of detail, whilst maintaining the necessary flexibility for competent authorities and issuers to ensure that there will be an adequate flow of information to the market. In areas where CESR has considered it necessary to provide greater detail, such as in relation to electronic connections, or the necessary output of information to media, these details are still open for future work, if required. In this sense, for example, electronic connections should be interpreted broadly in order to provide the necessary flexibility and adaptability to existing and future means of communication. CESR has also

tried to maintain a certain consistency in the approach to this issue and its previous proposals in relation to the storage and the electronic filing with the competent authority.

14. The matter of approval of service providers will remain under review, as recommended by consultees. CERS considers that competent authorities are free to decide whether they will approve service providers or not. CESR will analyse whether the effective application of the standards for dissemination will require this question to be dealt with at level 3.

15. On the matter of issuers' identification, the current advice requires that issuers are identified without stating an additional specific method to achieve such identification. Notwithstanding, CESR acknowledges that further, and consistent with the storage, work needs to be made. CESR will address this issue in light of the work currently undertaken in different groups and areas.

KEY CONCEPTS

16. In order to accomplish the mandate, CESR considers it necessary to make quite clear some of the key concepts used throughout this advice, as follows.

17. **Dissemination** describes how information enters the public domain. For the purposes of this advice, dissemination requires that information is actively distributed by issuers or service providers to organisations whose business it is to distribute such information further, such as business wires, news agencies, newspapers and other media.

18. In defining the meaning of dissemination, CESR considered other information requirements. Article 6 (1) first subparagraph of the **Market Abuse Directive** requires that an issuer "inform the public". Article 6 (1) second subparagraph of the Market Abuse Directive implies that posting information on the internet site of the issuer, while being required, does not in itself fulfil the requirement to inform the public.

19. Article 14 of the **Prospectus Directive** requires that a prospectus be "made available to the public" by a number of different (alternative) means including newspapers. Where publication is only on paper, Member States may in addition require electronic publication. In any event, a list of recently approved prospectuses and, where applicable hyperlinks, must be available on the website of the competent authority.

20. CESR considers that dissemination is more than that and requires a greater degree of activity. Also, the Transparency Directive requires that information be disseminated throughout Europe, while the publication requirements of the Market Abuse Directive and the Prospectus Directive are limited in scope to the respective Member State. It must also be recalled that the Transparency Directive requires dissemination to the public, not to the business community.

21. **Regulated information** covers the following:

(i) Information to be disclosed under the Transparency Directive, namely:

a. Annual financial reports;

b. Half-yearly financial reports;

c. Interim management statements;

d. Major shareholdings information;

e. Additional information

(ii) Any other information required to be made public by the Home Member State in accordance with Article 3 (1).[1]

(iii) Inside Information which is to be disclosed under the Directive 2003/6/EC on Insider Dealing and Market Manipulation, (the "Market Abuse Directive" or "MAD").

(iv) Directors' dealings are only regulated information to the extent that this information is available to the issuer under each Member State transposition measures of the Market Abuse Directive.

22. The dissemination is an obligation the Directive imposes on **issuers** whose securities are admitted to trading on a regulated market or to the persons who applied for the admission to trading without the issuers' consent. Therefore, all the references to issuer or issuers should be read accordingly.

23. The term **securities** includes all transferable securities as defined by article 2 (18) of the Directive 2004/39/EC on markets in financial instruments with the exception of money market instruments, as defined in article 2 (19) of the Directive 2004/39/EC on markets in financial instruments having a maturity of less than 12 months, for which national legislation may be applicable.

[1] Art. 3.1 enables the Home Member State to provide for requirements that are more stringent than those of the Directive.

TECHNICAL ADVICE

24. Issuers must ensure, when disseminating regulated information, that the following minimum standards are met:

(a) fast access to regulated information for investors

25. CESR considers that the dissemination method must be capable of providing investors with regulated information (as defined in Article 2(1.k of the Directive) without delay. This is especially the case where regulated information is, or may be, of a price sensitive nature, for example 'inside information' as defined under the Market Abuse Directive 2003/6/EC. CESR considers that fast access to regulated information for investors is best achieved through the use of electronic dissemination methods. In this context, it is also important to avoid fragmentation of information streams which may compromise the goal of fast access.

(b) access on a non discriminatory basis

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

(c) effective dissemination throughout the EU

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

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

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

29. In accordance with Article 21(1) issuers cannot charge investors for the regulated information provided.

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

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

f) Distribution

Connections with media

31. To ensure that the issuer is fulfiling its obligations under Article 21 of the Directive CESR would normally expect that the connections with media include different channels of distribution. CESR considers that these connections should include mandatory connections with, at least, the key

national and european newspapers, specialist news providers, news agencies with national and european coverage and financial websites acessible to investors.

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

33. Issuers are responsible for ensuring that whatever method of dissemination they chose, it ensures sufficient and reasonable connections with the media and adequate means of reaching the media. CESR considers that these connections should be electronic.

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

Re-submissions of information

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

Output format

36. Regulated information must be provided to media in unedited full text in industry standard formats. In addition, local formats may be used for regulated information at national level.

Necessary output information fields

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

- identification of the issuer concerned;
- headline (the subject of the announcement);
- time and date; and
- sequence number of the announcement.

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

39. In addition to the standards set out above, issuers should disseminate regulated information in accordance with the following standards:

(A) SECURITY

40. An appropriate level of security must be incorporated into the dissemination mechanism. Breaches of security can lead to erroneous announcements being released or information leaking into the market. Both these factors could seriously undermine the orderliness of the trading market. Consequently, security is essential at each stage of the dissemination process.

Processing

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

Output

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

(i) in a secure manner; and

(ii) by the issuer or service provider appointed by the issuer.

Breaches of security

43. In the event that there is a breach of any security measure relating to the dissemination, appropriate corrective action must be taken without delay.

(B) INFORMATION THAT MUST BE RECORDED AND PRESERVED

44. The following information regarding the regulated information must be recorded and preserved by the issuer for a reasonable time period:

- name of person submitting regulated information to the media;
- security validation details;
- date and time regulated information was sent;
- medium in which regulated information was sent;
- details on any embargo by the issuer (if relevant);
- date and time regulated information is released.

(C) RECOVERY PROVISIONS

45. CESR considers that the issuer must have adequate recovery systems in place to rectify as soon as possible a failure in or disruption to the dissemination.

(D) STANDARDS FOR ISSUERS USING A SERVICE PROVIDER

46. When issuers use service providers to accomplish their obligations under Article 21 of the Directive, CESR considers that issuers must take into account (i) the proper handling of regulated information by that service provider (ii) the need to ensure an informed decisions on what service provider to chose. Therefore, CESR considers that whenever issuers make use of service providers to meet their obligations, issuers must ensure that these service providers meet the requirements set out below in D1 to D9.

D.1 SECURITY

47. In addition to (A) above, service providers must ensure that the mechanism by which they receive regulated information (input mecanism) ensures that:

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

D.2 INFORMATION THAT MUST BE RECORDED AND PRESERVED BY THE SERVICE PROVIDER

48. In addition to (B) above, the service provider must record and preserve the following in

relation to each piece of regulated information:

- issuer's name;
- time and date regulated information was received;
- medium in which regulated information was received;
- details of the service provider staff in contact with regulated information from receipt to release, in order to ensure that records of proper handling of the information are kept and available for supervisory purposes;
- details of any changes made to the document by the service provider during processing.

D.3 RECOVERY PROVISIONS

49. The recovery service must be available during the operational hours of the service provider (as set out in D.4 below) in order to ensure the timely receipt and dissemination of regulated information to media.

D.4 OPERATIONAL HOURS

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

D.5 MANAGEMENT OF REGULATED INFORMATION BY THE SERVICE PROVIDER

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

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

D.6 SERVICE PROVIDER HELP SUPPORT

53. The service provider must provide support/help to issuers during the operational hours.

D.7 SEPARATION OF FUNCTIONS WHEN SERVICE PROVIDERS PROVIDE OTHER SERVICE OR PERFORM OTHER FUNCTIONS

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

55. When competent authorities act as service provider, they may not impede free competition, as stated in the Directive, by requiring issuers to make use of their services. On the other hand, when stock exchanges act as service providers, their admission to trading criteria cannot mandate the use of their service provider facility services.

56. In addition, no competitive advantage should be allowed (for example, if a service provider

is also a media, it should establish a clear separation of functions so that the part of the bussiness that acts as media will not receive regulated information in advance of competing media but only when regulated information is released to media).

D.8 CHARGES

57. Charges for any service provider service must be clearly stated and indicate the activities covered so that they can be readily compared with competing service provider.

58. Entities that perform more than one service or function as stated in paragraphs 31 and 33 above should clearly identify and separate the fees being charged for each specific function or service, to allow comparision between the various service providers.

D.9 DOCUMENT

59. CESR considers that it will be of a great assistance to issuers when chosing a service provider if these provide and publish a document where they demonstrate the way in which they comply with the dissemination standards and requirements set out above. Therefore, CESR strongly recommends that issuers require service providers to present them such a document before taking any decision on this matter.

SECTION 2

CONDITIONS FOR KEEPING PERIODIC FINANCIAL REPORTS AVAILABLE

INTRODUCTION

60. CESR has been mandated to provide technical advice to the Commission by June 2005 in relation to how the issuers can meet their obligations in respect of:

61. Article 4(1) which requires the issuer to ensure that its annual financial report remains publicly available for at least five years; and

62. Article 5(1) which requires the issuer to ensure that the half- yearly financial report remains available to public for at least five years.

Extract from the mandate

Keeping periodic financial reports available by issuers (Articles 4(5) and 5(5))

CESR is invited to provide technical advice on possible implementing measures on the technical conditions under which a published annual financial report (including the audit report) and a published half-yearly financial report (including any audit report or any review) is to remain available to the public. In particular, CESR is invited to consider the possibility for the issuer to fulfil such obligation by providing the relevant information to the central storage mechanism referred to in Article 17 (1a) of the Level 1 Directive.

63. CESR was invited to consider the possibility for the issuer to fulfil its obligations to keep a published annual financial report (including the audit report); and a published half-yearly financial report (including any audit report or any review) by providing this information to the Central storage mechanism.

64. CESR considers that the Commissions proposal is the best way that issuers can ensure that these directive obligations are met for the following reasons:

65. Under the requirements of Article 21 (1) (discussed fully in Section 1) regulated information has to be disclosed in a manner that ensures fast access to all investors on a Pan- European basis, and has to be made available to the central storage mechanism.

66. The term "regulated information" includes the annual financial reports (including the audit report); and half- yearly financial reports (including any audit report or any review).

67. This information is already required under Article 21 (1) to be made available to the central storage mechanism, the purpose of which (as discussed in detail in Part C of this paper) is for the public to be able to access this information.

68. CESR considers that the only difference between these article 21 (1) obligations and those under articles 4.1 and 5.1 is the specification of the amount of time for which this information has to remain available in the central storage mechanism.

69. There is no reason why the central storage mechanism should not be able to ensure that annual financial reports (including the audit report); and half- yearly financial reports (including any audit report or any review) remains accessible for at least 5 years.

70. All that will be required is the creation of an archiving facility in the central storage mechanism, so that this information can remains accessible for at least five years.

TECHNICAL ADVICE

71. Issuers' obligations to keep available to the public the published annual financial reports (including the audit report) and the published half-yearly financial reports (including any audit report or any review) are met if such reports are kept in the central storage mechanism for the time period forseen in the Directive.

CHAPTER II

NOTIFICATIONS OF MAJOR HOLDINGS OF VOTING RIGHTS

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

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

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

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

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

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

(vi) To clarify the conditions of independence to be complied with by management companies, or by investment firms, and their parent undertakings to benefit from the exemptions in Articles 12(4) and 12(5);

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

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

SECTION 1

THE MAXIMUM LENGTH OF THE SHORT SETTLEMENT CYCLE FOR SHARES AND FINANCIAL INSTRUMENTS IF TRADED ON A REGULATED MARKET OR OUTSIDE A REGULATED MARKET AND THE APPROPRIATENESS OF THE "T+3 PRINCIPLE" IN THE FIELD OF CLEARING AND SETTLEMENT

Extract from mandate

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

maximum length of "the usual short settlement cycle" referred to in Article 9(3a) in cases of shares and financial instruments to be defined under Article 11(a) if traded on a regulated market or outside a regulated market and the appropriateness of the "T+3 principle" in the field of clearing and settlement.

Relevant Level 1 text

9(4) of the Transparency Directive:

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

EXPLANATORY TEXT

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

a) the holding of the shares and other financial instruments:

(i) aims exclusively at clearing and settling transactions; and

(ii) is temporary;

b) during this temporary period, during which the shares or financial instruments are being held:

(i) there is no exercise of the voting rights attached to the shares or financial instruments; and

(ii) the voting rights are not being used for intervention in the management of the issuer.

73. In view of the existing definitions of clearing and settlement[2], 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.

74. 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

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

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.

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

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

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

TECHNICAL ADVICE

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

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

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

SECTION 2 CONTROL MECHANISMS TO BE USED BY COMPETENT AUTHORITIES WITH REGARD TO MARKET MAKER AND APPROPRIATE MEASURES TO BE TAKEN AGAINST A MARKET MAKER WHEN THESE ARE NOT RESPECTED

Extract from mandate

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

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

Relevant Level 1 provisions

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

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

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

EXPLANATORY TEXT

The requirements of Article 9(5)

81. The control mechanisms as regards market makers will have to meet the requirements of Article 9(5) which establish when the limited exemption can apply. These requirements are:

a) that the market maker is acting in its capacity as a market maker;

b) that the market maker is authorised by its home Member State competent authority under MiFID;

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.

82. The first requirement (acting in the capacity of a market maker) means that the market maker is acting as a market maker as defined in Article 2(1).

83. The second requirement refers to authorisation under MiFID. 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. 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(5) of the Transparency Directive.

84. The third 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.

85. 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 voting rights attached to the shares, nor use the shares to influence the management of the issuer concerned.

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

Methods of controlling the market maker activity with regard to the exemption provided

87. 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.

88. 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 make a declaration to the relevant competent authority for which shares it acts or intends to act as market maker for.

89. On the content of declaration, CESR considers that the declaration must be made on an issuer by issuer basis. CESR considers that this can be done in a single declaration to all competent authorities listing all the issuers for whose shares it conducts or intends to conduct market making activity.

90. The post-control that CESR considers appropriate for competent authorities is the ability to request all the necessary information to support the declaration.

91. 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.

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

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

93. 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.

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

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

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

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

95. MiFID only deals with breaches of MiFID and not of the Transparency Directive; therefore it is necessary for CESR to establish which measures are appropriate for the purposes of the Transparency Directive.

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

The relevant competent authority

97. 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.

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

99. 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.

TECHNICAL ADVICE

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

101. Market makers that want to benefit from the exemption should make this declaration:

a. at the start of the implementation of the Transparency Directive for those issuers for which it is acting as market makers at that moment;

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

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

102. The relevant competent authority should be the competent authority of the issuer under the Transparency Directive.

103. Market makers that want to benefit from the exemption should 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 identifiable on request;

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

c) when undertaking market making activity an investment firm should either:

a. hold the shares subject to that activity in a separate account; or;

b. be able to identify the shares held for market making activities.

104. 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.

105. 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.

106. On consideration of the measures set out under MiFID, 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 that can take appropriate action.

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 12(2). DG Internal Market does not consider necessary to define a uniform calendar of trading days throughout the EU. Instead, it invites CESR to provide advice on the trading days of which Member State should be relevant.

Relevant Level 1 provisions

Article 12 (2):

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

Article 12 (6):

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

Article 12 (7):

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

Article 14:

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

EXPLANATORY TEXT

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.

107. 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.

108. Time requirements are :

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

109. 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.

110. 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.

111. 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.

112. In addition, because there is no standard calendar for use across member states, CESR considers it important to create a 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 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).

a) What criteria should be used to determine the rule for establishing which calendar to use.

113. Several options are set out below :

Calendar of the location where the trade takes place:

114. 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 regulated market.

115. 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.

116. 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 the regulated market.

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

117. 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.

118. 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 issuer was first admitted to trading.

Calendar of the state where the shareholder, natural person or legal entity is located

119. CESR recognises that this option may be the easiest from the perspective of the shareholder natural person or legal entity 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 natural person or legal entity making a disposal is located in a different country to that of both the issuer and the shareholder natural person or legal entity 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.

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

Calendar of trading days of issuer's home Member State

121. 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.

122. 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.

TECHNICAL ADVICE

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

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

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

SECTION 4

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

Extract from the mandate

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

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

Relevant level 1 provisions

Article 10 of Transparency Directive

Acquisition or disposal of major proportions of voting rights

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

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

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

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

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

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

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

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

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

EXPLANATORY TEXT

a) General principles

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

127. 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.

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

a. by identifying additional voting rights that shareholders may have under the circumstances listed in Article 10, for the purposes of aggregation with the shares they hold; and

b. by identifying an additional set of natural persons or legal entities that need to make notifications on major entitlements to voting rights.

b) Objective of notification requirements

129. Just like for the issue of aggregation (which is further discussed in CESR's advice in relation to the content of the standard form in Section 7 of this advice), CESR considers it important to point out that irrespective of how one can interpret Articles 9 and 10, it is not the intention of the Transparency Directive to change the acquis which imposed notification obligations on shareholders in respect of changes in their "holdings" of voting rights. On an examination of Article 9 there are references to voting rights, holdings, major holdings and shares. However, it is clear that the intention of the Transparency Directive is to impose ongoing obligations on shareholders in respect of acquisitions and disposals of both shares and voting rights.

130. In addition to the above, the objective of the notification requirements in the Transparency Directive is to disclose to the market major holdings of voting rights and continuing changes in such holdings, when the proportion of voting rights reaches, exceeds or falls below a notification threshold. Therefore CESR interprets Article 9 as requiring from shareholders notification of acquisitions and disposals of voting rights even though shares are not acquired or disposed of.[3]

c) Notification thresholds

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

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

Article 10(a) of Transparency Directive

132. "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;"

133. 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

[3] One member is of the opinion that the notification duty should be triggered by the transfer of legal ownership. It considers further that Article 9 should only impose obligations/disposals of shares with voting rights attached.

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.

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

135. 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.

136. 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.

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

Article 10(b) of Transparency Directive

138. *"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;"

139. 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.

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

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

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

Article 10(c) of Transparency Directive

143. *"The notification requirements defined in paragraphs 1 and 2 of Article 9 shall also apply to a natural person or legal entity to the extent it is entitled to acquire, to dispose of, or to exercise voting rights in any of the following cases or a combination of them:*
c) voting rights attaching to shares which are lodged as collateral with that person or entity, provided the latter controls the voting rights and declares its intention of exercising them;"

144. 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").

145. 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.

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

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

Article 10(d) of Transparency Directive

148. "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;"

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

150. 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.

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

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

Article 10(e) of Transparency Directive

153. "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;"

154. Article 10(e) applies to situations where a controlled undertaking is required to notify under the situations described in Article 9 and Article 10 (a)-(d). The Article requires the controlling natural person or legal entity to make a notification regardless of whether or not it holds voting rights itself.

155. 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

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

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

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

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

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

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

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

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

Article 10(f) of Transparency Directive

163. "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;"

164. 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".

165. 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.

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

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

Article 10(g) of Transparency Directive

168. "The notification requirements defined in paragraphs 1 and 2 of Article 9 shall also apply to a natural person or legal entity to the extent it is entitled to acquire, to dispose of, or to exercise voting rights in any of the following cases or a combination of them:
(g) voting rights held by a third party in its own name on behalf of that person or entity;"

169. 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.

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

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

Article 10(h) of Transparency Directive

172. "The notification requirements defined in paragraphs 1 and 2 of Article 9 shall also apply to a natural person or legal entity to the extent it is entitled to acquire, to dispose of, or to exercise voting rights in any of the following cases or a combination of them:
(h) voting rights which that person or entity may exercise as a proxy where it can exercise the voting rights at its discretion in the absence of specific instructions from the shareholders."

173. 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.

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

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

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

177. If proxies are given in relation to one shareholders meeting, CESR is of the opinion that, although the proxy holder who can exercise voting rights at his discretion has two notification obligations (one when he acquires control over the voting rights and one when his discretion ends), one notification can be given of the extent of his interest and of the fact that he will cease to be so interested after the relevant shareholders meeting. To take this into account, CESR added a line of information in the standard form (see paragraph x of this advice). Similarly the proxy giver who has two notification obligations can give one notification.

e) Other issues

The appointment of another person to comply with the notification obligation

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

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

180. However, CESR does not consider that this appointment releases the shareholder, natural person or legal entity from its obligation to make the notification. If the appointed person does not

make the notification, then the legal obligation to notify still remains with the original shareholder, natural person or legal entity. CESR wants to point out that this obligation includes the content of notification as well as the notification obligation.

Single notification in cases of joint notification duty

181. 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.

182. 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.

183. 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.

TECHNICAL ADVICE

184. In order to clarify which person (the shareholder or the natural person or legal entity referred to in Article 10 or both) should make the notification, CESR established a table setting out who should make the notification in the different circumstances described in Article 10.

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

185. Whenever changes to the circumstances described in Article 10(a)-(h) take place (for example : when the agreement comes to an end, when the shares and/or voting rights attaching to shares are returned by the collateral holder to the collateral lodger or by the deposit taker to the original depositor), which result in changes to the amount of voting rights attributable to the person that was required to make the notification, a subsequent notification requirement should be triggered if the change results in threshold(s) being crossed, reached or fallen below.

186. A shareholder, a natural person or a legal entity that has to make a notification should be able to appoint another person to make a notification on its behalf.

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

188. Such an appointment does not release the shareholder, natural person or legal entity from its obligation (including the content of the notification as well as the notification obligation itself) to make a notification.

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

190. The use of a single notification does not release the persons involved from their obligation (including the content of the notification as well as the notification obligation itself) to make a notification.

191. If proxies are given in relation to one shareholders meeting, although the proxy holder who can exercise voting rights at his discretion has two notification obligations (one when he acquires control over the voting rights and one when his discretion ends), one notification can be given of the extent of his interest and of the fact that he will cease to be so interested after the relevant shareholders meeting.

SECTION 5

THE CIRCUMSTANCES UNDER WHICH THE SHAREHOLDER, OR THE NATURAL PERSON OR LEGAL ENTITY REFERRED TO IN ARTICLE 10, SHOULD HAVE LEARNED OF THE ACQUISITION OR DISPOSAL OF SHARES TO WHICH VOTING RIGHTS ARE ATTACHED

Extract from the mandate:

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

to clarify the circumstances under which the shareholder, or the natural person or legal entity referred to in Article 10, should have learned of the acquisition or disposal of shares to which voting rights are attached.

Relevant Level 1 provision

Article 12

Procedures on the notification and disclosure of major holdings

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

a) the resulting situation in terms of voting rights;

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

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

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

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).*

EXPLANATORY TEXT

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

192. For the requirements of the Directive, the Article that stipulates from which point in time the notification obligation commences is Article 12(2)(a) which states: "The notification to the issuer shall be effected as soon as possible , but not later then four trading days, the first shall be the day after the date on which the shareholder, or the natural person or legal entity referred to in Article 10: learns of the acquisition or disposal or the possibility of exercising voting rights, or which , having regard to the circumstances, should have learned of it, regardless of the date on which the acquisition or disposal or possibility of the exercise of the voting rights takes effect.."

193. CESR considers that the objective should be that the notification is made as soon as possible, but at the latest four trading days from the date on which the shareholder, natural person or legal entity learns or should have learned of the acquisition disposal or possibility to exercise voting rights.

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

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

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

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

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

199. CESR's proposal in this area should be avoiding any unnecessary debate about when and whether or not legal transfer of shares has taken place.[4]

200. CESR considers that the relevant date for determining when the notification obligation commences should be the date when the shareholder, natural person or legal entity learns or should have learned of the transaction being executed and not when the shareholder, natural person or legal entity learns or should have learned that the legal transfer of the shares of voting rights has taken place.

201. If an instruction is given to a broker to acquire or dispose of shares, then there may be an element of uncertainty regarding whether or not that instruction was or was not carried out. However, CESR considers that natural persons and legal entities always have a duty of care to exercise when acquiring or disposing of major holdings.

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

202. CESR considers it important 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.

203. CESR considers that in light of the fact that the minimum threshold for the trigger of a notification requirement under the Transparency Directive starts at 5% this duty of care should be very high, and that:

a. a natural person or legal entity should follow up on instruction that it has given; and

[4] See footnote 3.

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

204. CESR considers that a natural person or legal entity is deemed to have knowledge of the acquisition or disposal or of the possibility to exercise voting rights on the first trading day after the transaction was actually executed.

205. 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 trading day after the transaction was executed.

206. CESR considers that in light of the recognition that there is a difference between learn 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.

207. Moreover, multi-national undertakings should be given a reasonable timeframe to obtain information from their operations and also overseas companies should be given similar conditions as European companies by taking into account possible time differences. Such companies monitor their holdings on a daily basis by sometimes complex systems and reports that indicate a passing of a threshold are generated automatically. One trading day is considered sufficient time for the production of such reports.

208. One trading 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.

TECHNICAL ADVICE

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

210. The need to use this advice in practice will be in situations where the natural person or legal entity is considered not to have made the notification within the deadlines set out in the Directive and the competent authority is trying to establish why.

SECTION 6

THE CONDITIONS OF INDEPENDENCE TO BE COMPLIED WITH BY MANAGEMENT COMPANIES, OR BY INVESTMENT FIRMS, AND THEIR PARENT UNDERTAKINGS TO BENEFIT FROM THE EXEMPTIONS IN ARTICLES 12(4) AND 12(5).

Extract from the mandate

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

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

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

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

Relevant level 1 provisions

Management Companies

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

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

Investment Firms

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

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

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

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

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

EXPLANATORY TEXT

211. This explanatory text is divided as follows:

1) Explanatory text about Management companies;
2) Explanatory text about Investment Firms
3) Explanatory text about CESR advice
4) Explanatory text about other issues

1) Explanatory text about Management Companies

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

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

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

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

214. 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. However the management companies must be supervised under national legislation in order for the parent undertaking to benefit from the exemption.

215. To deal with management companies that are not authorised under the UCITS Directive CESR consider it necessary for parent undertakings that wish to benefit from this exemption to include (in the declaration that needs to be submitted to the competent authority which is discussed below) the name of the competent authority by which the different management companies that are not authorised under UCITS are supervised.

216. Holdings in portfolios of investments managed by management companies in accordance with Article 5(3)(a) of the UCITS Directive relating to individual portfolio management activities that are also conducted under the provisions set out in UCITS are covered. The Transparency Directive (Article 12(4)) does not differentiate between the conduct of individual or collective portfolio management.

2) Explanatory text about Investment Firms

217. The Transparency Directive (Article 12 (5)) 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.

218. According to Article 12(5) 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.

219. There are two references to independence in the text of Article 12(5). The first reference relates to the independence of the portfolio management function from other functions the investment firm performs, which is regulated by MiFID. The second reference relates to the investment firm exercising the voting rights attached to the shares in its portfolio independently from its parent undertaking. As the first reference to independence is regulated by MiFID, it is only this second reference to independence for which CESR needs to establish a test of independence for this mandate.

3) Explanatory text about CESR advice

220. CESR was asked to provide the Commission with advice relating to three issues:

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

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

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

a) The Level of Independence

221. The level of independence that is important for the purposes of the Transparency Directive is 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.

222. Independence should only cover any possible use of the voting rights by the management company or investment firm. For the purposes of the exemption, the use of the rights attached to the assets should be restricted to the exercise of voting rights attached to the assets.

223. 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, in light of the fact that both management companies and 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.

224. 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.

b) Conditions to Benefit From the Exemption

225. In order for a parent undertaking to benefit from the exemption it should 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/investment firm's independence from its parent

226. 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.

227. 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.

b. Declaration to the competent authority

228. In order for the competent authority to know who wants to make use of the exemption, it is necessary for the parent undertaking to make a declaration to the competent authority of the Transparency Directive, i.e. the competent authority of the issuer of the shares.

229. 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.

230. The parent undertaking should not have to identify each and every underlying share in which it has an investment, do the same exercise for its management companies and investment firms, make different notifications to each competent authority of these shares, and then make additional notifications each time the content of its portfolio of investments changes. This declaration only needs to be made once and does not need to be made on an issuer by issuer basis.

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

232. The declaration by the parent undertaking should 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 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).

d. For EU-incorporated management companies that are not authorised under the UCITS Directive, the name of the competent authority which supervises them.

233. The parent undertaking can chose:

a. either to submit the declaration at the start of the implementation of the Transparency Directive; or

b. to submit the declaration whenever it wants to make use of the exemption

c) Notion of Indirect Instructions

234. 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).

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

4) Explanatory text about other issues

a. Use of third parties to exercise voting rights

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

party exercises the voting rights independently from the parent undertaking of the management company or investment firm.

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

237. In order for the parent undertaking to be able to benefit from the exemption in relation to financial instruments, it should make the declaration to the competent authority of the issuer of the relevant underlying shares but only include the information contained in paragraph 232 c above. It should also comply with the requirements set out in paragraphs 233 above.

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

TECHNICAL ADVICE

Scope of management companies included for the purposes of this exemption

239. The exemption in Article 12(4) should apply to all management companies that conduct their management activities under the conditions laid down under the UCITS Directive, irrespective of whether or not they are authorised under that Directive. However the management companies must be supervised under national legislation in order for the parent undertaking to benefit fro, the exemption.

The requirements

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

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

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

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

241. The parent undertaking should be able to demonstrate on request that the organisational structures of the parent undertaking and the management company or investment firm are such that the voting rights are exercised independently of the parent. This should 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.

242. The parent undertaking should 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 act independently.

243. 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

244. In circumstances where a parent undertaking intends to use the exemption, it should make a declaration to the competent authority of the issuer of the shares. This declaration only needs to be made once and does not need to be made on an issuer by issuer basis.

245. The declaration by the parent undertaking should 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).

d. For EU-incorporated management companies that are not authorised under the UCITS Directive, the name of the competent authority which supervises them.

246. The parent undertaking can choose either:

a. to submit the declaration at the start of the implementation of the Transparency Directive; or

b. to submit the declaration whenever it wants to make use of the exemption

The notion of indirect instructions

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

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

248. In order for the parent undertaking to be able to benefit from the exemption in relation to financial instruments, it should make the declaration to the competent authority of the issuer of the relevant underlying shares but only include the information contained in paragraph 245 c above. It should also comply with the requirements set out in paragraphs 246 above.

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

SECTION 7

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

Extract from the mandate

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

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 19 (3).

Relevant Level 1 provisions

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

a) the resulting situation in terms of voting rights;

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

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

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

EXPLANATORY TEXT

Introduction

250. The content of the information as provided for under Article 12(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.

251. The notification requirements that are triggered by Article 13 and the standard form that is to be used for such notifications is the subject of a separate mandate. For other financial instruments there is a separate standard form to be used (see Section 8).

252. CESR strongly 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.

253. 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.

254. 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.

Aggregation for the purposes of calculating the number of voting rights to be disclosed

255. 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.

256. 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.

a) aggregation of shareholdings

257. 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.

b) aggregation between voting rights under Article 10 and shareholdings

258. 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.

259. 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

260. 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).

Information requirements in Article 12(1) in relation to Article 9 and Article 10 situations

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

Article 9 situations

a) The resulting situation in terms of voting rights

262. 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).

263. 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).

264. 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

265. 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.

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

267. 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

268. 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.

269. B) Overall totals

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

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

Other considerations

270. 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.

271. CESR believes that the inclusion of the number of shares should not be mandated, but proposes to include in the standard form a separate column for this information where it will be mandated at national level, thus facilitating the use of the standard form on a Pan–EU basis.

272. 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).

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

273. 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.

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

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

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

276. 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.

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

278. 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.

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

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

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

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

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

Article 10 situations

Article 10(a)

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

a) the resulting situation in terms of voting rights

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

In relation to the transaction that triggered the notification requirement

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

286. 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.

287. 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;

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

288. 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.

289. 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.

290. 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.

291. CESR believes that the inclusion of the number of shares should not be mandated, but proposes to include in the standard a separate column for this information where it will be mandated at national level, thus facilitating the use of the standard form on a pan–EU basis.

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

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

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

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

294. 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.

295. In case of passive breaches, the same principles as for Article 9 apply.

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

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

a. that enter into the agreement upon entering into the agreement; or

b. that are parties to the agreement at the time of a change in the agreement; or

c. that are parties to the agreement upon its termination.

Articles 10(b)-(h)

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

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

a) The resulting situation in terms of voting rights

In relation to the transaction that triggered the notification requirement

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

299. 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

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

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

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

303. CESR believes that the inclusion of the number of shares should not be mandated, but proposes to include in the standard a separate column for this information where it will be mandated at national level, thus facilitating the use of the standard form on a pan–EU basis.

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

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

c) The date when the threshold was crossed or reached

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

306. In case of passive breaches, the same principles as for Article 9 apply.

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

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

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

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

Filing with the competent authority under Article 19(3)

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

311. CESR notes that it has been mandated to consider the use of the standard form for filing this information with the competent authority under Article 19(3). However, for regulatory purposes, the identification of the shareholder by use of its name may be insufficient because it does not provide the necessary contact information that the competent authority may require in order to fulfil its duties under Article 24 of the Directive.

312. 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.

313. 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.

314. 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.

315. 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.

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

317. 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.

Identity of the issuer

318. At the moment, CESR considers that the issuer should be identified by its name, but considers it important to point out that some other method of issuer identification should be developed for use in the future.

Additional information

319. The standard form shall also include a section for any additional information that either person making the notification wishes to include. For example where the person making the notification thinks it is necessary to add clarification to its notification, e.g. because it has entered into a contractual agreement this can be done in the additional information section. This section can also be used for any additional requirements that a Member State may require.

TECHNICAL ADVICE

Content of the information requirements

a) The resulting situation in terms of voting rights

Requirements for Article 9

320. In relation to the transaction that triggered the notification requirement the following information is required:

a. 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.

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

321. In relation to the resulting situation after the triggering transaction the following information is required:

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.

322. 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.

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

Requirements for Article 10

Article 10(a)

324. 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:

325. In relation to the transaction that triggered the notification requirement the following information is required:

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

326. In relation to the resulting situation after the triggering transaction the following information is required:

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 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.

327. 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.

328. There should be no disclosure of individual holdings per party unless a party individually crosses an Article 9 threshold. This applies upon entering into, terminating and subsequent changes to an agreement.

329. 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.

Article 10(b) – (h)

330. In relation to the transaction that triggered the notification requirement the following information is required:

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

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

331. In relation to the resulting situation after the triggering transaction the following information is required:

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

class/type of share ;

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

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

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

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

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

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

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

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

337. 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.

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

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

339. For Article 10(a), it must include 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.

Notifications of combinations of Article 9 and Article 10 situations

340. 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.

Identity of the shareholder in relation to Article 10 notifications

341. Under Article 10 (b) to (g), not only the full name of the natural person or legal entity that is entitled to exercise voting rights attached to shares must be disclosed, but also 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.

342. CESR is of the opinion that only the identity of those that have a notifiable interest under one

of the Article 9 thresholds (so an interest of 5% or more of voting rights) have to be identified.

Identity of the issuer

343. The identity of the issuer is the name of the issuer.

Additional information

344. CESR proposes to include a separate section in the standard form for additional information.

The format of the notification

345. CESR strongly recommends that electronic means should be used for both filing in and sending the standard form to the issuer and the relevant competent authority.

Filing with the competent authority under Article 19(3) – annex to the standard form

346. 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.

347. 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 may be restricted under European and national law. Therefore, this additional information should be provided in an annex to the standard form that is sent only to the competent authority.

348. 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.

Proxy voting

349. If proxies are given to a proxy holder in view of voting at a particular shareholders meeting, the proxy holder should have the possibility to make one notification of the extent of its interest and of the fact that he will cease to be so interested after the relevant shareholders meeting, on the condition that his interest will end shortly after that shareholder's meeting. The proxy can make the notification after the proxy lodging deadline, but always has to respect the thresholds and the time limits of Level 1. Similarly the proxy giver who has two notification obligations can give one notification.

Standard form

350. A standard form (including annex) covering the most frequent cases and containing the elements listed in the paragraphs above could be presented as follows:

STANDARD FORM[5]

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"
   [ ] an acquisition or disposal of voting rights "indirect holding"
   [ ] an event changing the breakdown of voting rights
3. **Full name of person(s) subject to the notification obligation[6]:**
4. **Full name of shareholder(s) (if different from 3.)[7]:**
5. **Date on which the threshold was crossed or reached:**
6. **Threshold(s) that has/have been crossed or reached:**
7. **Notified details:**

Class/type of shares	Triggering transaction [8]	Resulting situation after the triggering transaction				
	Number of voting rights acquired (+) or disposed of (-) when reaching or crossing a threshold[9]	Number of shares[10]	Number of voting rights[11]		% of voting rights	
		Direct	Direct	Indirect	Indirect	Indirect

TOTAL (based on aggregate voting rights)				

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

9. **In case of proxy voting:** (name of the proxy holder) will cease to hold (number) voting rights as of (date).

10. **Additional information:**

Done at [place] on [date].

[5] This form is to be sent to the issuer and to be filed with the competent authority.

[6] This should be the full name of (a) the shareholder; or (b) the person entitled to exercise/disposing of voting rights; or (c) all the parties to the agreement, if applicable.

[7] This should be the full name of (a) the shareholder who disposed of the voting rights if he has a notifiable interest; or (b) of the shareholder to whom the voting rights are being transferred if he has a notifiable interest.

[8] 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.

[9] In Member States where the number of shares will be disclosable this should be read as number of voting rights and shares.

[10] To be used in Member States where applicable.

[11] 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.

ANNEX[12]

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[13]**:**

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

c) Additional information

[12] This annex is only to be filed with the competent authority.
[13] Whenever another person makes the notification on behalf of the shareholder or the natural person/legal entity entitled to exercise the voting rights.

SECTION 8

FINANCIAL INSTRUMENTS

Extract from the mandate:

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

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;

nature of the formal agreement resulting in an entitlement for the holder of the financial instrument to acquire shares as referred to in paragraph (5), the content of the notification to be made, a standard form for such notification, the notification period, and to whom the notification is to be made by the holder of a financial instrument.

Relevant Level 1 provisions:

Article 13

The notification requirements laid down in Article 9 shall also apply to a natural person or legal entity who holds, directly or indirectly, financial instruments that result in an entitlement to acquire, on such holder's own initiative alone, under a formal agreement, shares to which voting rights are attached already issued of an issuer whose shares are admitted to trading on a regulated market.

The Commission shall, in accordance with the procedure referred to in Article 27(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.

EXPLANATORY TEXT

351. 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.

Relevant thresholds that trigger a notification requirement

352. Article 13 refers to Article 9 in relation to the requirements that have to be complied with when making a notification about financial instruments. This includes the reference to the thresholds that are established under Article 9. This thinking is in line with the reference made in Article 13 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, the reference in Article 13 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 13;

- that the exemptions provided for in Articles 12(4) and 12(5) apply also to financial instruments, because Article 13 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 12(4) and (5) situations.

When is the notification triggered

353. Notification should be triggered upon acquisition and disposal of a financial instrument.

Deadline within which the notification has to be made

354. 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.

355. The notification timeframe for instruments under Article 13 should begin at the same time as it does for notifications of the Article 9 requirements which also apply to Article 10 situations.

356. As such, this timeframe should begin from the time established in Article 12(2) and the respective level 2 measures that relate to this Article. This will ensure consistency with the notifications made for the purposes of Articles 9 and 10, therefore making it simpler for the market to understand and to fulfil its obligations and, at the same time, will provide transparency on holdings within an adequate timeframe.

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

357. 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 numbers of shares to which voting rights are attached may vary during the life of the relevant financial instrument.

358. 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

359. 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

360. 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 15 disclosure.

361. 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.

Types of Financial Instruments

362. Article 13 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 13 of the Transparency Directive.

363. Under the provisions of Article 13 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.

364. To that end, CESR considers that:

- entitled means that the holder has a legal right that is not dependent 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 as Article 13 refers to instruments that entitle the holder to acquire shares, instruments that entitle the holder to sell shares do not qualify under Article 13.

365. 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. The following are examples that illustrate this:

- 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. If the instrument holder, on maturity, has the right to decide whether to receive shares or cash, the instrument qualifies under Article 13. If such decision is dependent upon the issuer of the instrument, then it does not qualify under Article 13.

- 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 13.

- If 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 13 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 a financial 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.

366. In relation to entitle the holder to acquire such shares under a formal agreement, CESR considers 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 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

367. It is not necessary in order to establish what instruments qualify as financial instruments for Transparency Directive purposes, to define what a financial instrument is, because MiFID already defines what a financial instrument is, and, for the purposes of the Transparency Directive, Article 13 already sets out the features of financial instruments that qualify under Article 13.

368. 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 under C of Annex I of the MiFID, CESR considers that the following instruments do not qualify as financial instruments under Article 13 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.

369. The above instruments do not qualify because they do not contain one or all of the features discussed above.

370. In relation to the other instruments listed under C of Annex I of the MiFID namely:

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

371. These instruments will qualify as a financial instrument for the purpose of Article 13 if they have all the features discussed above. For example, in relation to a transferable security such as a covered warrant, this will qualify under Article 13 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.

Aggregation between financial instruments

372. The holder has to aggregate and make a notification about all the instruments that qualify under Article 13 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. CESR considers that this principle is the one that makes the most sense from both a practical perspective and the perspective of market transparency.

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

374. In relation to instruments that give the holder the right to sell the underlying shares, for example, a put warrant, these are not 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.

375. The Level 1 text does not require aggregation between financial instruments relevant under Article 13 and holdings of voting rights under Article 9 or 10.

376. If the holder holds financial instruments that qualify under Article 13 and shares of the same issuer, the holder has to report the shareholdings and the holding of the financial instruments separately. Therefore, if the holder 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 the holder 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.

377. Aggregation between Articles 9 and/or 10 and 13 may be required at national level through the provisions of Article 3.

The content of the notification to be made

378. The notification under Article 13 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 12(2) within which the notification has to be made to the issuer, starts to run from the date that the shareholder is informed about the passive breach;
- the chain of controlled undertakings through which the financial instrument is effectively held, if applicable, stating the identity of each controlled undertaking and the total number of voting rights held by each entity 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.

379. The above information is 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.

380. 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:

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

b) 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.

381. 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.

382. 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.

383. CESR considered whether it would be relevant for the standard form to include a breakdown of the financial instruments per class 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.

384. 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, 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.

385. The name of the issuer of the financial instrument itself should not be included in the standard form. This information is not relevant insofar as 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.

386. Identity means full name with an individual's contact address or a legal entity's registered office being provided for separately in an annex which is filed with the relevant competent authority. CESR points out that it considers that further work needs to be undertaken in the future in order to establish other standardised methods of better identifying the issuer.

To whom the notification is to be made

387. 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 19(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 12(6) of the Transparency Directive), unless the issuer has been exempted under Article 12(7) 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 19(1) of the Transparency Directive), unless exempted under Article 12(2).

388. The same procedures should apply to notifications made under Article 13. Harmonizing these requirements 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 13.

389. In consideration of the objective of the provision, as discussed above, CESR thinks that the information required under Article 13 is only relevant to the issuer of the underlying shares and not to the issuer of the financial instrument. Market transparency about these instruments is about being made aware of eventual changes in the shareholding structure of the issuer of the underlying share.

390. The holder of financial instruments should send the notification required under Article 13 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.

TECHNICAL ADVICE

When is notification duty triggered?

391. A notification obligation under Article 13 of the Directive is triggered upon acquisition or disposal of a financial instrument when the relevant threshold as set out in Article 9 is reached, crossed or fallen below.

Types of financial instruments that trigger a notification

392. To qualify under Article 13, a financial instrument must "entitle the holder (direct or indirect) to acquire shares to which voting rights are attached, already issued, of an issuer whose shares are admitted to trading on a regulated market". To that end, CESR considers these features to mean that:

- entitled means that the holder has a legal right that is not dependent 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 as Article 13 refers to instruments that entitle the holder to acquire shares, instruments that entitle the holder to sell shares do not qualify under Article 13.

393. 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.

394. In relation to “entitle the holder to acquire such shares under a formal agreement”, CESR considers 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.

395. CESR considers that the following instruments referred to in MiFID will not qualify under Article 13 because they do not have one or more than one of the above features:

(2) Money market instruments;

(3) Units of a collective investment undertaking;

(4) Options, futures, swaps, forward rate agreements and other derivative contracts relating to securities other than shares, currencies, interest rates or yields

(5), (6) and (7) Derivative commodities;

(8) Derivative instruments for the transfer of credit risk

(9) Financial contracts for differences, if these only allow for a cash settlement;

(10) Derivative instruments related to climatic variables, freight rates, emission allowances, inflation rates, other economical statistics, or assets, rights, obligations, indices and measures.

Aggregation between financial instruments

396. The holder of financial instruments is required, under Article 13, to aggregate and notify all instruments held that qualify under Article 13 relating to the same underlying issuer.

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

398. In relation to instruments that give the holder the right to sell the underlying shares, for example, a put warrant, these are not 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.

Separate notifications in relation to each underlying issuer

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

Notification deadlines

400. The deadlines for notification under Article 13 should be the same as those established for the notifications under Articles 9 and 10.

401. The notification obligations under Article 13 are triggered in accordance with the timeframes established in Article 12(2) and the respective Level 2 measures.

Calculation of number of voting rights

402. The number of voting rights to be considered when calculating whether a threshold is crossed or reached is the number of voting rights in existence according to the issuer's last disclosure under Article 15 of the Transparency Directive. Whenever the issuer discloses additional information under Article 15, the holder has to recalculate its holdings accordingly.

Content of notification requirements

403. The notification under Article 13 shall include the following:

- the resulting situation in terms of voting rights, i.e. the total number of voting rights and the percentage of voting rights held;
- information on the transaction that triggered the crossing or reaching of the relevant threshold by the holder, including information on the date on which the threshold was crossed or reached and total number of voting rights in such a transaction;
- in cases where the notification requirement is triggered as a result of a change in the breakdown of voting rights, this should be stated and will be the information on the transaction that made the holder cross or reach the relevant threshold. However, it is important to point out, that in relation to passive breaches, the 4 trading day period specified in Article 12(2) within which the notification has to be made to the issuer, starts to run from the date that the shareholder is informed about the passive breach.
- the chain of controlled undertakings through which the financial instrument is effectively held, if applicable, stating the identity of each controlled undertaking and the total number of voting rights held by each entity;
- for instruments with an exercise period, an indication of the moment when shares will or can be acquired, if applicable;
- date of maturity/expiration of the instrument, i.e. the date upon which the right to acquire the share ends;
- identity of the holder (stating its full name);
- name of underlying issuer.

To whom the notification is to be made

404. The holder of financial instruments that qualify under Article 13 has to notify its holdings to the issuer of the underlying share and the competent authority of such issuer.

STANDARD FORM FOR FINANCIAL INSTRUMENTS[14]

1. Full name of the underlying issuer of existing shares to which voting rights are attached[15]:

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
[ ] an event changing the breakdown of voting rights

3. Full name of the holder (natural person/legal entity) entitled to acquire shares already issued to which voting rights are attached:

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

5. Notified details:

Expiration Date[16]	Triggering transaction [17]		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[18]	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].

[14] 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.
[15] Full name of legal entity
[16] Date of maturity/expiration of the financial instrument i.e. the date when right to acquire shares ends
[17] This column does not need to be filled in in the case of notification due to an event changing the breakdown of voting rights
[18] If the financial instrument has such a period – please specify this period – for example once every 3months starting from [date].

ANNEX[19]

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[20]**:**

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

c) Additional information

[19] This annex is only to be filed with the competent authority.
[20] Whenever another person makes the notification on behalf of the shareholder or the natural person/legal entity entitled to exercise the voting rights.

CHAPTER III – HALF-YEARLY FINANCIAL REPORTS

(Chapter II of the Transparency Directive – Periodic information – Article 5)

SECTION 1

MINIMUM CONTENT OF HALF-YEARLY FINANCIAL STATEMENTS NOT PREPARED IN ACCORDANCE WITH IAS/IFRS

Extract from the mandate

3.3.2 Half-yearly financial report (Article 5.5)

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

" *As to half-yearly reports, minimum content of the condensed balance sheet, profit and loss accounts and explanatory notes on these accounts where they are not prepared in accordance with international accounting standards, as adopted pursuant to the procedure provided for under Article 6 of Regulation (EC) No. 1606/2002*".

Extract from Level 1 text

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(6) of the Transparency Directive: "*The Commission shall, in accordance with the procedure referred to in Article 27(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 5 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."

Explanation to the advice

405. 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.

406. 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.

407. 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.

408. 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.

409. 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.

410. 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).

411. 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.

412. 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.

413. Considering that a harmonization of provisions on periodic financial reporting between all issuers whose securities are traded on a regulated market is in the interest of investor protection and to create a minimum level playing field between all issuers, CESR believes that issuers not required to prepare consolidated accounts should at least follow IAS 34 principles as explained in paragraph 419 below.

414. 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.

415. 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.

416. 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.

417. 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.

418. 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.

TECHNICAL ADVICE

419. 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.

420. These principles are as follow:

a) The balance sheet and the profit and loss account must show, as a minimum requirement, each of the headings and subtotals included in the most recent annual financial statements of the issuer. Additional line items shall be included if their omission would make the half-yearly report misleading;
The half-yearly financial information should include comparative information presented as follows:

- Balance sheet as at the end of the first six months of the current financial year and comparative balance sheet as at the end of the immediate preceding financial year;
- Profit and loss account cumulatively for the first six months of the current financial year with comparative information for the comparable period for the preceding financial year.

b) The following information should be included, as a minimum requirement, in the notes of the half-yearly financial statements. However, the issuer shall also disclose any events or transactions that are material to an understanding of the first six months of the financial year:

i. a statement that the same accounting policies and methods of computation are followed in the half-yearly financial statement as compared with the most recent annual financial statements or, if those policies or methods have been changed, a description of the nature and effect of the change;

ii. explanatory comments about the seasonal or cyclical nature of interim operations;

iii. the nature and amount of items affecting assets, liabilities, equity, net income, or cash flows that are unusual because of their nature, size, or incidence (disclosure of cash flow information is required in the half-yearly report only if the issuer has disclosed this type of information in its annual financial statements);

iv. the nature and amount of changes in estimates of amounts reported in prior financial years, if those changes have a material effect in the current interim period;

v. issuances, repurchases, and repayments of debt and equity securities;

vi. dividends paid (aggregate or per share) separately for ordinary shares and other

shares;

vii. segment revenue and segment result for business segments or geographical segments, whichever is the entity's primary basis of segment reporting (disclosure of segment data is required in the half-yearly report only if the issuer has disclosed segment data in its annual financial statements);

viii. material events subsequent to the end of the first six months that have not been reflected in the financial statements for the interim period;

ix. the effect of changes in the composition of the entity during the interim period, including business combinations, acquisition or disposal of subsidiaries and long-term investments, restructurings, and discontinued operations, and

x. changes in contingent liabilities or contingent assets since the last annual balance sheet date if the issuer has recognised or disclosed contingent liabilities or contingent assets in its annual financial statements.

421. CESR believes it is important to include in the half-yearly report information required by IAS 34 that is not required by the existing accounting Directive if the issuer has disclosed such information in the annual reports, in order to assure comparability between the annual financial statement and half yearly report and greater harmonization on periodic information.

SECTION 2 - MAJOR RELATED PARTIES TRANSACTIONS

Extract from the mandate

3.3.2 Half-yearly financial report (Article 5.5)

DG Internal market requires CESR to provide technical advice on possible implementing measures on the following issues

(1) clarification of the notion of "major related parties transactions" as part of an interim management report for issuers of shares"

Extract from Level 1 text

Article 5.4 (Half-yearly financial reports) of the Transparency Directive requires that: "For issuers of shares, the interim management report shall also include major related parties transactions"

Prospectus regulation

422. In Commission Regulation Nr. 809/2004 regarding the implementation of the Prospectus Directive (Level 2) the Commission establishes the minimum information that a prospectus shall contain, including:

Details of related party transactions (which for these purposes are those set out in the Standards adopted according to Regulation (EC) No 1606/2002), that the issuer has entered into during the period covered by the historical financial information and up to the date of the registration document, must be disclosed in accordance with the respective standard adopted according to Regulation (EC) No 1606/2002 if applicable.

If such standards do not apply to the issuer the following information must be disclosed:

(a) The nature and extent of any transactions which are - as a single transaction or in their entirety - material to the issuer. Where such related party transactions are not concluded at arm's length, provide an explanation of why these transactions were not concluded at arm's length. In the case of outstanding loans including guarantees of any kind, indicate the amount outstanding.
(b) The amount or the percentage to which related party transactions form part of the turnover of the issuer.

423. 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.

424. 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.

TECHNICAL ADVICE

Concept of Related Party Transactions

425. CESR has considered that the definition of related party transactions should be consistent in the yearly and half-yearly reports.

426. 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.

427. Issuers of shares who do not have to prepare consolidated accounts are not required to apply for the IAS/IFRS. Instead, they are required to apply national financial reporting standards derived from the different accounting Directives. However, the Transparency Directive and the accounting Directives do not provide definition of related parties or related parties transactions is provided. CESR does not consider it necessary or appropriate to develop a new definition of related party transactions for the purpose of the implementation of the Transparency Directive. CESR believes that a reference should instead be made to IAS 24 which already provides appropriate definition of related party transactions.

428. Third country issuers that use GAAP that has been determined to be equivalent to IFRS should apply the definition of Related Party Transactions provided by these standards.

429. CESR considers that 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.

430. It is worth indicating that this consistency is supported by the responses to the call for evidence that CESR published on 29 June 2004 regarding the European Commission's mandate on the Transparency Directive".

The concept of "major" related parties' transactions

431. Article 5(4) of the Transparency Directive requires issuers of shares to include major related parties' transactions in their interim management report.

432. The purpose of half-yearly financial report is to allow investors to make a more informed assessment of the issuer's situation. Considering that the investors have the possibility to access 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.

433. CESR considers that in their interim management reports, issuers of shares should disclose the following elements as "major related parties transactions":

a. Related parties transactions that have taken place in the first six months of the financial year, and that have materially effected the financial position **or** the performance of the enterprise in this period.

b. **Any changes** in the related parties transactions described in the last annual report that could have a material effect on the financial position **or** performance of the enterprise **in the first six months of the financial year**

434. In this approach, CESR considers that the concept of materiality (for transactions to be considered) is the same in annual and half yearly reports. Therefore, the concept of "major" transactions does not introduce a different definition of material transactions, but only implies some limitations in terms of disclosures about such transactions, as described above.

SECTION 3 - AUDITORS' REVIEW OF HALF-YEARLY REPORT

Extract from the mandate

3.3.2 Half-yearly financial report (Article 5.5)

DG Internal market requires CESR to provide technical advice on possible implementing measures on the following issues

(1) clarification of the nature of the auditors' review of the half-yearly report, with the objective of ensuring a common understanding for investors on the level of assurance that investors can at least expect from the auditor's review referred to in Article 5 (4). The Commission invites CESR to notably consider existing national standards as well as the international standards on auditing developed by the International Auditing Standards Board (such as ISRE 2400 (*Engagement to review financial statements*)).

Extract from Level 1 text

Article 5(5) of the Transparency Directive establishes that: "*If the half-yearly financial report has been audited, the audit report shall be reproduced in full. The same shall apply in the case of an auditors' review. If the half-yearly report has not been audited or reviewed by auditors, the issuer shall make a statement to that effect in its report*".

Background

435. 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.

436. 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.

437. 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).

438. 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.

439. 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.

440. 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's proposal essentially deals with the audit of statutory annual financial statement, which is as such already required by Community law; there is no clear indication as to whether and how review of audit report would also be covered.

441. 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".

442. 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.

443. In June 2003 IFAC issued for comment a proposed international standard on auditing related to "Review of Interim Financial Information Performed by the Auditor to the Entity". This document is still under review.

CESR's approach

444. 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 States in relation to the standards on basis which an auditor's review is carried out.

445. In order to provide technical advice on the nature of the auditors' review of the half-yearly report, with the objective of ensuring a common understanding for investors on the minimum level of assurance that investors can expect from the auditor's review referred to in Article 5 of the Transparency Directive, CESR considered the existing regulations and the practises followed in the different jurisdictions as well as the existing national and international standards on auditing developed by the profession in order to ascertain whether or not there is any form of convergence.

446. To this end CESR conducted a survey amongst all of its members with the aim of learning the existing regulations and practises followed in terms of auditors' review of the half-yearly report with the following results:

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

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

From the results of the survey, CESR concludes that in the majority of cases, an auditors' review is done on a voluntary basis.

b) *Nature of audit review of half yearly reports (limited review vs. full audit)*

CESR looked into the nature of the review, i.e. whether the half yearly report is submitted for auditing or review.

CESR concludes from the results of its survey that when a half yearly report is submitted for auditing, in the majority of cases a limited review is conducted.

c) Use of general auditing principles at national levels when conducting a review

CESR looked into whether or not standards are applied when an auditor conducts a review. It found that a large majority of Member States 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[21].

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

447. 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.*

[21] 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 (e.g. A level of assurance "less" than that of an audit), which has the same meaning as "moderate" in this context.

CHAPTER IV

EQUIVALENCE OF THIRD COUNTRIES INFORMATION REQUIREMENTS

(Article 19 of Transparency Directive – Third Countries)

Extract from the mandate:

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

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

(1) the principle that the competent authority of the home Member State should use in order to establish a list of third countries the domestic law, regulations or administrative provisions provide for equivalent information requirements (excluding financial statements and the conditions for consolidating financial statements). In particular, CESR is invited to consider the principles for determining equivalence with regard to:

(a) annual management reports (annual reports under the 4th Company Law Directive);

(b) half-yearly (interim) management reports under Article 5;

(c) statements to be made by the responsible person under Articles 4 and 5;

(d) interim management statements under Article 6;

(e) in the case where provision of individual accounts by a parent company is not required by a third country, information provided in consolidated accounts only;

(f) individual accounts established under the law of a Member State;

(g) transparency about major holdings of voting rights or financial instruments; and

(h) information on general meetings under Articles 13 and 14.

(2) a list of third countries which ensure the equivalence of the independence requirements laid down in this Directive in relation to management companies or investment firms as provided for under Article 19(3c) (related to Articles 11(3a) and 11(3b). CESR is invited to focus its assessment at this stage to the rules applicable to management companies/investment firms located in those third countries it considers being the most relevant from the point of view of European capital markets.

Extract from Level 1 text

Article 23

Third countries

1. Where the registered office of an issuer is in a third country, the competent authority of the home Member State may exempt that issuer from requirements under Articles 4 to 7 and Articles 12(6), 14, 15 and 16 to 18, provided that the law of the third country in question lays down equivalent requirements or such an issuer complies with requirements of the law of a third country that the competent authority of the home Member State considers as equivalent.

However, the information covered by the requirements laid down in the third country shall be filed in accordance with Article 19 and disclosed in accordance with Articles 20 and 21.

2. By way of derogation from paragraph 1, an issuer whose registered office is in a third country shall be exempted from preparing its financial statement in accordance with Article 4 or Article 5 prior to the financial year starting on or after 1 January 2007, provided such issuer prepares its financial statements in accordance with internationally accepted standards referred to in Article 9 of Regulation (EC) No 1606/2002.

3. The competent authority of the home Member State shall ensure that information disclosed in a third country which may be of importance for the public in the Community is disclosed in accordance with Articles 20 and 21, even if such information is not regulated information within the meaning of Article 2(1)(k) of this Directive.

4. In order to ensure the uniform application of paragraph 1, the Commission shall, in accordance with the procedure referred to in Article 27(2), adopt implementing measures

i) setting up a mechanism ensuring the establishment of equivalence of information required under this Directive, including financial statements, and information, including financial statements, required under the law, regulations, or administrative provisions of a third country;

ii) stating that, by reason of its domestic law, regulations, administrative provisions, or of the practices or procedures based on international standards set out by international organisations, the third country where the issuer is registered ensures the equivalence of the information requirements provided for in this Directive.

The Commission shall, in accordance with the procedure referred to in Article 27(2), take the necessary decisions on the equivalence of accounting standards which are used by third country issuers under the conditions set out in Article 30(3) at the latest five years following the date referred to in Article 31. If the Commission decides that the accounting standards of a third country are not equivalent, it may allow the issuers concerned to continue using such accounting standards during an appropriate transitional period.

5. In order to ensure uniform application of paragraph 2, the Commission may, in accordance with the procedure referred to in Article 27(2), adopt implementing measures defining the type of information disclosed in a third country that is of importance to the public in the Community.

6. Undertakings whose registered office is in a third country which would have required an authorisation in accordance with Article 5(1) of Council Directive 85/611/EEC or, with regard portfolio management under point 4 of section A of Annex I to Directive 2004/39/EC [Markets in Financial Instruments Directive] if it had its registered office or, only in the case of an

investment firm, its head office within the Community, shall also be exempted from aggregating holdings with the holdings of its parent undertaking under the requirements laid down in Article 12(4) and (5) provided that they comply with equivalent conditions of independence as management companies or investment firms.

7. In order to take account of technical developments on financial markets and to ensure the uniform application of paragraph 6, the Commission shall, in accordance with the procedure referred to in Article 27(2), adopt implementing measures stating that, by reason of its domestic law, regulations, or administrative provisions, a third country ensures the equivalence of the independence requirements provided for under this Directive and its implementing measures.

448. In CESR's view equivalence refers to substance of information given and not the time limits.

449. Following the list of issues that are set out in mandate, a first section will deal with equivalence as regards issuers, and a second section will deal with equivalence as regards with UCITS management companies/investment firms.

SECTION 1 – EQUIVALENCE AS REGARDS ISSUERS

INTRODUCTION

450. 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"

451. 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.

452. 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".

453. 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".

454. 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.

455. Consequently, CESR considers that "equivalence" as regards transparency requirements for third country issuers:

- does not mean "identical to" the transparency requirements set out under third country issuer's laws, regulations or administrative provisions;
- can be declared when the requirement under third country issuer's laws, regulations or administrative provisions enables investors to make similar decisions as if they were provided with the requirement under the Transparency Directive.

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

457. 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

458. In addition to the conceptual approach of equivalence set out above, CESR has considered the fact that the mandate from the EC invites it to develop "principles". CESR has examined each main requirement listed in Article 23(1) of the Transparency Directive in order to determine if it is possible to set up principles based on the conceptual approach of equivalence. CESR believes that this approach has the advantage of avoiding on the one hand a set of high level principles that competent authorities could use in order to grant equivalence on a general point of view to third countries transparency frameworks and on the other hand a list of detailed rules, that could give the form of equivalence without any guaranty of substance.

CESR understanding of the list of third countries

459. The mandate from the Commission suggests that, using a common approach, competent authorities may establish lists of third countries in which the domestic law, regulations or administrative provisions provide for equivalent information requirements. Over the course of time, CESR anticipates that competent authorities will be sharing information and views as to whether certain third countries are or are not deemed to be equivalent and how they have applied the approach established at Level 2. In doing so, an EU list of third countries who will be deemed to be equivalent will be created.

Other general considerations

460. Based on the conceptual approach of equivalence, CESR is the opinion that:

- competent authorities of home Member States will be able to grant equivalence on certain items listed in Article 23(1) of the Transparency Directive and not on others, based on the result of an item by item assessment;

- equivalence relates to the substance of information given according to the transparency requirements under third countries law, regulations and administrative provisions. Consequently, no exception should be given as regards the time limits set by the Directive within which the transparency requirement is to be met.

TECHNICAL ADVICE

461. Equivalence as regards issuers will be governed by the following principles:

– *Equivalence* does not mean "identical to" the transparency requirements set out under third country issuer's laws, regulations or administrative provisions and can be declared when the requirement under third country issuer's laws, regulations or administrative provisions enables investors to make similar decisions as if they were provided with the requirement under the Transparency Directive;

– Equivalence can be declared when general disclosure rules provide users with understandable and broadly equivalent assessment of issuers' position.

– Equivalence pronouncements will not change unless there is a fundamental change in the relevant third country or EU requirements;

– Competent authorities of home Member States will be able to grant equivalence on certain items listed in Article 23(1) of the Transparency Directive and not on others, based on the result of an item by item assessment;

– Equivalence relates to the substance of information given according to the transparency requirements under third countries law, regulations and administrative provisions. Consequently, no exception should be given as regards the time limits set by the Directive within which the transparency requirement is to be met.

PRINCIPLES FOR ESTABLISHING EQUIVALENCE OF THE ITEMS SET OUT IN THE MANDATE

462. 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

463. 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[22] :

- a fair review of the development and performance of the issuer's business and of its position, together with a description of the principal risks and uncertainties that it faces. The review shall be a balanced and comprehensive analysis of the development and performance of the issuer's business and of its position, consistent with the size and complexity of the business;

- to the extent necessary for an understanding of the issuer's development, performance or position, the analysis shall include both financial and, where appropriate, non-financial key performance indicators relevant to the particular business;

- an indication of any important events that has occurred since the end of the financial year;

- indications of the issuer's likely future development.

B. Half-yearly (interim) management reports

464. In order for a third country issuer to be deemed to be meeting equivalent requirements to those set out in Article 5(4) of the Transparency Directive, the interim half-yearly management report of any issuer has to include at least the following:

(a) a review of the period covered;

(b) indications of the issuer's likely future development for the remaining six month of the financial year;

(c) for issuers of shares and if not already disclosed on an ongoing basis, major related parties transactions.

In order for a third county issuer to be deemed to be meeting equivalent requirements it is also necessary that the third country's laws, regulations or administrative provisions require at least a condensed set of financial statements in addition to the management report.

C. Statements to be made by the responsible person under Articles 4 and 5

465. 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,

[22] 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).

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.

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

D. Interim management statements under Article 6

467. 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:

468. 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.

469. 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

470. 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"

471. 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.

472. 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

473. 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.

474. 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.

475. In the case they are, competent authorities will not require a complete set of accounts, but will require additional audited disclosures giving information on the individual accounts of the issuer as a standalone, relevant to the issue in question (for instance, amount, computation and availability of the retained earnings if the rules governing dividends are based on the individual accounts of the issuer). Those disclosures may be prepared under local GAAP.

476. As regards dividends, competent authorities will have to ensure consistency with information provided under Article 17(2)(d) of Transparency Directive which states that the issuer shall publish notices or distribute circulars concerning the allocation and payment of dividends (…).

F. Individual accounts established under the law of a Member State

477. 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.

478. 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.

479. 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.

480. The individual accounts must be audited independently.

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

INTRODUCTION

481. 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"

482. CESR considers it important to point out that although the wording of the mandate is very generic, and suggests that principles for establishing the equivalence of all the Directive requirements about major holdings of voting rights or financial instruments need to be established by CESR, its mandate is limited to the specific major holdings of voting rights and financial instrument provisions set out in Article 23(1).

483. Article 23(1) establishes which parts of the Directive a competent authority is allowed to exercise its discretion about when assessing a third county issuer's equivalence to the Directive requirements.

484. On examination of Article 23(1), the majority of the major holdings of voting rights or financial instruments requirements in the Directive (which are set out in Articles 9-13) are not included in Article 23(1), and as such, CESR's mandate is limited to the following provisions of the Directive: Articles 12(6), 14, and 15.

485. The following is a discussion about each of these Articles and the principles for establishing a third country issuer's equivalence to them.

G1. Article 12(6)

Explanatory Text

486. Article 12(6) 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."*

487. 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.

488. 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.

489. In establishing what an equivalent time frame can be, the following needs to be considered:

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

b) what the purpose of Article 12(6) is;

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

490. There are no other relevant timeframes in the Directive relating to the disclosure of major holdings that can be subject to an equivalence test. For example, Article 12(2), which also establishes a time frame within which the notifications or acquisitions of major holdings has to be made, is not the subject of Article 23(1).

491. In addition, as stated 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.

492. As such, it appears that there can be no "equivalence" in relation to the time limit established in Article 12(6). However, as with the other parts of the equivalence mandate, in order to establish its advice, CESR needs to consider the purpose of Article 12(6).

b) what the purpose of Article 12(6) is

493. The purpose of Article 12(6) is to establish the time frame within which notification of an acquisition, disposal, or change in a major holders' holding of voting rights in an issuer whose shares are admitted to trading on a regulated market is made public. This is set at three trading days.

494. However, the requirement of Article 12(6) only relates to the time within which the issuer has to make this notification public, but the overall purpose of the Article is to establish the maximum timeframe within which the notification that is first made to the issuer by the shareholder, natural person or legal entity is to be made public.

495. In establishing its advice, CESR has taken into consideration the fact that under the provisions of Article 12(2), the shareholder, natural person or legal entity has four trading days within which to notify the issuer, which overall means that notification of an acquisition, disposal or change in holding is made public within a maximum total of seven trading days (that is on the assumption that the original notification is made within the four trading day period) after the date on which the shareholder, natural person or legal entity learns (or should have learned) of the acquisition or disposal, or the Article 9(2) event.

496. CESR recognises that it may be the case that third country issuers are already obliged to publish such notifications in their market within set time periods, which may be different to those set out in Article 12(6). For example, an issuer may have to make such notification public, once received, within one trading day.

497. In addition, under the requirements of Article 17(1), a third country issuer of shares is obliged to ensure equal treatment for all holders of shares that are in the same position. As such, in establishing whether or not the Article 12(6) time frame can be different for such issuers, CESR also needs to take into consideration the implications of imposing an obligation on issuers who have dual listing of shares in both their third country and in Europe, to make the notification public within a timeframe that may lead shareholders and investors receiving the same information at different times.

498. For example, a third country issuer under its domestic laws has a notification structure whereby it receives the notifications within a one trading day period, but has five days within which to make such notification public. If the issuer has to make the notification to the market under the Transparency Directive requirements within the four trading day period, in doing so, the issuer is making a notification in the EU market before it is required to do so in its domestic market, and is thus not meeting its obligations to ensure equal treatment for all holders of shares who are in the same position.

499. Taking all of this into consideration, as the purpose of the Article 12(6) is to ensure that the notification is made to the public within a seven trading day period (that is on the assumption that the original notification is made within the four trading day period), CESR concludes that provided that this seven trading day notification deadline is met by a third country issuer, the issuer itself may be able to make its notification to the market within a different number of trading days to that set out in Article 12(6).

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

501. In establishing its advice, CESR also considered whether or not equivalence in relation to Article 12(6) could apply to a situation where the shareholder, natural person or legal entity made the notification to the public, and the issuer or the competent authority (where a competent authority makes public such a notification under the provisions of Article 13) did not.

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

503. However, because the Article 21 obligations (to disclose regulated information in a manner that ensures fast access to such information on a non-discriminatory basis, throughout the European Union, as well as to the central storage mechanism) cannot be the subject of the test of equivalence, it is not possible for the shareholder, natural person or legal entity to take on the Article 21 obligations. Whenever the shareholder, natural person or legal entity makes the notification public,

CESR does not consider this to be equivalent to the mechanisms established under the Directive for disclosing information under Article 21.

TECHNICAL ADVICE

504. Third countries will be considered as having equivalent requirements to those set out in Article 12(6) provided that:

a) the notification and publication period (i.e. the period of time upon which the notification is to be made to the issuer and is to be made public) is shorter than seven trading days. The notification has to be made within the shorter time frame; or

b) the notification and publication period (i.e. the period of time upon which the notification is to be made to the issuer and is to be made public) is in total a seven trading day period, but the time frames between notification to the issuer and the subsequent making of this notification public are different to those set out in Articles 12(2) and 12(6).

G2. Article 14 – acquisition and disposal of own shares

Explanatory Text

505. Article 14 states that:

> *"Where an issuer of shares admitted to trading on a regulated market acquires or disposes of own shares, either itself or through a person acting in his own name but on the issuer's behalf, the home Member State shall ensure that the issuer shall make public the proportion of own shares as soon as possible, but not later than four trading days following such acquisition or disposal where that proportion reaches, exceeds or falls below the thresholds of 5% or 10% of the voting rights. The proportion shall be calculated on the basis of the total number of shares to which voting rights are attached."*

506. The purpose of this requirement is to impose a notification obligation upon an issuer when it acquires or disposes of its own shares and in doing so the percentage of voting rights it holds reaches, exceeds or falls below the threshold of 5% or 10%. In these circumstances, the issuer has a four trading day time period within which to notify the public of this.

507. As a general principle, CESR does not consider it prudent to allow third country issuers to be able to make notifications within longer time periods than those set out in the Directive. In contrast to the situation discussed in relation to Article 12(6), there is no flexibility that CESR can exercise in establishing an equivalent timeframe within which this has to be done, as the objective of the requirement is to make this notification public within the four trading day deadline, and time starts to run from the time that the issuer makes an acquisition or disposal. There are no other time frames that are relevant.

508. CESR therefore considers that there can be no equivalence in relation to the four trading day timeframe within which the notification has to be made, but there is another element of this requirement that may be different but can be considered as being equivalent.

509. The element that can be considered as being equivalent relates to how many own shares an issuer can hold. If under its domestic requirements a third country issuer can only hold a maximum of less then 10 % of own shares to which voting rights are attached, and this lower percentage holding triggers a notification requirement upon acquisition or disposal of own shares, such a requirement will be considered as meeting equivalent notification requirements under Article 14.

510. For example, a third country issuer under its domestic laws and regulations is only allowed to hold a maximum of 8% of own shares to which voting rights are attached, and the issuer holds 6% and acquires 2 %, thus reaching the 8% maximum. If this triggers a notification requirement, such notification can be considered as equivalent to the maximum of 10% threshold under Article 14.

511. There are no additional notification requirements under the Transparency Directive above the 10 % threshold even if issuers are allowed to hold more than 10 % of own shares under their national law. Therefore if an issuer is allowed to hold more than 10 % it will have to make a notification of this at 10 %, and then comply with its own national legislation.

TECHNICAL ADVICE

512. A third country will be considered as having equivalent requirements to those set out in Article 14 if:

a) an issuer is only allowed to hold up to a maximum of 5% of its own shares to which voting rights are attached, and this maximum threshold triggers a notification requirement. This notification requirement can be deemed equivalent to both the 5% and 10% trigger thresholds set out in Article 14; or

b) an issuer is allowed to hold between 5% and 10% of own shares to which voting rights are attached and a notification requirement is triggered whenever this level, and the 5% threshold, is triggered. These requirements can be deemed equivalent to the 5% and 10% thresholds of Article 14.

513. If a third country issuer is required, under its national requirements, to disclose holdings in own shares to which voting rights are attached at lower and different thresholds to those established under Article 14, there will be no equivalence unless one of the above mentioned circumstances apply.

514. There are no additional notification requirements under the Transparency Directive above the 10 % threshold even if issuers are allowed to hold more than 10 % of own shares under their national law. Therefore if an issuer is allowed to hold more than 10 % it will have to make a notification of this at 10 %, and then comply with its own national legislation.

G3. Article 15 - notification following increase or decrease in capital

Explanatory Text

515. Article 15 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."*

516. 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

517. CESR considers that if a third country issuer is required under its domestic laws to make such notifications at a different point in the month, so for example, in the middle of the month, or x number of trading days after the increase of decrease, then it can be said to be meeting an equivalent requirement to that set out in Article 15.

TECHNICAL ADVICE

518. Provided the third country issuer is required to make a notification to the public within 30 calendar days after it has increased or decreased its share capital and/or voting rights, the third country shall be considered as having equivalent requirements to those set out in Article 15.

H. Information on general meetings under Articles 17 and 18

519. As CESR has not been given any mandates in relation to the provisions of Article 17 and 18, in order to establish its advice to the Commission in relation to how a third country issuer meets equivalent requirements, it is first necessary for CESR to consider what the purpose of this mandate is.

520. 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.

521. The issue of how information from a third country issuer gets to the investor in order for the investor to be able to exercise its rights is already dealt with under the provision of Article 23(1) that obliges third country issuers to file the information in accordance with Article 19 and disclose it in accordance with Articles 20 and 21. As such, all that CESR is required to establish for the purposes of this mandate is what the content of the information about general meetings needs to be.

522. 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.

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.

EXPLANTORY TEXT

523. 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.

524. 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.

525. Although the mandate makes specific reference to the creation of a "list" of third countries, CESR concludes that such a list is not necessary as its approach in establishing the test of independence for third country management companies and investment firms is not based on an assessment of equivalence of third countries frameworks.

526. 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.

527. On this basis, CESR concludes that establishing a test of equivalence for third country investment firms and management companies is not 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.

528. On this basis, CESR is not advising the Commission to create a test of equivalence for third country incorporated entities for the purposes of this exemption.

Reference to authorisation in the Level 1 text

529. CESR considers the following provision of Article 23(6) to be relevant in relation to the reference to authorisation:

a) the reference to the nature of the authorisation of the investment firm or management company;

b) the requirement that the management company or investment firm complies with equivalent conditions of independence as required by management companies and investment firms laid down in Article 12(4) and 12(5)

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

530. CESR considers 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.

531. 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.

532. 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.

533. It is assumed that the controlled undertaking of the parent undertaking that wishes to make use of the exemption will be supervised by the third country competent authority.

b) the requirement to comply with equivalent conditions of independence as management companies or investment firms do under Articles 12(4) and 12(5)

534. CESR has been mandated to establish what a parent undertaking of a management company and or investment firm that is incorporated in the 3rd country has to do in order to get the benefit of the exemptions set out in Articles 12(4) and 12(5).

535. CESR does not consider it 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.

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

536. CESR does not consider it necessary to establish different requirements for management companies and investment firms incorporated in the EU in order for their parent undertakings to benefit from the exemptions in Articles 12(4) and 12(5). As such, CESR does not consider it 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.

537. 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.

538. CESR therefore considers that a management company or investment firm registered in a third country must follow the same requirements that management companies and investment firms registered in the EU, must follow, which are the following:

a) that the management company or investment firm is free to exercise the voting rights attached to the assets it manages;

b) that the management company or investment firm has to disregard the interests of the parent undertaking and any other party whenever conflicts of interest arise;

c) that the parent undertaking must be able to demonstrate on request that the organizational structures of the parent undertaking and the management company or investment firm are such that the voting rights are exercised independently. This can be demonstrated in a number of ways, for example, by having implemented written policies and procedures reasonably designed to prevent the distribution of information between the parent undertaking and the management company or investment firm that relate to the exercise of voting rights and investment decisions over securities traded; and

d) that the parent undertaking must be able to demonstrate on request that the persons who decide how the voting rights are to be exercised are not the same for the parent undertaking and the management company or investment firm and that these act independently from one another,

but will be able to demonstrate that it fulfils such requirements in ways that a competent authority considers equivalent to those established for management companies and investment firms registered in the EU.

539. In addition to the above, in order to benefit from the exemption, the parent undertaking of a management company or investment firm registered in a third country will be required to follow the same declaration procedure as that established for parent undertakings of management companies and investment firms that wish to benefit from the exemptions in Article 12(4) and 12(5) which are:

Declaration to the competent authority

540. CESR considers that in circumstances where a parent undertaking intends to use the exemption in respect of an investment firm or management company within the scope of Article 23(6), it should declare to the competent authority of the Transparency Directive, i.e. the competent authority of the issuer of the shares that it intends to use the exemption, in order that the competent authority knows who wants to make use of the exemption.

541. The procedure for making this declaration is the same as that established for the parent undertaking of EU registered management companies and investment firms. The content of the declaration is also the same, however there is no requirement to include the name of competent authority that supervises those management companies that that are not authorised by UCITS.

Use of third parties to exercise voting rights

542. The provisions of Articles 12(4) and 12(5) also apply in cases where the exercise of the voting rights is delegated by the management company or investment firm (under the relevant

requirements of the relevant legislation applicable to them), 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.

TECHNICAL ADVICE

543. Provided that the following are met, the parent undertaking of a management company or investment firm registered in a third country is not required to notify its aggregated holdings with the holdings managed by its undertakings if:

a) the management company or investment firm is free to exercise the voting rights attached to the assets it manages in all situations;

b) the management company or investment firm has to disregard the interests of the parent undertaking and any other party whenever conflicts of interest arise;

c) the parent undertaking must be able to demonstrate on request that the organizational structures of the parent undertaking and the management company or investment firm are such that the voting rights are exercised independently; and

d) the parent undertaking must be able to demonstrate on request that the persons who decides how the voting rights are to be exercised are not the same for the parent undertaking and the management company or investment firm and that these act independently from one another.

544. In addition to the above, it is important to point out that in order to benefit from the exemption, the parent undertaking of a management company or investment firm registered in a third country will be required to follow the same declaration procedure as that established for parent undertakings of management companies and investment firms registered in the EU that wish to benefit from the exemptions in Articles 12(4) and 12(5).

Declaration to the competent authority

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

546. The declaration shall have the following content:

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

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

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

547. The Parent undertaking can chose:

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

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

The notion of indirect instructions

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

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

549. 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 546 c) above. It must also comply with the requirements set out in paragraphs [ ] above.

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

Use of third parties to exercise voting rights

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

CHAPTER V

PROCEDURAL ARRANGEMENTS WHEREBY ISSUERS MAY ELECT THEIR "HOME MEMBERS STATE"

(Article 19(4) of Transparency Directive – home Member State control)

Extract from the mandate

DG Internal Market requests CESR to provide technical advice on possible implementing measures on the procedural arrangements in accordance with which an issuer may elect its "Home Member State" under Article 2(1) (i) (ii).

In this respect, CESR is invited to notably consider the following issues: (a) coordination of filings between the competent authority elected by the issuer under Article 2(1) (i) (ii) and several competent authorities elected under the Prospectus Directive and (b) applicable regime in case of delisting from the regulated market of the Home Member State whilst continuing being listed in other Member States.

Extract from Level 1 text

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;"*

EXPLANATORY TEXT

552. CESR has been mandated to give advice in relation to procedural arrangements related to the Home Member State (Article 2(3)b) and the competent authority (Article 19(4)).

553. 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.

Coordination of filings between the competent authorities elected by the issuer under Article 2(1) (i) (ii) and several competent authorities elected under the Prospectus Directive

554. 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.

555. As such, although each Directive sets out the nature of the filings that the issuer has to make to its home competent authority, there needs to be some form of communication between these different competent authorities' because of the linkages between these two Directives.

556. It is envisaged that under the provisions of Articles 21 and 22 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.

557. 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.

558. For these reasons, CESR has been mandated to advise how the filing of the same information under two different Directives is to be co-ordinated.

559. Although CESR does not consider it necessary to give advice to the Commission in this matter, it sets out a proposal as to how a coordination of filings between a Prospectus Directive Competent authority and Transparency Directive competent authority can be achieved.

560. 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. It is anticipated that on implementation of Article 22 of the Transparency Directive there will be a link between Prospectus Directive information and regulated information which is required to be filed with the competent authority under the Transparency Directive. It is at this stage unknown whether this will work in practice.

561. As competent authorities will have access to information that is filed by issuers under the Transparency Directive and the Prospectus Directive, competent authorities will be better able to co-ordinate amongst themselves what an issuer files under the two Directives.

562. In addition CESR expects that competent authorities are granted easy and unrestrictive access to the storage mechanisms set up at national level, therefore allowing for a better coordination relating to the filings made under the Prospectus and Transparency Directives. How this will work will depend upon how the goal of easy access for investors to this information is achieved.

Applicable regime in case of delisting from the regulated market of the home Member State whilst continuing being listed in other Member States

563. 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 de-listed 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.

564. The issuer should make a declaration about its original choice of competent authority for Transparency Directive purposes, because making a notification about a change of home competent authority when there was no original notification about the choice made can be confusing.

TECHNICAL ADVICE

565. In relation to all of the above situations, CESR considers 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 de-listed) or any other Member State where the issuer has its securities admitted to trading on a regulated market.

566. In the case of a change of home Member State, the issuer should make a notification of this change which is to be disclosed to the public in the manner set out by Article 21 so that the market knows who the relevant competent authority for Transparency Directive purposes is.

567. The issuer should make a declaration about its original choice of competent authority for Transparency Directive purposes.