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FEEDBACK STATEMENT

Consultations on documents 04~511, 04~512c and 05~267 for CESR's Technical Advice on Implementing Measures of the Transparency Directive in the areas of

- 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'

June 2005

INTRODUCTION

Background

1. This feedback statement covers all three consultation periods which have been held to date by CESR when producing the technical advice on possible measures of the Transparency Directive.
2. CESR received on 25 June 2004 a formal mandate by the Commission to give technical advice on possible implementation measures concerning the Directive on the harmonisation of transparency requirements for securities issuers. In addition CESR was requested to provide a report on the role of the officially appointed mechanism, the setting up of a European electronic network and electronic filing.
3. For the purpose of delivering the advice and the report CESR has set up an Expert Group on Transparency. The Group is chaired by Mr. Andres Trink, Chairman of the Management board of the Estonian Financial Supervision Authority. The Expert Group has been divided into three drafting groups to cover the different areas that were covered by the mandate and the request for a report on storage.
4. The mandate and the request resulted in two Consultation Papers published in October 2004 and December 2004 respectively.
5. CESR received on 29 June 2004 the official request from the European Commission for technical advice on implementing measures of the Transparency Directive.
6. On 28 October 2004 CESR published for consultation Draft Advice on possible implementing measures of the Transparency Directive, Part 1 Dissemination and Storage. The Consultation Paper set out draft technical advice on disclosure of regulated information according to Article 21 of the Directive (then 17(1) of the unofficial version of the Transparency Directive). Furthermore a second part of that Consultation Paper deals with the central storage mechanism under Article 22 (then Articles 17(1) and 17(1a)).
7. For the October Consultation the period to respond lasted from the publication of the paper on 28 October 2004 to the 29 January 2005. The consultation period also included an open hearing on 7 December 2004. Following the consultation CESR received 53 answers from a variety of organisations.
8. On the second part of the October Consultation paper CESR delivered its report concerning the role of the officially appointed mechanism and the setting up of a European electronic network of information about issuers and electronic filing on 30 March 2005 (CESR 05-150b).
9. On 13 December 2004 CESR published the second part of its draft advice as a result of the formal mandate from the Commission (05-512c). This Consultation Paper deals with Notifications of major holdings, Half-yearly financial reports, equivalence of third countries information requirements and procedural arrangements whereby issuers may elect its 'Home-Member State'.
10. The December Consultation lasted from the publication of the Consultation Paper on 13 December 2004 until 4 March 2005. An open hearing was held on 17 February and was visited by some 40 parties. CESR received 40 written responses in the consultation.
11. In these two consultations the answers received were varied in their support for CESR's initial draft advice, as well as in their focus because of the variety of issues covered under the Directive. In most cases CESR received a good deal of support for the draft technical advice and in others critical points were made. The answers also raised some issues which CESR had not discussed in the papers, which led CESR to ask new questions in the April Consultation Paper.



12. From the October Consultation, the part on dissemination was put to a second consultation following amendments to the draft technical advice. From the later consultation, in December, the draft technical advice was altered in many instances and set out for a second consultation. For reasons of consistency and transparency, CESR also published those parts of the technical advice where there had not been any changes, other than minor drafting changes which were not up for re-consultation (CESR 05-267).

13. An in-depth analysis of all the comments received in the two consultations led to CESR making changes to its initial technical advice. These changes were also a result of further discussions within the CESR Expert Group as well as discussions with the Commission. In the second draft technical advice which was set out for re-consultation CESR chose to combine the two sets of advice into one combined set of advice dealing with all the issues from the Commission formal mandate of June 2004. This re-Consultation Paper (CESR/05-267) was set out for consultation from its publication on 26 April 2005 to the end of consultation on 27 May 2005. In the re-consultation 52 answers were received.

14. CESR takes the opportunity in this feedback statement to thank all respondents for their fruitful and constructive contribution in all three consultation procedures.

15. This feedback statement is part of the CESR transparent working process that CESR will continue to follow in its work of preparing and finalising its advice to the European Commission on the issue of dissemination. In particular, as part of its public consultation practices, CESR has set up an ad-hoc Consultative Working Group of market participants of varied backgrounds and sound knowledge of the financial markets and matters relating to dissemination of information on financial markets. The list of members of the Group has been published on the CESR website (www.cesr-eu.org).

16. This feedback statement covers the two consultation periods which ended on 28 January and 4 March respectively and the second consultation period lasting between 27 April and 27 May 2005.

17. In relation to previous Consultation Papers reference is sometimes made 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”. The April Consultation Paper document CESR 05-267 covered all these subjects and is referred to as the "April Consultation Paper".

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CHAPTER I

INTRODUCTION

18. This section covers CESR Consultation Papers in relation to dissemination and with keeping financial reports available, that is to say, in relation to the October Consultation Paper (CESR/04-511), questions 1 to 14, and in relation to the April Consultation Paper (CESR/05-267) questions 1 to 15. The feedback statement points out the main results from consultation and CESR responses to that, either by amending the advice or by maintaining the proposed approach and why. This feedback statement covers both consultations and therefore, questions relating to the October Consultation Paper or the April Consultation Paper are identified as such. For ease of reference, the questions are included.

19. As this feedback statement deals with both consultations, CESR felt that it was necessary to organize the questions by broad subjects, thus allowing a proper understanding of the development of CESR thinking in this area and of the results of consultation. Therefore, this feedback statement is divided as follows:

A - DISSEMINATION

I - MINIMUM STANDARDS FOR DISSEMINATION

20. This part of the feedback statement relates to Questions 1, 2 and 6 of the October Consultation Paper and to questions 1, 2, 3, 4, 5 and 6 (standards and requirements for dissemination) of the April Consultation Paper.

II – ROLE AND NATURE OF THE SERVICE PROVIDER

21. This part of the feedback statement relates to Questions 3, 7 and 8 of the October Consultation Paper and to questions 9, 10 and 11 of the April Consultation Paper.

III – DISSEMINATION MODELS, FEES STRUCTURES AND CHARGES

22. This part of the feedback statement relates to Questions 4 and 11 of the October Consultation Paper and to questions 12 and 13 of the April Consultation Paper.

IV – APPROVAL OF SERVICE PROVIDERS AND RELATED ISSUES

23. This part of the feedback statement relates to Question 5 of the October Consultation Paper and to questions 14 and 15 of the April Consultation Paper.

V – BLACK HOLE PROBLEM

24. This part of the feedback statement relates to Questions 9 and 10 of the October Consultation Paper.

VI – OTHER ISSUES

25. This part of the feedback statement relates to Question 12 of the October Consultation Paper.

B - KEEPING REPORTS AVAILABLE



A - DISSEMINATION

I – MINIMUM STANDARDS FOR DISSEMINATION

October Consultation Paper – Question 1

What are your views on the minimum standards for dissemination? Are there any other standards that CESR should consider?

26. In the October Consultation Paper, CESR explained in some detail what were the main drivers for the dissemination (paragraphs 12 to 17), the key concepts upon which CESR has construed the dissemination standards (paragraphs 18 to 44) and has set out objectives (paragraphs 3 and 4) and standards for the dissemination (paragraphs 5 and 6). Therefore, CESR asked consultees whether they agreed with the standards set out for the dissemination.

27. The majority of respondents agreed on the proposal to have minimum standards of dissemination and considered the standards drafted by CESR to be acceptable. CESR has kept this general approach.

28. One respondent highlighted that the standards and regulation should concern the issuer but opposed any direct imposition of standards on service providers, which would have to operate according to the minimum standards anyway in order to compete in the market.

29. Upon reflection of this issue and taking into consideration that CESR will not mandate the approval of service providers, and that service providers will not be regulated entities CESR has decided that the addressee of the standards should be the issuer, as it is ultimately responsible for ensuring proper dissemination. CESR has therefore made adjustments to the advice, but kept the substance of the standards.

30. Some respondents also pushed for the standards to stress that, despite possible pre-approval, the issuer is responsible for the dissemination. CESR clarified this point in its April Consultation Paper stating that the issuer is ultimately responsible for ensuring that its obligations under Article 21 are met. This was also included in the final advice.

31. Many respondents highlighted that investors should not be charged any fees and the information should be available simultaneously to all investors. One respondent also proposed that the information should be disclosed at the same time to the media and investors whereas another respondent was concerned about the weakened interest of the commercial vendors if the information is available free of charge in real time.

32. Respondents also pointed out that the dissemination concept proposed by CESR was considered to appeal to new channels to comply with the minimum standard (fast access to regulated information for investors) and that dissemination can best be achieved only by electronic means.

33. The obligation to disseminate effectively throughout the EU was considered by some respondents in both consultations to create unreasonable burdens on issuers. It was proposed that the effective dissemination throughout the EU would mean an obligation to disseminate regulated information in those Member States, where securities are offered to the public or admitted to trading on regulated market, whereas in other Member States free access to regulated information on the internet pages of the issuer, stock exchange or competent authority would suffice. CESR recognises the concerns of small issuers with local investor base that consider that the pan-European level of dissemination is both costly and burdensome without proportionate benefits to investors. However, CESR points out that the obligation to disseminate effectively throughout EU has been set on level 1 and therefore in the technical advice provided for level 2 it is not possible to ignore that.

34. Some responses was also asked whether the approach chosen in paragraph 5 c) of the October Consultation Paper ("Effective dissemination throughout EU") is due to ensure an efficient functioning of the market as the moment of reception by investors in different Member States was



considered to be the most crucial. It was highlighted that investors within the EU should receive regulated information within the same timeframe as investors based in the issuer's home Member State. CESR has recognised the risk of information not reaching all investors (referred to as a black hole –problem in the Consultation Paper) and, in relation to timing issues, CESR has included in the dissemination standards (paragraph 43 of the October Consultation Paper) a requirement that the dissemination channel shall 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.

35. Many respondents proposed that the required data output format would include the ISIN code of the security. In the second Consultation Paper CESR proposed what field the regulated information should contain.

36. At this stage, however, CESR can only recognise that there has to be some information relating to the identification and although the ISIN has been appointed as an adequate method of issuer identification, at this stage CESR cannot define the identification method/code more precisely. Identification of the issuer is discussed in more detail below.

37. Also the definition of "media" was considered useful and the proposed definition included in addition to well-known financial news services (e.g. Reuters, Bloomberg) also special financial websites and portals, specialist financial services used (e.g. institutional fund managers) and private investors (e.g. via a free-of-charge subscription service). CESR has not defined the contents of word "media" in the second Consultation Paper. However, CESR considers that the definition of media should be understood broadly.

October Consultation Paper – Question 2

<p>What are your views on the standards for dissemination by issuer? Are there any other standards or related issues that CESR should consider?</p>
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38. In the October Consultation Paper, CESR explained in some detail what were the main drivers for the dissemination (paragraphs 12 to 17), the key concepts upon which CESR has construed the dissemination standards (paragraphs 18 to 44) and has set out objectives (paragraphs 3 and 4) and standards for the dissemination (paragraphs 5 and 6). CESR asked consultees what their views were on the standards set out for the dissemination, and whether they had any additional views. Views from the respondents mainly focused on three areas: the dissemination standards, as such; the issuers' ability to disseminate by themselves and some terminology issues.

39. In general the respondents considered the standards for dissemination by the issuer to be reasonable and supported the standards. One respondent considered specific standards to issuers to be too onerous without benefit to investors.

40. There were some concerns raised about the dissemination without delay through media e.g. through the dissemination by newspapers. CESR has proposed a variety of means (of media) to achieve dissemination (including newspapers) to cater different circumstances and the different ways in which these media operate, without delay.

41. Some respondents also considered that CESR should explicitly recognise the role of the issuers' website for the dissemination of information. However, CESR considers dissemination to mean active push of information to investors by using media and issuers' websites do not fulfil these criteria. Notwithstanding, CESR considers that the issuers' website can be used as an additional means of making information available to investors but it is not part of the dissemination process and in this regard it is outside of the scope of the mandate.

42. CESR was encouraged to focus on security, record keeping and preservation of data when drafting the standards. CESR has emphasized the meaning of security in the text of its final advice.

43. In addition answering the question, many respondents stressed the possibility of the issuer performing the dissemination by itself and that service providers should not be mandatory.



However, there were also opposing views, which were based on the idea of effective dissemination process can only be done properly by service providers. CESR clarified in the April Consultation Paper and in its final advice that the issuer is responsible for dissemination, therefore CESR considers that the issuer has the right to perform the dissemination by itself.

44. There were also some comments concerning the terminology, this was streamlined in the final advice.

October Consultation Paper – Question 6

What are your views on the proposed minimum standards to be satisfied by operators? Are there any other standards that CESR should consider?

45. In the October Consultation Paper, CESR presented minimum standards to be met by service providers (paragraph 19). CESR asked consultees what were their views on the proposed minimum standards set out for the dissemination and if there were any additional standards to be set.

46. The majority of respondents felt that the standards were appropriate but there were a number of suggestions for additional standards on security, the handling of price sensitive information and connections with media. Persons who come into contact with price sensitive information are subject to the requirements of the Directive 2003/6/EC on insider dealing and market manipulation (market abuse).

47. A number of respondents pointed out that it was not reasonable to expect information received by fax to be processed immediately. In its April Consultation Paper CESR asked whether these connections should be mandatory and electronic and the responses are discussed further below. In its final advice, CESR is mandating electronic connections.

48. In response to some of the questions and suggestions raised in relation to the standards for dissemination as stated in the October Consultation Paper, CESR made some amendments to its advice in the April Consultation Paper and asked some additional questions, discussed further below.

April Consultation Paper – Questions 1 and 2

Q 1 – Do consultees agree with the above proposals?

Q 2 – What distribution channels do consultees consider should be mandated? Please provide reasons for the answer.

49. In the April Consultation Paper, CESR acknowledged that dissemination would occur, in practice, when regulated information reaches entities that are able to distribute the information further and push it to the market. CESR considered that the method for dissemination chosen by the issuer needed to ensure sufficient connections with a number of media in order that regulated information is disseminated as widely as reasonably possible, on both a national and pan-European basis, to allow as many interested parties as possible to gain access to the regulated information as quickly as possible, keeping in mind as well the need to a proper balance between practicability and the objective of dissemination throughout Europe.

50. As some respondents to the October consultation suggested that CESR should be more specific in setting the standards for these connections with the media, CESR proposed in the April Consultation Paper that mandatory connections should be established with at least the key national and european newspapers, specialist news providers, news agencies with national and european coverage and financial websites accessible to investors and asked whether consultees agreed with the mandatory connection and what channels should be mandated and why.

51. There were many comments received in relation to the dissemination standards and connections with media as proposed by CESR. The responses reflected different parties concerned with dissemination and the respondents represented mainly media, stock exchanges, issuers and also some parties representing investors' side.

52. Many representatives of media agreed with CESR's proposal. There were, however, some respondents, which considered that currently in some Member States the newspapers have central role in publication and this should not be prejudiced by CESR's advice. The main concern of media representatives was that a more exact definition of media would be needed. In this way the issuer would be able to ensure that it has fulfilled its obligations and it would also be easier for investors to know where they can find price-sensitive information. The proposed definition of media includes three categories:

- a) financial news services,
- b) press agencies and newspapers
- c) financial websites

53. One respondent also proposed that the standards should not only require that regulated information is provided to the media but the standards should also recommend the issuer to publish the information in newspapers in those Members States where this is already common procedure.

54. There were some stock exchanges, which were concerned about the assurance of market surveillance in the proposed model and proposed CESR to mandate service providers with direct connection to authority or stock exchange. Some stock exchanges also considered CESR's proposal to be too burdensome especially to small and local issuers without proportionate matching with investors needs and therefore preferred the currently existing model of some EU countries, where issuers are obliged to deliver all regulated information to be made available in the stock exchange.

55. Many representatives of issuers were mostly concerned about the heavy burden set by the minimum standards to issuers and there were some concerns raised about the willingness to have their securities admitted to trading in a European regulated market. It was considered that the standards, which cause additional burden to issuers, still do not ensure that investors get the regulated information. It was proposed that the regulation concerning dissemination should be left to national regulators to decide. Some respondents strongly preferred the existing systems in their Member States, where information is delivered to the stock exchange (and issuer's website), from where both the investors and media can have access to the information. The mandatory connections with media were considered to be unreasonable solution to many issuers. Especially the mandatory connection with international newspapers was considered to be useless to listed companies that operate locally and where the ownership is local. The reasoning behind it was that if a company wants to have foreign investors, it is in the company's own interest to disseminate information outside the local market as well. It was highlighted that the issuers should be able to consider by themselves, what is the best dissemination method to fulfil the obligations set in the Directive.

56. The mandatory connections with media also raised a question relating to a "legal black hole" in a situation where an issuer has delivered the regulated information to the media but the media does not publish the information (problem especially with small issuers with less editorial interest). The issuer has fulfilled its obligations; however, investors do not get the information.

57. A respondent representing investors was mainly concerned with the fragmented flow of information, which was considered to weaken the possibility of all investors getting the information at the same place at the same time. It was also proposed that each market would have a single pipeline through which information flows simultaneously to all investors. It was also stressed that there should be at least one website, where all regulated information would be available to retail investors free of charge. The dissemination through electronic means was considered to fulfil the criteria of "fast access" and that is why CESR was encouraged to reflect that in the standards as well.

58. It was also stressed that there exists significant risk that the information is not published at all as the information received by media will be overwhelming.

59. In relation to the fragmented flow of information, CESR wishes to point out, once again, that access to regulated information in the Directive is assured by three different means: the dissemination; the storage and the option granted to competent authorities to post information on their websites. CESR therefore considers that investors will have a single point were all regulated



information will be – the storage mechanism – which is something new in relation to existing community legislation.

60. In relation to the risk that information may not reach every investor across Europe CESR considers that mandating connections with different types of media will decrease such risk and points out that the majority of those who responded to questions 9 and 10 of October Consultation Paper considered that this risk would not be relevant.

61. It was also highlighted that on level 2 it is not possible to set mandatory connections with media as Article 21 of the Directive allows Member State to mandate the use of one particular dissemination method (e.g. use of certain website). CESR is, on the other hand, of the view that these standards are to be used throughout Europe as standards for the dissemination for the regulated information in all Member States.

62. There were also some additional proposals to CESR's model. It was proposed that also the issuer's website should be one mandatory channel of dissemination. Two respondents considered that there should be an approval system of service providers. It was also proposed that there should be a deadline for mandatory adoption of the service provider model, whereas issuers disseminating by themselves would be a solution in transitional period only. CESR has dealt with these questions elsewhere in this feedback statement.

April Consultation Paper – Question 3

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

63. In the October consultation, consultees suggested that CESR recommended electronic connections between issuers and media as these would allow faster and secured processing. Therefore, in its April Consultation Paper, CESR asked the market whether mandating electronic connections with the media would be an appropriate approach.

64. The majority of respondents considered this to be too demanding, too costly or even too detailed to a level 2 measure. Notwithstanding, a large number of consultees agreed with CESR proposal, as these would ensure fast and secure processing of regulated information.

65. CESR has considered the arguments presented and decided to mandate electronic connections with the media but wishes to point out that for this purpose, “electronic” should be interpreted broadly to ensure the necessary flexibility and cater for existing means of electronic connection and future developments in the market.

66. CESR also wishes to point out that there is a need for a consistent approach in this issue together with the electronic filing with the competent authority and the functioning of the storage mechanism.

April Consultation Paper – Question 4

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

67. In addition, CESR asked in the April Consultation Paper what sort of connections consultees considered should be mandated. Those who responded positively to question 3, agreed that the connections should be electronic, but some of them pointed out that CESR should not mandate a particular method, especially not dedicated lines as these are costly and burdensome and that the benefits would not outweigh the costs. CESR agrees with this opinion and is mandating electronic means for the process of dissemination without reference to a specific method, in order to keep the advice as flexible as possible.



April Consultation Paper - Question 5

Do consultees agree with the approach of redrafting the required field of information, as proposed above?

68. In the April Consultation Paper (paragraphs 21 to 23) CESR proposed to redraft the fields of information required to be included in any piece of regulated information sent from the issuer (or service provider) to the media. CESR proposed that instead of “company name” it would require “identification of the issuer”.

69. All consultees who comment on question 5 agree with the approach of redrafting. Therefore, CESR adopts the new approach in the final advice.

April Consultation Paper - Question 6

Do consultees consider that a specific method of issuer identification should, in addition, be mandated (such as the identification number in the companies register or the ISIN)? Which of these?

70. Although CESR pointed out in its Consultation Paper in April that the method by which the issuer should be identified in the information sent to media could be left to the market and the parties to decide (paragraphs 23 of the April Consultation Paper), CESR asked consultees whether a specific method of issuer identification should be mandated.

71. The majority of consultees who commented on question 6 were in favour of a mandatory identification by the ISIN code, although some mentioned the problem of the ISIN actually referring to the security and not to issuer itself. Few consultees suggested using the identification in the companies register. About one third of the commenting consultees opposed a mandatory method of issuer identification at all. They assumed a specific method of identification either not to be necessary or to be left to the market to decide.

72. A majority of consultees opted for the ISIN number and recommended that CESR should consider prescribing the use of the ISIN as a specific method of issuer identification. At the same time CESR should address the problem of issuers having more than one security. One consultee proposed CESR should mandate the first security admitted to trading by the issuer on a regulated market in its home member state to be used for the identification of the issuer.

73. CESR acknowledges that some sort of issuer identification should be incorporated both in dissemination and in storage. Notwithstanding, in the time available for its level 2 advice, CESR considers that it would be very difficult to advice to the Commission an adequate and standardised method. As such, although the majority of the respondents considered CESR should be mandating a method for issuer identification at this stage CESR doesn't want to exclude any possible future development in this area and thus will review it again at level 3.

April Consultation Paper - Questions 7 and 8

Q 7 Do consultees consider that CESR should establish a method, or some sort of a code, by which there would be a single and unique number of identifying each announcement that an issuer makes, that is valid on a European basis and that could be used also for storage?

Q8 What methods do consultees suggest CESR should establish? Please provide reasons for the answer.

74. In the October consultation, some consultees commented that the information fields that dealt with numbering the announcement were confusing and not necessary. CESR clarified in its April Consultation Paper what these information fields mean by redrafting the required items of information. In addition, CESR asked whether it should establish some sort of a code by which each



announcement could be identified and used also for the storage and which codes would consultees suggest.

75. A majority of those who answered confirmed the need to have a unique identifier and made several suggestions, such as the ISIN, the EBEI (both together with a date and time stamp). A few respondents made the reservation that it must be low-cost. CESR has decided to retain the sequence number which together with the date and time will give a unique identifier.

II - ROLE AND NATURE OF THE SERVICE PROVIDER

October Consultation Paper – Question 3

Should an issuer be able to satisfy all of this Directive's requirements to disclose regulated information by sending this information only to an operator? Please explain reasons for your answer?

76. In addition to detailing the standards to be complied with when disseminating regulated information, CESR explained in the October Consultation Paper that when the issuer decides to use a service provider, that service provider should be able to undertake the three main obligations of the issuer in relation to regulated information: (i) the dissemination of the regulated information; (ii) the storage of the regulated information and (iii) the filing of the regulated information with the competent authority. Therefore, CESR asked in the October Consultation Paper (question 3) whether consultees considered that the issuer should be able to satisfy its obligations by sending the information to the service provider.

77. The vast majority of those who responded to this question pointed out that the issuer should be able to fulfil all its obligations in relation to regulated information by sending the information to the service provider. Notwithstanding, consultees raised several different points, discussed below.

78. Some of the consultees pointed out that security issues need to be addressed. CESR clarified this issue in the April Consultation Paper by linking the language on security issues to the one used in the progress report on storage already sent to the European Commission. This would both ensure consistency with the approach taken in that document and also strengthen the security issues related to the dissemination.

79. Consultees also pointed out that although the issuer could send regulated information only to the service provider, CESR should not mandate the use of the service providers because issuers should be able to disseminate by themselves if they so wish. CESR clarified this point in its April Consultation Paper and also in the final advice by stating that as the issuer is the ultimately responsible for dissemination it may choose the method of dissemination that suits it best.

80. Other consultees linked this issue to the approval of service providers discussed further below.

October Consultation Paper ~ Question 7

Should issuers be required to use the services of an operator for the dissemination of regulated information?

81. After detailing the additional requirements service providers would have to comply with when disseminating regulated information on behalf of the issuers (paragraph 19), CESR asked in the October Consultation Paper whether issuers should be mandated to use service providers.

82. A large number of responses were received in relation to this question. The majority of respondents felt that issuers should not be mandated to use service providers. Respondents felt that if issuers had the ability to disseminate information themselves, in accordance with the minimum standards that were set down for service providers, then they should be able to so do. However, most felt that giving issuers the option to use service providers was beneficial.



83. CESR has taken on board the views of respondents and does not believe that it is appropriate to mandate the use of service providers although issuers should have the choice to do so if they wish. Issuers who carry out dissemination themselves must comply with the minimum standards as set out in the advice.

October Consultation Paper - Question 8

What are your views concerning the role of competent authorities in disseminating regulated information as operators? Please set out reasons for your answer.

84. In the October Consultation Paper, CESR explained in some detail (paragraphs 20 and 21) the role that competent authorities currently play in the dissemination process and asked consultees whether they envisaged that competent authorities could act as service providers.

85. There were mixed responses to this issue. Those in favour of competent authorities acting as service providers highlighted that competent authorities had credibility and means to do the job. Those against it raised issues of conflicts of interests, charging structures and inability to keep up with the technology requirements and the need to ensure that in doing so, they meet the requirements generally applicable to service providers.

86. Consultees also referred to the stock exchanges as possible service providers, subject to identical problems.

87. CESR has considered these comments carefully and in the April Consultation Paper attempted to deal with the issue by imposing additional standards in relation to fee structures (see responses to questions 12 and 13 on the April Consultation Paper) and conflicts of interests (see below in relation to questions 9, 10 and 11 on the April Consultation Paper).

April Consultation Paper – Question 9

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

88. Some of the consultees to the October Consultation Paper suggested that service providers used by issuers to disseminate regulated information should be subject to additional requirements on conflicts of interests. Therefore, in its April Consultation Paper CESR explained in some detail how to deal with this issue (paragraphs 27 and following). CESR acknowledged that the Directive did not impede cumulation of functions (such of competent authority, stock exchange, entity in charge of the storage mechanism or media and service provider) but that the issue of conflicts of interests need to be dealt with. Therefore CESR proposed:

- that whenever service providers also provide other services or functions, these functions should be kept clearly separate; and
- in addition, no competitive advantage should be allowed in disadvantage of competing entities.

89. CESR questioned consultees whether this approach was adequate.

90. The large majority of those who responded to this question agreed with CESR's proposals.

91. Some of the consultees suggested that CESR should go into more detail, such as to require service providers to implement an adequate code of ethics and have sufficient personnel. CESR considered these proposals, but in trying to reach an adequate compromise between the required level of detail and the flexibility of service providers to perform their services, considered that the details would in fact be detrimental to the overall process.

92. Three consultees pointed out previous opinions that market regulators or authorities should not be allowed to act as service providers. CESR considers that the Directive does not prevent this, as explained in relation to Question 8 of the October Consultation Paper above.



93. CESR wishes to point out that these standards of dissemination are applicable to any party carrying out the tasks of service provider. Thus all service providers are subject to the standards set out in the final advice.

April Consultation Paper – question 10

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

94. In addition to the requirement for separation of functions, CESR considered, in response to the October consultation, that whenever competent authorities also act as service providers, they cannot prevent free competition and asked whether consultees agreed with that.

95. The majority of respondents agreed that when a competent authority acts as a service provider it must not impede free competition by requiring issuers to make use of its services. A number of respondents referred to the need for clarity, in order to establish a distinction between the separate functions of the competent authority when it acts as a service provider. A number of respondents did not agree that a competent authority should act as service providers as they would be unable to manage potential conflicts of interests and that issuers would feel under moral pressure to use the services of the competent authority. CESR considers that this separation should be functional rather than legal and that a competent authority should maintain a clear distinction between its functions as a competent authority and as a service provider, as the advice already detailed by referring to “functions”.

96. One respondent suggested that the central storage mechanism operator could also act as a service provider.

97. As the majority of respondents agreed with CESR’s advice, CESR does not consider it necessary to change the advice proposed in the April Consultation Paper.

April Consultation Paper – Question 11

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

98. In addition to the clear separation of functions, consultees in the October consultation suggested that if the stock exchanges were to act as service providers they could not mandate the use of their dissemination service in the listing rules, as this would impede competition.

99. The majority of respondents agreed that when a stock exchange acts as a service provider, it cannot mandate the use of its services as a service provider. Respondents felt that there should be transparent costs and that a stock exchange should not bundle dissemination charges together with listing charges. A number of respondents referred to the need for clarity, in order to establish a distinction between the separate functions of a stock exchange.

100. Some respondents asked what CESR meant when referring to separation of functions. CESR considers that this separation should be functional rather than legal and that a stock exchange should maintain a clear distinction between its functions as a market operator and a service provider.

101. As the majority of respondents agreed with CESR’s advice, CESR does not consider it necessary to change the advice proposed in the April Consultation Paper.

III - DISSEMINATION MODELS, FEE STRUCTURE AND CHARGES

October Consultation Paper – Question 4

Do you agree with the structure set out in Figure 1? Are there any other structures that would be in line with the Transparency Directive requirements?

102. When explaining how the dissemination is to occur if services providers are to be used, CESR explained in the October Consultation Paper the fee structure that underlies that model and asked consultees whether they agreed with the structure and whether they envisaged other structures of dissemination of regulated information compatible with the Directive.

103. Almost all consultees agreed with the structure set out in the Consultation Paper. Only one of the consultees was against the described model, favouring a mechanism that holds the information available and enables the media and other interested persons to access the information.

104. Some consultees commented on the fees charged by service providers. One consultee mentioned the danger that in smaller markets a fee could prevent the information from being disseminated as widely as possible. Another consultee suggested that issuers should be able to send the information to service providers free of charge. A further suggestion is that only the issuer should pay for dissemination services (no fees for media and investors). Finally, one consultee put forward that media should get direct revenues from the issuer.

105. CESR emphasised in the April Consultation Paper that issuers are free to choose the model for dissemination that suits them best. CESR expects two basic models to be used for dissemination. Either issuers disseminate regulated information by themselves or they use a service provider to disseminate regulated information on their behalf. In the April Consultation Paper, CESR suggested a clear fee structure of a service provider and considered that the cost structure should not be detrimental to the overall objective of proper dissemination. CESR has decided not to address the issue of a fee structure of service providers as this is mainly an issue of internal relationship between the parties, as pointed out by consultees to the April Consultation Paper (as explained further in this feedback statement).

October Consultation Paper ~ Question 11

Do you consider there to be other methods of dissemination that would satisfy the minimum standards for dissemination? If so, please provide a description of such dissemination methods, and how they would work.

106. In its October consultation, CESR put forward its proposals in relation to the model of dissemination that could be used in the EU in order for issuers to be able to meet their Level 1 obligations.

107. CESR explained in some detail (paragraphs 26) what considerations need to be taken into account in order to establish whether or not issuers should be able to use various methods of dissemination.

108. CESR explained in paragraph 27, that allowing issuers to choose from a range of dissemination methods could lead to the fragmentation of the dissemination of regulated information, and that it is highly desirable that issuers employ one method of dissemination – namely that of service providers.

109. CESR asked consultees whether or not there were other methods of dissemination that would satisfy the minimum standards. And if there were any, CESR asked consultees to provide a description of such methods and how they would work.

110. There were 20 responses to this question, of which the strong majority agreed with CESR's proposals (17), 1 disagreed and 2 came up with alternatives.

111. Some consultees considered that the use of service providers was the only method of achieving the Directives objectives and requirements, that it provided a complete and safe solution for complete, immediate and broad electronic dissemination thus reaching the target audience of the



Directive. Others, commented that the service providers system is the most promising approach to achieving the Directive's objective.

112. In addition, a strong majority of consultees considered that only electronic distribution can meet the basic disclosure principles in terms of speed, security and certified identification of all market players. Some also considered that it was necessary to use one mandatory electronic standardised format in which the information is to be disseminated. Both these issues were further developed and consulted on in CESR's April consultation (see response to question 4 of the April Consultation Paper discussed in part I of this feedback statement).

113. In answer to the question as to whether or not consultees considered there to be an alternative method of distribution that would satisfy the minimum standards, the strong majority did not consider that there was one. Two alternative proposals were made, both combining the dissemination and storage requirements, and not dealing specifically with an alternative proposal for dissemination.

114. CESR explained in its October consultation in paragraph 18 of the introduction, that it considered that there are two fundamental concepts that need to be clearly understood and separated, dissemination of information (which describes how the information enters the public domain), and storage (which allows this information to remain in the public domain and be accessible by the public on a long term basis).

115. As CESR has at this stage been mandated to establish advice in relation to dissemination, any proposed dissemination model that relies on the storage mechanism, can not facilitate CESR's establishment of advice in relation to dissemination.. For both these reasons, these proposals were not considered as appropriate alternatives.

116. One consultee disagreed with CESR that dissemination by an issuer implies fragmented dissemination, and that issuers may wish to disseminate the information made available to the public to investors that it has identified. As such, the use of service provider services would make such a service more difficult to supply if the issuer had to use a service provider.

117. As a result of responses to question 3 of the December consultation, CESR explained in its April consultation that issuers have a choice as to whether or not to use the services of a service provider, therefore the model being proposed will not prevent those issuers who wish to send information directly to specific investors from doing so. CESR however points out the sending information only to specified investors does not meet the level 1 obligation to disseminate on a non discriminatory basis.

118. Some consultees commented that although they supported the proposal that CESR was making, it was important that alternative solutions should not be ruled out and that the proposals need to leave room for future solutions.

119. Although CESR agrees that any advice given has to be flexible enough to cater for future developments and that other solutions that can achieve the same results should not be ruled out, CESR can only give advice in relation to dissemination standards that in practical terms fit with a particular dissemination method in mind. No consultees came up with any other proposals, and many commented that they could not think of any.

120. Following the support for the model of dissemination received, the lack of any workable alternative suggestions being made, the overwhelming support to the proposal that issuers should be able to satisfy all of its disclosure obligations under the Directive by using a service provider, (see paragraph 10-12 of October Consultation – see the response to question 3), CESR retained its proposals in relation to the use of service providers, as set out in its April consultation.

121. Following the responses, CESR is including the use of service provider services in its final advice.

April Consultation Paper – question 12

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

122. In the October Consultation Paper CESR has set out the fee structure underlining the dissemination model where service providers were used (see paragraph 6). In the April Consultation Paper CESR underlined that the fee structure should not be detrimental to the dissemination process (paragraphs 30 and 31) and therefore proposed that the dissemination fees should not be detrimental to the overall process.

123. CESR proposed in its April Consultation Paper that:

- the fees for the services of dissemination should be clearly stated, so that issuers could easily compare service providers among themselves;
- if the service provider would be involved in more than one role in the dissemination, its fees should be unbundled, in order to be clearly identified;
- to ensure that the overall costs of dissemination would not be detrimental, CESR also proposed that media should not be required to pay the service provider to get access to regulated information.

124. Therefore CESR asked consultees whether they agreed with the proposal that media should not be required to pay service providers to get access to regulated information.

125. There were mixed responses to this issue. Almost half of the respondents agreed with CESR proposal, but a small majority did not, referring that this should be left for the parties to decide, that this would be too detailed level 2 advice, that this was a commercial matter in which CESR should not be involved in, that it would require additional study and at least a analysis for types of costs (connection costs, for instance, should be borne by media as well).

126. CESR has considered these comments carefully and came to the conclusion that it is not proposing to make any further comment on this matter.

April Consultation Paper – question 13

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

127. After asking whether consultees agreed that media should not be required to pay to get access to regulated information, CESR asked whether this would be economically viable.

128. Again there were mixed responses. Those who considered that this was commercially viable pointed out that service providers would be paid by the issuer; those who did not agree pointed out that this was a matter of contractual relationship between the parties, that this might be a level 3 issue or that costs should be shared.

129. In consideration of the decision taken in the above question, CESR considers that it is not appropriate to address this issue and doesn't propose making any further comment.

IV ~ APPROVAL OF SERVICE PROVIDERS AND RELATED ISSUES



October Consultation Paper – Question 5

Should operators be subject to approval and ongoing monitoring by competent authorities or not?

130. In the October Consultation Paper, CESR also raised the question of approval of service providers and ongoing monitoring them by competent authorities.

131. The consultation responses to this question were mixed.

132. The consultees that want service providers to be subject to approval pointed out that an approval would provide issuers with the certainty needed when choosing service provider. Besides, issuers would not have the duty to investigate whether service providers fulfil the minimum standards.

133. The consultees that were opposed to an approval put forward that there is more competition between service providers if approval is not mandatory. Additionally, the Directive did not entitle regulators to impose regulations on service providers; the same could easily be achieved by holding the issuers responsible for proper dissemination. Furthermore, qualifying criteria bore the risk of creating market barriers.

134. Although the majority of consultees were in favour of mandatory approval of service providers, on further consideration of this issue and following discussions with the Commission it became clear that mandating such an approval was beyond the scope of Level 1 and, as a practical note, it might be difficult for CESR, in the time available, to reach an agreement on how to set an harmonised approach on approval of service providers. Notwithstanding, CESR will keep this issue under review at Level 3.

135. As a consequence of this, CESR will not mandate approval of service providers, but competent authorities will be able to approve service providers if they want to do so. As the approval is not mandatory, issuers will be allowed to use service providers that are not approved. Either way the issuer remains responsible for accomplishing dissemination of regulated information.

April Consultation Paper - question 14

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

136. Since CESR is unable to mandate the approval of service providers, in the April Consultation Paper CESR asked consultees whether service providers should be obliged to prepare a document in which they would show how they intend to meet the requirements for dissemination.

137. The majority of the respondents expressed their agreement to require a document from the service provider, but without showing a clear opinion whether it should be mandatory or not. A few of them, specifically asked for it not to be mandatory.

138. Some of the respondents insisted that the approval of service providers should be mandatory (based on the importance and confidentiality of the information, risk of the issuer, etc). On the contrary, some other respondents mentioned the danger of over regulation and the risk of creating monopoly situations because this will not permit the issuer to have a free choice between service providers and the media and they will feel obliged to use a service provider, although the Directive does not require it. It should be highlighted that in the advice CESR's proposal was to allow issuers to choose between using approved and non-approved service providers.

139. One respondent proposed to create a voluntary publishing standard to which service providers could choose to adhere. Another suggested creating a “seal of approval”, recognized by all EU Member States to have the same judgement of the provider in each country.



140. In light of the mixed responses received in consultation, and insofar the approval of service providers will not be mandatory and that the standards will be addressed to issuers, CESR has decided to strongly recommend issuers to require this document from service providers before making any decision on this matter because CESR considers that this document is an important source of information to issuers on how service providers are able to fulfil the requirements of proper dissemination on behalf of issuers.

April Consultation Paper – question 15

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

141. Only a few respondents dealt with the question of having Level 3 future work. Most of them believed that there should be more Level 3 work, in order to clarify the mutual recognition among approved providers in each Member State and what the role of the competent authority should be.

142. CESR has decided that the matter of approval of service providers will remain under review, as recommended by consultees. CESR will analyse whether the effective application of the standards for dissemination will require this question to be dealt with at Level 3.

V - THE “BLACK HOLE” PROBLEM

October Consultation Paper – question 9

Do you consider it necessary to attempt to address the risk that regulated information may not reach every actual and potential investor throughout the EU? Please set out reasons for your answer.

143. In the October Consultation Paper CESR explained that the dissemination would not provide every investor in Europe with all the regulated information on all European listed companies (paragraph 25) and called it informally the “black hole problem”. CESR also pointed out that media should not be obliged to disseminate all pieces of regulated information received insofar these had to maintain their editorial freedom (see paragraphs 23 and 30 of the introduction to the October Consultation Paper). CESR explained that it envisaged three possible ways of dealing with the issue:

- service providers would be required to ensure that at least one of the media selected publishes all regulated information in full text on a web site on real time basis, at no charge to investors;
- service providers could be required to publish all real-time regulated information on their web sites at no charge to investors which would result in a fragmentation of information depending on the number of service providers; and
- the central storage mechanism could make regulated information available within a reasonable timeframe. CESR considered reasonable that price sensitive information is available on a real time basis, and other, non price sensitive information as soon as possible and at the latest before the beginning of trading on the following day.

144. CESR asked consultees whether they considered necessary to deal with this issue at Level 2.

145. The general concern of respondents was CESR’s use of the term “potential investor”, because it is a very broad term. Consultees pointed out that in practice and in realistic terms it is impossible and unworkable to ensure that all regulated information reaches every actual and potential investor through the EU. Some respondents even proposed that CESR should find a more precise terminology. Others, also referred to the cost of achieving this goal, the media or the issuer would be



overburdened if it were forced to reproduce all regulated information of all European companies to all the potential investors, and even more, if full disclosure is ensured by media, this does not automatically mean that full disclosure on a European scale is achieved.

146. The majority of respondents, however, considered that the black hole problem is not a significant one since investors who want the information in real time can subscribe to the media or know where to look for it.

147. The respondents also felt that in the whole process, some activity from the investor is needed and some effort, on their part, and also some ability to use at least internet. In some cases, part of the risk will fall in the “potential investor” if they have the lack of ability to use internet.

148. A great part of the respondents expressed that at least one free retail investors website, where investors could get the information on companies across the European Union, could help to achieve this goal. Other stated in addition, using the service of information vendors, global web sites and portals, leading press agencies and newswire the information would be available all across Europe. Considering these responses, CESR doesn't see the need to address this issue further.

149. CESR also points out that the access of investors to regulated information does not need to rely solely on the dissemination, as the Directive also requires that issuers make information available in the storage mechanism and also file that information with the competent authority that, in turn, may decide to make that information available on its own website.

October Consultation Paper – Question 10

Which of the options presented above would, in your view, minimise this risk? Please set out reasons for your answer.

150. In addition, in the October Consultation Paper, CESR also asked the market which of the options referred to above would deal better with the issue of the “black hole problem”.

151. Respondents in general supported option C (availability of the information on the storage mechanism in short delays), the issuers must be able to access the CSM to get any information they need. Some reasons they gave are: It is believed to be the most cost effective, the most easily accessible by investors and, to a certain degree, avoids the risk of fragmentation. Also, some respondents noted that it is not the purpose of storage to store the information in real time. With these options potential black holes should be moderate.

152. Some respondents added to this option the possibility of making the information available on the issuers' own website as well.

153. In consideration of the responses to these two questions, CESR recognises that this issue may arise and that the existing provisions of the Directive (such as the storage or the ability of competent authorities to make information available) will minimize such risk of information not being available.

VI - OTHER ISSUES

October Consultation Paper - Question 12

Do you agree with this draft level 2 advice”

154. After detailing the content of the draft advice, CESR asked consultees whether they agreed with the draft advice.



155. Nearly all respondents agreed with this Level 2 advice as proposed by CESR in its October Consultation Paper. Every respondent, however, deemed it appropriate to reserve final agreement in line of their comments and answers to other questions. No respondent had strong views against the advice. Those that reserved judgment stressed the following points:

156. The use of a service provider must be allowed where it fully assumes the responsibility of the issuer and therefore becomes an accepted insider (in the sense that they can legally be informed before the rest of the market).

157. Some respondents felt that the competent authorities should receive the information before the rest of the market.

158. As many respondents didn't have strong views against the draft advice CESR made the changes discussed above in the April Consultation and in its final advice.



SECTION 2

KEEPING REPORTS AVAILABLE

159. There are two aspects in relation to this mandate that CESR discussed in its October Consultation Paper:

- i) keeping annual and half yearly financial reports available to the public;
- ii) establishing a minimum time period for which all regulated information should be made accessible to end user.

a) Keeping annual and half-yearly financial reports available to the public

160. In Section 2 of its October consultation, CESR put forward its proposals in relation to how issuers can meet their obligations of ensuring that their published annual financial report and half - yearly financial report remain available to the public for at least five years.

161. CESR explained that it considered that the best way for an issuer to be able to fulfil its obligations in this regard is to send this information to the central storage mechanism, where it can remain available and accessible for the required time frame.

162. CESR explained why it considered this to be the best way to facilitate the issuers obligations in this respect, and asked consultees whether or not they agreed with this proposal.

163. There was unanimous support from consultees to CESR's proposals that both the annual financial report and half-yearly financial report should be stored in the central storage mechanism where it will remain accessible for a minimum of 5 years.

164. On this basis, CESR made no changes to its original proposals, (which for this reason were not included in its April consultation), and has changed its proposals into the advice that it is giving to the Commission.

b) Establishing a minimum time period for which all regulated information should be made accessible to end user

165. In its October consultation, CESR also asked whether or not consultees thought it was necessary for CESR to establish a minimum time period for which all regulated information should be made accessible to end-users, and whether there should be different time frames for different types of regulated information.

166. There was a mixture of responses to this question, of the 18 respondents, 4 considered that it was necessary for CESR to mandate a minimum time frame for which all regulated information remained accessible, and that in order to be consistent with the Level 1 requirements for the annual and half-yearly financial reports, this time frame should be 5 years.

167. Other consultees considered that it was not necessary for CESR to establish any such time frames beyond those already established in Level 1 for the annual and half –yearly financial report, other consultees, considered that CESR should mandate different time frames for different types of regulated information.

168. As a result of the differing views in this aspect, and the fact that this issue is inextricably linked to the issue of the central storage mechanism (about which CESR will be mandated to provide the Commission with advice), CESR has decided not to expand beyond the scope of its original mandate for now, and to leave this issue to further work on establishing standards for the central storage mechanism.



CHAPTER II

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

172. In CESR's consultation paper on major shareholding notifications, published in December 2004, in establishing what the short settlement cycle should be CESR first considered what circumstances would be covered by this exemption. For this CESR analysed:

- a) what clearing and settling means in the context of the provision;
- b) whether or not the same principle applied to shares traded on a regulated market should also apply to the same shares if traded outside a regulated market; and
- c) whether the principles established for shares should be the same ones that apply to other financial instruments.

a) What does clearing and settlement mean in the context of the provision?

173. In the December Consultation Paper, CESR consulted on whether to create new definitions of clearing and settlement for the purpose of the exemption under Article 9(4) of the Transparency Directive or whether to adopt existing definitions. CESR did not consider that it was necessary to establish a different set of definitions for clearing and settlement. CESR proposed to adopt the terminology of CESR/ECB Standard No 3 (published in the September 2004 report – ref CESR/04-561) and the 2nd report on EU Clearing and Settlement Arrangements of the Giovannini Group (April 2003) for defining clearing and settlement for the purposes of the exemption under Article 9(4).

174. Of 41 respondents to the consultation 15 responded to CESR's question as to whether CESR needs to define what clearing and settlement means for the purpose of "the usual short settlement cycle", or whether CESR can rely on the definitions already set out by other bodies.

175. The majority of the responses agreed with CESR's proposal to rely on the definitions of clearing and settlement of the CESR/ECB standards and the Giovannini Group. Respondents stated that there was no need for further definition because the definitions were clear and already used in common practice. One respondent also noted that it was more practical for the market to work from a single common definition.

176. Two respondents to the consultation disagreed with CESR's proposal to rely on existing definitions. One of these respondents considered that the definitions are too broad and of little help in identifying which entities can benefit from the exemption under Article 9(4). It was suggested that further clarification is needed on which entities can make use of the exemption.

177. This respondent also considered that there should not be an explicit definition of clearing and settlement as there is no European case law on this issue, and it would therefore be more appropriate to rely on national discretion.

178. The second dissenting view did not believe that the definitions of clearing are relevant to the transparency issue. The respondent advised CESR that an entity performing a clearing function may temporarily become the owner as principal of the shares that it is clearing, and such entities should not be required to disclose because of their role in the clearing process. It was suggested that a more appropriate definition, applying to any entity that temporarily acquires ownership of shares as a

result of its role in the clearing process, should be applied. However, CESR would like to point out that the exemption provided for under the Level 1 text applies to the activity itself, therefore CESR cannot provide advice that relates to the nature of the entity that is performing that activity.

179. As the majority of consultees agreed with CESR's proposal to rely on existing definitions of clearing and settlement for the purpose of the exemption from notification under Article 9(4), CESR did not create separate definitions of clearing and settlement for the purpose of the Transparency Directive. CESR would also like to point out that it considers the activities of central counterparties to be included in the definition and as such would not be required to notify a holding which breached the thresholds in Article 9.

180. Therefore, CESR did not change its advice in the April consultation. Only one of the respondents to the April consultation commented on this point. The response supported CESR's use of existing definitions.

181. In the December 2004 consultation, CESR proposed that "the usual short settlement cycle" referred to in Article 9(4) should be T+3 for transactions conducted on a regulated market.

182. The majority of the respondents to this question agreed with CESR's proposal that the "usual short settlement cycle" should be T+3 for the purposes of transaction on a regulated market. One of these respondents requested that CESR make it clear in the technical advice that the definition only applies for the purposes of the exemption under Article 9(4) of the Transparency Directive. CESR wishes to point out that the original advice stated that 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.

183. Three respondents disagreed with CESR's advice, suggesting that T+3 is restrictive and could be problematic as it does not accommodate transactions with non-standard settlement periods. These consultees suggested that "usual short settlement cycle" should accommodate any transaction carried out on a regulated market under the rules of that regulated market.

184. As the majority of respondents agreed with CESR's advice that "the usual short settlement cycle" should be T+3 for the purposes of on-exchange transactions, CESR did not change its advice for the April consultation. None of the responses to the April consultation commented on this part of CESR's advice to the Commission.

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

185. In its December Consultation Paper, CESR considered whether the same principle applied to shares traded on a regulated market should also apply to shares traded outside a regulated market. CESR proposed that in order for the exemption under Article 9(4) to apply to shares traded outside a regulated market, clearing and settlement should follow the T+3 principle.

186. Again the majority of the consultees who responded to this question agreed with CESR's advice that the T+3 principle should be applied to shares traded outside a regulated market in order to benefit from the exemption provided for under Article 9(4).

187. A small number of those that responded disagreed that the T+3 principle should apply to shares traded outside a regulated market. These respondents suggested that T+3 is too restrictive as transactions outside a regulated market tend to have longer settlement cycles. Some of these respondents proposed that "the usual short settlement cycle" be extended for shares traded outside a regulated market to at least T+10.

188. For the April consultation CESR did not change its technical advice to the Commission in relation to "the usual short settlement cycle" for shares traded outside a regulated market. CESR considers that transparency requirements should be the same regardless of where the trading of these shares takes place and the majority of the respondents agreed with CESR's advice.

189. From the overall respondents to the April Consultation Paper, four of them did not agree that T+3 should be used for transactions executed outside a regulated market as they thought this would result in misleading notifications. These consultees suggested that the exemption provided for under Article 9(4) of the Directive should be applicable for the length of the settlement cycle agreed by the parties, in accordance with market practice, or at least ten days.

190. CESR is not persuaded by the minority view. CESR considers that transparency requirements should be the same regardless of where the trading of these shares takes place. Therefore, CESR is not changing its advice in relation to the "usual short settlement cycle" for shares traded outside a regulated market.

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

191. Finally, CESR was mandated to establish whether the principles established for shares should be the same as those that apply to other financial instruments. CESR proposed in its draft technical advice that the same principles applicable to shares should apply to other financial instruments relevant under Article 13.

192. All of the consultees which responded to CESR's question in relation to whether "the usual short settlement cycle" should apply to other financial instruments in the same way it applies to shares agreed with CESR's proposal that it should. Therefore CESR did not make any changes to its technical advice in relation to this issue for the April consultation.

193. There were no comments in this area in the responses to CESR's April consultation.



SECTION 2

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

194. In CESR's December Consultation Paper CESR detailed its draft advice to the Commission in relation to the exemption under Article 9(5), which exempts firms undertaking market making activity from making a notification when the 5% threshold is reached if the shares are acquired for the purpose of the market making activity.

195. CESR was mandated to advise the Commission on the control mechanisms that should be established for market makers that want to benefit from the exemption.

196. In the December consultation, CESR explained that the control mechanisms will have to meet the requirements of Article 9(5) which establish when the exemption can apply. These requirements are:

- a) that the market maker is acting in its capacity as a market maker (Article 9(5));
- b) that the market maker is authorised by its home Member State competent authority under MiFID to act as an investment firm (Article 9(5)(a));
- c) that the market maker does not intervene in the management of the issuer concerned nor exert any influence on the issuer to buy such shares or back the share price (Article 9(5)(b)).

197. CESR discussed each of these requirements. In relation to c) CESR considered that for the purposes of the exemption it means that the market maker is not going to exercise any of the rights attached to the shares, nor use the shares to influence the management of the issuer concerned.

198. Responses to the December consultation raised concerns about reference to "any of the rights attached to the shares", explaining that this unnecessarily restricts the market makers' ability to benefit from rights attaching to the shares which are not connected to the ability to exert influence, for example, financial rights such as receiving dividends or taking up rights offers.

199. In response to these comments CESR amended its advice in this area. In its April Consultation Paper, CESR decided that for the purposes of the exemption non intervention in the management of the company means that the market maker is not going to exercise "any of the rights attached to the shares, nor use the shares to influence the management of the issuer concerned".

200. Of the overall responses received to the April consultation, 13 responded in relation to this change in the advice. All 13 were supportive of the amendment, agreeing that it is reasonable and practical to distinguish between voting rights and other financial rights.

201. Two of the consultees that responded thought that a market maker should only be able to make use of the exemption if it is contractually prohibited from exercising voting rights or using the shares to influence management of the issuer. CESR does not consider it necessary to mandate a contractual arrangement in relation to the non intervention in the management on the company and so is not changing its advice in this area.

202. Having established what each of the requirements of Article 9(5) meant, CESR then discussed what the appropriate control mechanisms for market makers should be. In the December Consultation Paper, the draft technical advice addressed the following areas:

- a) Possible measures of controlling the market maker activity with regard to the exemption provided;



- b) Measures to be taken with regards market makers' violation of the conditions of the exemption; and
- c) Who should be the relevant competent authority

a) Possible measures of controlling the market maker activity with regard to the exemption provided

203. CESR did not consider that it was necessary to establish a full set of controls for market makers wishing to benefit from the exemption. The only form of pre-control CESR considered it appropriate to make was the requirement for the market maker to notify the relevant competent authority of its intention to act as market maker and of its intention to utilise the exemption under Article 9(5) of the Transparency Directive.

204. In the December consultation, CESR considered that market makers wishing to make use of 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 kept separate.
- b) in circumstances where an investment firm intends to act as market maker it should notify the relevant competent authority in order for the competent authority to know who benefits from the exemption.
- c) if a market making agreement between the market maker and the stock exchange and/or the issuer is required under national requirements, the market maker should upon request of the relevant competent authority provide the agreement to it.
- d) when undertaking market making activity an investment firm should hold the shares subject to that activity in a separate account.

205. Responses to the CESR's consultation in December raised concerns about the meaning of keeping the different activities separate and the practical implications of the notification to the competent authority.

Keeping activities separate

206. The majority of respondents which commented on this part of CESR's advice proposed that "kept separate" should not mean that Chinese Walls must be in place. Consultees' responses advised that it is not economically viable for investment firms to keep their market making activity separate from proprietary trading and that it is common market practice for these activities not to be separate.

207. In response to comments received from consultees to the December consultation CESR reconsidered its advice in relation to separation of activities of investment firms. CESR did not consider that investment firms acting as market makers need to establish Chinese Walls between market making activities and other activities the investment firm may undertake. CESR did not wish to interfere in the way in which investment firms organise themselves or meet the requirements. CESR considered that it is sufficient for an investment firm undertaking market making activities to be able to identify upon request the market making activity by, for example, identifying those who perform this function and what their market making policy is.

208. Therefore, CESR amended the advice proposed in its December Consultation Paper to state that where an investment firm conducts market making activities and other activities it should be able to identify these different activities. CESR re-consulted on these amendments in April 2005.

209. 12 consultees responded in relation to this part of the advice. 2 of the consultees who replied welcomed CESR's clarification that market makers are not required to establish Chinese Walls. 3 of the respondents suggested that "identified" be changed to "identifiable" or "identifiable on request" as they thought a change in the wording would be a better reflection of a market maker's obligations.

210. On consideration of the responses to the consultation CESR has amended the advice from "identified" to "identifiable on request".

211. The draft advice in the April consultation retained the requirement that investment firms hold the shares subject to market making in a separate account. The responses received in relation to this requirement were mixed. Four consultees supported this requirement and thought that shares should be held separately wherever jurisdictional custody and settlement arrangements allow.

212. However, 3 respondents thought that the need to keep market making shares in a separate account is unnecessary and likely to cause problems and excessive costs for market making firms. They suggested that this requirement would greatly increase the burden on market making firms for little gain as it will complicate clearing and settlement of transactions, and result in a significant increase in the costs of settlement and complicate trading records. These responses said that such a requirement would be out of line with current market practice and suggested that this requirement be dropped. The consultees suggested that it is sufficient for market makers to be able to identify shares used for market making, and that currently institutions are able to identify by pre-assigned codes of categorisation shares held for market making and those held for other activities. One of the respondents suggested "different activities" be changed to "different non-trading activities".

213. In response to comments raised from consultees, CESR has amended its technical advice in relation to separation of accounts to require that investment firms either keep the shares for market making activity in separate accounts or are able to identify the shares held for market making activity.

214. CESR has considered the request to change "different activities" to "different non-trading activities", but does not consider that this is a specific enough distinction to ensure that market making activities are identified separately from other activities undertaken by the investment firm and also that such a difference in drafting is not clear.

Notification to the competent authority

215. In the December Consultation Paper, the only form of pre-control CESR considered it appropriate to make was the requirement for the market maker to notify the relevant competent authority of its intention to act as market maker and that it wished to utilise the exemption under Article 9(5) of the Transparency Directive.

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

217. In consideration of the comments received, CESR clarified its advice in relation to the requirement for the market maker to notify the relevant competent authority of its intention to act as a market maker and make use of the exemption under Article 9(5). In the April Consultation Paper CESR stated that the notifications made by the market maker to the competent authority are non-public and should be made in relation to each share for which the investment firm conducts market making activities. CESR considers this is necessary in order for the relevant competent authority to know which firms intend to make use of the exemption on an issuer by issuer basis.

218. CESR also clarified when the notification must be made to the relevant competent authority. On consideration of this issue CESR considers that the market maker has a choice as to when the notification should be made. The notification can either be made on implementation of the

Transparency Directive, when a new contract to conduct market making activity for an issuer is entered into, or at the latest within the time limit of Article 12, i.e. 4 trading days.

219. CESR received 12 responses in relation to its amended advice in this area. 9 of those consultees that replied agreed with the changes CESR had made to the technical advice. 3 of these respondents thought that the notification should also be made to the issuer as it is not always clear whether major shareholdings should have been declared. One of the respondents that agreed with the advice in general, thought that the declaration should be made at the time the market making activity commences and so disagreed with paragraph 135c) of the April Consultation Paper.

220. In relation to sending the notification to the issuer, CESR does consider that this is unnecessary and over-burdensome. In addition, in many cases the issuer will be aware of the investment firm conducting market making activities in its shares by way of a contractual arrangement.

221. CESR would like to point out that the three possible time frames for making the declaration that the market maker is intending to conduct or does conduct market making activity in the shares of a particular issuer are in line with the major shareholding notification requirements of Level 1.

222. Two of the responses disagreed with CESR's advice. They did not agree that the market maker should notify for each security for which it is or may be a market maker. The comments stated that such a requirement is burdensome and the cost of doing so would outweigh the benefit of the exemption for investment firms wishing to undertake market making activity. These consultees suggested that a declaration of an investment firm's general status as a market maker should be sufficient for each relevant market.

223. CESR is not changing its advice in this area. However CESR would like to point out that 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 in whose shares it conducts market making activity.

224. In contrast 1 respondent thought that in order to take advantage of the exemption under Article 9(5) of the Transparency Directive the market maker should be required to submit a market making agreement to the competent authority together with the notification, not only upon request.

225. On further consideration, CESR was not persuaded by this argument and will not be changing its advice in this area. If competent authorities require this information then they can request – it is not a mandatory requirement.

226. Finally, in relation to the possible methods of controlling the market making activity with regard to the exemption provided under Article 9(5), in the December consultation, CESR asked whether consultees envisaged other control mechanism to be appropriate for market makers wishing to make use of the exemption under Article 9(5) of the Transparency Directive.

227. CESR received fourteen responses in relation to this question. None of the fourteen respondents envisaged other control mechanisms which could be appropriate for market makers wishing to make use of the exemption from notifying at the 5% threshold level. No further replies were received in response to the April consultation in relation to this.

b) Measures to be taken with regard to market makers' violation of the conditions of the exemption

228. In the December consultation CESR discussed possible measures to be taken by competent authorities when a breach of the market maker exemption is discovered. CESR proposed that the minimum measures that could be appropriate are:

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



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

229. In response to comments received in relation to this advice, CESR amended its advice and in the April consultation pointed out that Member States may impose more restrictive measures than those set out in its draft technical advice by exercising its powers under Articles 24 and 28 of the Transparency Directive. In addition, CESR wishes to point out that it has not been mandated to define sanctions, just appropriate measures to be taken.

230. One respondent to the April consultation commented on CESR's technical advice in this area. They thought that the measures were sensible but thought that this should be left to national discretion. The response stated that Level 2 measures should not overrule options which have been left to Member States as decided by EU Parliament and Council at Level 1.

231. CESR is not changing its advice in this area, and wishes to point out that it was mandated by the Commission to consider appropriate measures, consistent with MiFID, to be taken against market makers, in particular where the market maker does not respect the control mechanisms.

c) Who should be the relevant competent authority

232. In its December Consultation Paper, CESR discussed which competent authority the market maker should notify of its market making activity and its intention to utilise the exemption. There were 2 possible options: the competent authority that authorised the investment firm to act as a market maker under the Markets in Financial Instruments Directive (MiFID), or the home competent authority of the issuer of the shares under the Transparency Directive. CESR concluded, and included in its draft technical advice, that the notification must be made to the home competent authority of the issuer of the shares under the Transparency Directive.

233. The majority of consultees who responded to CESR's draft advice, published in December, in relation to control mechanisms to be used by competent authorities with regard to market makers, agreed with CESR's draft technical advice to the Commission.

234. However, a minority of respondents disagreed with CESR's conclusion that the relevant competent authority to which the notification should be made is the home competent authority of the issuer of the shares under the Transparency Directive. These respondents thought that the market maker should notify the competent authority that authorised the investment firm to act as a market maker under MiFID. The main reason given by these consultees for preferring this approach was that it was more efficient and would reduce the cost to the investment firms.

235. CESR was not convinced by the reasons given by consultees who disagreed with CESR's advice in relation to this. Under the Transparency Directive it is the competent authority of the issuer whose shares were acquired or disposed of that will be receiving the notifications of major holdings. Therefore it makes sense that this is the authority in charge of controlling whether the exemption is being used appropriately. In addition, under MiFID the determination of home competent authority may result in a number of different competent authorities depending on the situation. CESR considers it vital that there is absolute certainty as to the home competent authority for the purposes of the exemption, so considers that the home competent authority under the Transparency Directive is the most appropriate as there can only be one as set out in Recital 18. Therefore CESR did not change its advice in relation to this issue for the April consultation.



SECTION 3

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

236. In CESR's December Consultation Paper, in determining a calendar of trading days for the notification and publication of major shareholdings CESR considered the following issues:

- a) which calendar of trading days should be used by persons who must notify and/or issue a publication, with the necessity for a clear rule; and
- b) what criteria should be used to determine the rule for establishing which calendar to use.

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

237. In the December Consultation Paper, CESR noted that there is no single calendar of trading days throughout the EU (due to different national bank holidays) and that it is necessary to have a clear and general rule in order to calculate the time within which the notification requirements must be disclosed.

238. CESR thought the creation of a rule necessary because if shareholders and/or issuers do not meet the deadlines they could be subject to sanctions and/or penalties.

239. In addition, as there is no standard set of calendar rules across Member States, it is important to create such a rule so that no form of calendar arbitrage is possible.

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

240. In its December Consultation Paper, CESR considered four options in determining the rule for establishing which calendar should be used:

- a) Calendar of the location where the trade takes place;
- b) Calendar of the state where the shares are admitted to trading on a regulated market;
- c) Calendar of the state where the shareholder is located; or
- d) Calendar of trading days of issuer's home Member State.

241. CESR discussed the advantages and disadvantages of each of these options in its December Consultation Paper. CESR concluded and proposed in its draft technical advice that 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, the best option is to use the calendar of trading days of the issuer's home Member State.

242. CESR thought this the best option for the following reasons:

- a) Legal certainty as to which calendar is to be used;
- b) The number of potential calendars that can be used is reduced 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 issuer's website, annual reports, prospectuses and other forms of issuer publications and information providers' websites.

243. In the December Consultation Paper, CESR further noted that there is no requirement on competent authorities to determine the calendar of trading days as such. Therefore, for ease of reference for all market participants, CESR considered it prudent for competent authorities to publish the calendar which applies to its regulated markets.

244. From the overall respondents to the consultation, 24 responded to CESR's proposed technical advice in relation to the determination of a calendar of trading days for the notification and publication of major shareholdings.

245. The majority of the responses agreed with CESR's proposal to use the calendar of trading days of the issuer's home Member State for the notification and publication of major shareholdings. One respondent agreed with CESR's advice but thought that a shareholder should also have the option of using the calendar of trading days of its own Member State. As stated in the December consultation CESR does not consider this to be a viable option as the issuer, acquiring shareholder and disposing shareholder may all be located in different countries and therefore notifications could be received on different days, a situation further exacerbated if one of the shareholders is located in a third country.

246. A further respondent thought that the best alternative would be the calendar of trading days where the shares are admitted to trading on a regulated market, and to address the issue of multiple listings an obligation should be imposed on issuers or competent authorities to provide clear information on the main listing. CESR considers that this option would still prove problematic for market participants who would have to check with all competent authorities to discover the correct calendar of trading days.

247. Two of the respondents thought that CESR should mandate a single uniform calendar to be used throughout the EU. A further 6 consultees who agreed with CESR's advice to use the calendar of trading days of the issuer's home Member State thought that in the long term CESR should consider the feasibility of establishing a single calendar across the EU.

248. In relation to the possibility of a single calendar to be used across the EU one respondent advised that whilst simplification could be useful, they make filings internationally on a daily basis and have processes in place which can handle different international calendars. A further respondent suggested that a single calendar could result in difficulties when co-ordinating the different working days of different Member States and stock exchanges.

249. CESR considers that a single calendar of trading days is unlikely to be achievable in practice in the short period available for completion of this Level 2 advice, but may be considered in Level 3. CESR would like to point out that it has not received a mandate from the Commission to develop a single calendar of trading days to be used across the EU.

250. As the majority of consultees to the December consultation agreed with CESR's proposal to use the calendar of trading days of the issuer's home Member State for establishing the time period within which a notification has to be made as set out in Article 12, and that none of the alternatives suggested are thought to be workable by CESR, the advice has not been changed.

251. In the December Consultation Paper, CESR considered it prudent for competent authorities to publish the calendar of trading days which applies to its regulated markets for ease of reference for all market participants. There was widespread support for this proposal from consultees, the majority of whom thought it should be mandatory for competent authorities to publish the calendar

on their websites. Therefore, CESR clarified its advice on this matter in the April Consultation Paper and in the final advice to the Commission.

252. One respondent thought that issuers should be required to identify in their annual report and on their website who their competent authority is. In addition, four respondents thought that CESR should recommend that competent authorities be required to publish a list of the issuers for whom they are home Member State on their websites for Transparency Directive notification purposes.

253. CESR considered both of these proposals and thinks that the most simple and practical approach for shareholders having to discover the correct calendar of trading days in order to make the major shareholding notification is for the issuer to publish its home Member State on its website. CESR added this as an option for issuers in the draft advice in the April Consultation Paper and in the final advice to the Commission.

254. Although CESR did not ask any questions about calendar of trading days in the April Consultation Paper, of the overall respondents 5 commented on the advice in this area. Two supported the changes that CESR had made to the advice. Two respondents insisted on the adoption of a single calendar throughout the EU. As previously stated CESR does not consider this to be a viable option for the moment.

255. One respondent requested that CESR recommend that competent authorities are required to publish a list of their issuers on their website. In addition, one consultee thought that CESR should recommend that issuers are required to identify their home competent authority in their annual report and their website. As stated above CESR considers that it most practical for issuers to identify their home Member State on their website.



SECTION 4

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

256. The December Consultation Paper dealt with the following four issues:

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

257. There were 25 respondents to the December Consultation that answered questions about these issues.

258. The April Consultation only dealt with issues related to b) and d) above and contained no specific questions.

259. There were 14 respondents to the April Consultation that commented on this section.

Issues related to a), b) and c) above

260. Consultees all agreed with CESR's proposals in relation to the issue of aggregation (paragraphs 85 to 90 of the December Consultation Paper).

261. Consultees all agreed with CESR's proposals in relation to the issue of appointment of another person to comply with the notification duty (paragraphs 143-145 of that paper) and in relation to the issue of single notification (paragraphs 146-149 of that paper).

262. In respect of those two issues, a respondent pointed out that this should not be mandatory. Making this mandatory has never been CESR's intention.

263. A few respondents pointed out that it might be useful to clarify that the responsibility for the notification remains with the originally obliged party. CESR is of the opinion that this was already clearly stated in paragraphs 153 and 155 of the December Consultation Paper. However, in view of these responses, the text was strengthened (see paragraphs 231 and 235 of the April Consultation Paper and the final advice).

264. In the area of appointment of another person to comply with the notification duty, a respondent had questions concerning the use of the words "another shareholder, natural person or legal entity" in paragraph 143. CESR has never had the intention of restricting the possibility for using third party services when a shareholder or holder of voting rights is fulfilling its obligations. That is why "another shareholder, natural person or legal entity" was replaced by "person" (see paragraphs 229 and 233 of the April Consultation Paper and the final advice).

265. In the area of single notification, a respondent read in paragraph 148 of the December Consultation Paper that two separate notifications by the parent undertaking were required on account of a single transaction by a controlled undertaking. This was not what CESR meant to say: CESR wanted to make clear that a parent undertaking notification (pursuant to Article 12(3)) can be considered as a kind of single notification.

Issues related to d) above

266. In the December Consultation Paper, CESR asked consultees whether they agreed that a subsequent notification requirement is triggered when there are changes to the circumstances described in Article 10 (a) – (h). Most of the respondents that answered this question considered that such a notification requirement should only arise if the change results in a threshold percentage being crossed.

267. CESR has never had the intention to say that a notification requirement could arise even if no threshold was crossed. CESR clarified its view by stating (in paragraph 182 of the April Consultation Paper) “that 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.” CESR also added this in the Draft technical advice (paragraph 232 of the April Consultation Paper).

268. A respondent to the April consultation pointed out that he appreciated this confirmation.

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

270. The consultation responses were also split on this issue. Of the 20 respondents that expressed their view, 11 had a preference for Approach A and 9 had a preference for Approach B. Following a review of the consultation responses, further discussion within CESR and with the Commission, CESR set out in the April Consultation Paper its new thinking in relation to who has a notification obligation under both Articles 9 and 10 in relation to the situations set out in Article 10 (paragraphs 174-228).

271. One CESR member did not agree with the new thinking and considers that Article 9 only imposes obligations in relation to acquisitions and disposals of shares and that Article 10 only imposes obligations in relation to voting rights (April Consultation Document paragraphs 179-181).

272. Although CESR did not ask any questions about this new approach, seven respondents said they supported the minority view; four of them also responded to the December Consultation and had then a preference for Approach A. Three of them said that they had a feeling that CESR opted for Approach B. Two respondents to the April Consultation expressly stated they supported CESR’s new approach; one of them favoured approach B in the December Consultation, the other one had no preference at the time.

273. The arguments against the new approach of CESR are legal or practical in nature or express concern that the market will be misled.

274. With respect to the arguments of a legal nature (e.g. the interpretation is inconsistent with the clear wording of the Directive, the wording of Articles 9 and 10 is unequivocal). As mentioned in the April consultation CESR referred this issue to the Commission. CESR would like to point out that it took into account the view of the Commission in formulating the new advice.

275. CESR believes that the market will not be misled or that the new approach will result in additional notifications which do not give additional information. First of all, CESR thinks that the number of additional notifications must not be exaggerated. Secondly, CESR thinks the market would be misled if a shareholder that disposed of his voting rights (and crossed a threshold) did not make a notification. As an example, a shareholder A, who has notified 11 %, disposes of 4 % of his voting rights to a person B. If A does not notify the disposal, the market will not know A can only exercise 7 % of voting rights.

276. With respect to the arguments of practical nature (for example, the concern that the number of notifications will be doubled, significant work overload, burdensome), CESR thinks that most of these concerns are linked to proxy voting (see the example in paragraph 181 of the April Consultation). CESR is very well aware of this problem, which is linked to Level 1 which imposes notification obligations on proxy holders.

277. In this context, CESR notes that two other respondents to the April Consultation (that do not have a problem with CESR's approach in its totality) have a problem with the notification duty for proxy holders. One suggests that proxy holders are required to notify after the general meeting, the other suggests that this notification duty is nonsense. However, Article 10(h) of the Directive imposes an obligation on the proxy holder who can exercise the voting rights at his discretion, which means that this is a Level 1 issue. It is therefore impossible for CESR to propose to the Commission that the notification duty would only arise after the general meeting. However, CESR believes that practical solutions to meet these specific concerns are possible.

278. Indeed, a respondent to the December consultation already considered that a requirement that a proxy makes a notification after the proxy holder's discretion has ended as well as when it commences is onerous. CESR wants to point out that, according to Article 10 (h), the proxy only has to notify where he can exercise the voting rights at its discretion in the absence of specific instructions from the shareholders. If no voting instructions are given and notification is therefore necessary, CESR is of the opinion that the suggestion made by the respondent can be followed. Although the proxy has two notification obligations, one notification can be given of the extent of the proxy's interest and of the fact that he will cease to be so interested after the relevant shareholders 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. To take this into account, CESR added a line of information in the standard form.

279. CESR also wants to indicate that if a shareholder, natural person or legal entity with a notifiable interest (proxy giver) gives a proxy to a proxy holder, both the proxy holder and the proxy giver are free to make a single notification.

280. A respondent to the December Consultation also pointed out that there was some inconsistency in the approach to Article 10(a). He was of the opinion that the question of whether one or all parties to an agreement falling within that Article needs to notify depends on the terms of the agreement. This respondent repeated this point of view in his response to the April Consultation. CESR believes that - whatever the terms of the agreement are - all parties to the agreement have a notification duty.

281. The same respondent to the December Consultation also pointed out that CESR, in its comments on controlled undertakings (Article 10(e)) omitted to comment on the situation where the controlled undertaking itself holds the shares. CESR would like to point out that in both consultations two situations were described (see paragraphs 207-210 and paragraphs 211-213 of the April Consultation Paper and the final advice), including where the controlled undertaking itself holds the shares.

282. Finally, a respondent raised questions about securities lending and collateral movements. The consultee requested clarification in relation to a situation where the shares are transferred to the borrower (or the lender), and the legal agreements enable the original holder to retain control of the vote in practice, whether lender or collateral giver.

283. CESR points out that under Article 10(c), 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. Similarly under Article 10(f), if the depositor 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 that notification.



SECTION 5

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

284. In its December consultation CESR discussed the circumstances under which a shareholder or a 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. CESR presented two possible options as to when a person is deemed to have knowledge of the execution of a transaction: on the day on which the transaction was executed or on the day after the transaction was executed.

285. Following a review of responses to the December consultation it became clear that for consultees there are two main issues in relation to this mandate:

- a) What does "should have learned mean"; and
- b) When a notification obligation is triggered

a) What does should have learned mean

286. In CESR's December Consultation Paper two views were presented as to when a person is deemed to have knowledge of the execution of a transaction: on the day on which the transaction was executed or on the day after the transaction was executed.

287. The responses CESR received were mixed with the majority of consultees favouring the day after the transaction was executed. CESR decided to follow this majority view for practical and juridical reasons. The extra day will give a meaning to the difference drawn by the Directive between learn and should have learned in Article 12 (2) (a) and, in addition, will give multi-national undertakings sufficient time to obtain information from all their operations. This was included in the advice in the April consultation.

b) When is a notification triggered

288. In response to the December consultation, a number of respondents raised concerns about CESR's proposals that the relevant starting date for the purposes of determining when a natural person or legal entity "should have learned" is the transaction date.

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

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

291. Other responses to the first Consultation Paper rejected both options as a notification duty is said to be triggered only when a person can exert any influence by virtue of holding voting rights following an acquisition, hence, only the settlement or closing date of a transaction should be relevant and not the execution of an order. The actual transfer of shares should be the starting point for determining when a person should have learned of an acquisition or disposal. CESR, except for one member, did not agree with these consultees. The different views in relation to this subject are set out in the final advice.

292. One consultee did not agree with CESR's conclusion that the mandate from the European Commission is limited to situations arising under Article 9 Transparency Directive as that would mean not addressing the most difficult questions arising in practice, e.g. when a controller should have learned of the acquisition of a controlled undertaking. CESR maintains its view that the mandate is restricted to Article 9 of the Transparency Directive. CESR considers that the concern raised is not covered by the mandate that CESR has been given.

293. That consultee also suggested that a person should have learned of an acquisition or disposal on receipt, in the normal course, of a contract note or confirmation which is required to be sent to retail clients according to MiFID level 2 rules proposed by CESR. CESR acknowledges the desirability of aligning obligations under different European directives and their respective implementing measures. However, the MiFID advice intends to establish conduct of business rules for intermediaries and was not designed for purposes of market transparency. Therefore, CESR did not consider this proposal to be suitable for the scenario CESR was mandated to deal with.

294. Another proposal raised was that there should be a split between the time an acquisition occurs and the time when a disposal occurs: an acquisition should be assumed to be taking place on agreement of the parties, a disposal when a transaction is settled. CESR did not agree to this approach as it may be difficult to apply in practice and would lead to the same transaction being notifiable at different times by two parties. For example, the acquirer would be due to notify immediately on agreement between the parties whereas the disposer would have to notify at a later point in time depending on the settlement date.

295. One consultee raised the issue that the demanded duty of care should only be at a reasonable standard rather than at a very high standard. CESR decided to continue demanding a very high duty of care as this can reasonably be asked from individuals and entities with a minimum holding of 5% in an issuer whose shares are admitted to trading on a regulated market.

296. As a result of comments raised by respondents to the December consultation, CESR clarified its thinking and advice in relation to this issue for the April consultation.

297. Although there were no questions on this area in the April consultation, CESR received comments from ten consultees. Five consultees raised concerns in relation to the term "meeting of the minds" of the parties as the starting point for the notification deadline for off-exchange transactions as being ambiguous and difficult for those required to make a notification to pinpoint the exact time of execution. It is said to give room for interpretation which may work against the goal of harmonisation. In jurisdictions where this is not a legal concept it is said to lead to misleading and superfluous notifications, uncertainty and a lack of harmonisation. CESR has considered these comments carefully and has on reflection removed the reference to "meeting of the minds" in its final advice. CESR would like to point out that the important concept is when the agreement is entered into.

298. One consultee did not believe that CESR had taken proper account of those delegating management of their portfolios to a fund manager. This consultee considered it unreasonable to expect a person to contact the fund manager on an assumed daily basis to find out if a disclosable stake was acquired. CESR questions the practical relevance of the given example as portfolio management is usually based on diversification and it seems to be a rather rare occasion that a notifiable holding of one particular issuer is a constituent of one portfolio. Moreover, the client of a portfolio manager can opt to receive contract notes from his fund manager which, in the normal course of proceedings, would reach him in time to make a notification within the required deadline (T+4). But even if he opts to receive confirmation notices only in a periodic statement it seems more than likely that a fund manager would communicate accumulation of a large holding in a particular issuer so that a daily enquiry by the shareholder would not be necessary. In general terms though, a high duty of care continues to apply if large holdings are accumulated and this duty cannot be offset by involving a fund manager.

SECTION 6

THE CONDITIONS OF INDEPENDENCE TO BE COMPLIED WITH BY MANAGEMENT COMPANIES OR BY INVESTMENT FIRMS AND THEIR PARENT UNDERTAKING TO BENEFIT FROM THE EXEMPTIONS IN ARTICLES 12.4 (FORMERLY 11.3A) AND 12.5 (FORMERLY 11.3B)

299. The December Consultation Paper (04-512c) dealt with the following five issues:

- a) The scope of the exemption in relation to management companies' parent undertakings;
- b) The level of independence;
- c) The conditions the management companies and investment firms and their parent undertakings should comply with to benefit from the exemption (including methods of demonstration of independence and declaration to the competent authority);
- d) The notion of indirect instructions;
- e) Exemption for financial instruments.

300. In relation to the above issues, CESR asked a number of detailed questions in the December consultation. Of the responses to the December consultation, 22 answered questions about this area. Overall respondents were positive in relation CESR's proposals, although there were some particular areas of concern or requests for clarification that were raised. Consultees were particularly supportive of the fact that CESR adopted the same approach for management companies and investment firms.

a) The scope of the exemption in relation to management companies' parent undertakings

301. In relation to the scope of exemption, there were two views in the December Consultation Paper. The first view was that only parent undertakings of management companies, which are authorised under the UCITS Directive could benefit from the exemption. The second view was that the exemption should apply to the parent undertakings of all management companies irrespective of whether they have an authorisation under the UCITS Directive. CESR asked consultees about their view on that issue. All consultees that responded to this question in the December consultation were in favour of the second view as they considered it to be more in line with the text and the objective of the Level 1 text and because it creates a level playing field in the market. CESR took into account those reactions as well as the Commission's view on that issue and in the April Consultation Paper adopted the second view.

302. In relation to this point, some CESR members considered that non-UCITS authorised management companies should be supervised under national law for reasons of investor protection. Therefore in the April consultation CESR asked whether consultees thought that this would be an appropriate requirement for parent undertakings of management companies.

303. Sixteen respondents to the April consultation commented on this area. Thirteen supported the view that non-UCITS authorised management companies should be supervised under national law for reasons of investor protection. Three respondents did not think that non-UCITS authorised management companies should be supervised under national law. The consultees that disagreed thought it sufficient for the competent authorities to impose general sanctions provided for by the Transparency Directive and national legislation and that this requirement will not solve the information problem for third country management companies or investment firms.

304. Although CESR recognizes the concerns raised in these comments CESR still thinks there is value in parent undertakings of EU incorporated management companies and investment firms identifying which competent authority is supervising them. This is reflected in the final advice.

305. Some respondents to the December consultation pointed out that under the UCITS Directive (Article 5(3)(a)), management companies can also manage funds on a discretionary basis. Those respondents considered that for reasons of equal treatment, CESR should clarify that the exemption should apply in the same way for collective investment portfolio management as well as for individual investment management. CESR was always of that view and clarified this issue in the April Consultation Paper.

b) The level of independence

306. In response to the December consultation, in respect of the level of independence, some respondents raised concerns in relation to the reference to “all the rights” attached to the assets managed. More particularly, they considered such reference very broad and vague and they claimed that independence should be restricted to the exercise of voting rights and should not cover other rights attached to assets such as the economic rights. As a result of those concerns, CESR restricted its reference to the exercise of the voting rights in the April consultation.

307. In addition to the above points, CESR also explained in the April consultation that it considers that 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 the 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.

c) The conditions the management companies and investment firms and their parent undertakings should comply with to benefit from the exemption (including methods of demonstration of independence and declaration to the competent authority)

308. In the area of conditions of independence, CESR pointed out in the December consultation that there is already in place extensive (European and national) regulatory frameworks dealing with the internal organisation and the functioning of management companies and investment firms. These frameworks directly or indirectly deal with the exercise of the voting rights by management companies and investment firms. As a result, CESR considered that it is not necessary to impose an extensive set of conditions on the management company or investment firm in order for them to get the benefit of the exemption. Although there were no specific questions about this part of the discussion, consultees that responded to the December consultation supported CESR’s reasoning and conclusion.

309. In addition to the declaration to be made by the parent undertaking, there was a proposal by one CESR member that the management company or investment firm should confirm in writing the statement of independence made by the parent undertaking. In its December consultation CESR asked whether or not such a confirmation was considered to be necessary. The large majority of respondents considered such a confirmation to be bureaucratic and unnecessary and concluded that the statement of independence made by the parent was sufficient. CESR therefore did not include this requirement in its new advice to the Commission as stated in the April Consultation Paper.

310. In the December Consultation Paper, CESR proposed some concrete methods by which the parent undertaking demonstrates its independence. Overall respondents supported CESR’s proposals as they considered them reasonable and workable. CESR also asked whether or not there should be other methods to those set out above by which the parent undertaking demonstrates its independence. The overwhelming majority of respondents to the December consultation did not consider that there should be other methods than those proposed by CESR.

311. In addition to the above, there was a suggestion that, recourse should also be made to the principles of self- regulation set out in corporate governance codes that already exist at national level and work alongside the national legislative provisions regulating the activities of institutional investors. CESR pointed out in the April consultation that it cannot in its advice mandate adherence to such codes, which are not harmonised throughout Europe and are usually something that firms adhere to only on a voluntary basis. However, there is nothing in CESR’s proposals that prohibits

firms as a matter of good practice to abide by such codes, which in scope deal with issues that are much broader than those of the parents' undertaking's independence from that of its management company and/or investment firm.

312. In addition, in the December consultation CESR also set out a number of other proposals that were included in the responses to the call for evidence and asked for views about them, and whether or not they were considered to be fundamental for the demonstration of independence.

313. There was a unanimous response from respondents that neither of the proposals was considered to be either fundamental or necessary. According to the respondents CESR should not add further requirements as management companies and investment firms are already subject to a comprehensive set of rules and those methods will create additional burden with poor added value. Moreover, some respondents argued that CESR should not specify particular methods of independence, as there are different ways in which a parent company can demonstrate independence on request. Therefore, CESR did not include them in its draft advice in the April Consultation Paper and does not include these in its technical advice to the Commission.

314. In the specific area of the declaration, most of the responses to the December consultation were generally supportive of CESR's proposals, including the written declaration procedure. However, some consultees considered that the declaration is "superfluous and places administrative burden". CESR considers that some of the objections may be attributed to the fact that there were some misunderstandings about the way the declaration will work in practice. In fact, consultees raised specific questions and asked for clarification regarding the written declaration as explained in the December Consultation Paper. More specifically, consultees asked how the declaration will work in practice, the content of the declaration (general or for every single share/ in each case) and when such a declaration should be made. As a consequence of those questions and remarks, CESR clarified its position and reviewed its advice with regard to the content and the timing of the written declaration in the April Consultation Paper.

315. A few respondents to the December consultation raised the issue of the competent authority claiming that it should be that of the MiFID or the UCITS Directive accordingly and not to the competent authority of the issuer. CESR retained its original approach i.e. that the declaration should be made to the competent authority of the issuer for the reasons explained again in the April Consultation Paper.

316. Finally, a respondent to the December consultation pointed out that CESR should not require subsequent notification from the parent undertaking when it ceases to meet the test of independence. CESR considered the comment quite reasonable and asked consultees whether or not they supported CESR's proposal to drop this requirement in the April consultation.

317. There were 20 responses to this question, of which 18 supported the proposed amendment. On the basis of this majority support CESR is not including this requirement in its final advice.

d) The notion of indirect instructions

318. In the area of the indirect instructions, the majority of consultees which responded to the December consultation pointed out that the definition provided was quite vague and could capture many communications in the normal course of the relationship between a parent undertaking and its subsidiaries. They claimed that the notion of "indirect instructions" should be restricted to activities conducted "with the intention to influencing the way in which voting rights are exercised" so as not to include for example vague statements or statements made to the press. CESR took into account those concerns and modified the definition of "indirect instructions" accordingly in its April Consultation Paper.

319. In general the responses to the April consultation were supportive of CESR's proposed change. However, four consultees thought that the definition of "specific interest" should be further narrowed. CESR has considered the requests to change the definition and does not consider the



suggestions made specific enough to warrant making the changes particularly when the majority of responses agreed the change.

320. In addition there was a request that the definition be aligned with CESR advice in relation to MiFID. CESR does not agree with the reasoning behind these proposals and is not changing its advice in this area.

e) Exemption for financial instruments

321. CESR explained in the December Consultation Paper that the financial instruments were also included in the nature of the holdings that are subject to the exemption for aggregation. CESR considered that as financial instruments have no voting rights attached to them, (although the underlying shares to which they relates have) any test of independence that relates to the exercise of voting rights cannot be applicable to such holdings.

322. CESR explained that in order to benefit from the exemption under Articles 12(4) or 12(5) in relation to financial instruments the following requirements need to be met:

- a) that the management company and/or investment firm meets the relevant requirement of the UCITS Directive and MiFID; and
- b) the declaration to the same competent authority as is required under Article 13.

323. In addition, it was proposed in the December consultation that the nature of the declaration that has to be made by the parent undertaking in relation to these instruments was different to that for Article 9 and 10 holdings, in that the declaration only has to include the names of the parent undertaking's subsidiary management companies or investment firms.

324. 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).

325. It was also made clear that 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.

326. There were no specific questions asked about this proposal in the December consultation, but the majority of consultees that commented in this area agreed with these proposals, and therefore, CESR did not change its draft advice in this area for the April consultation or for the final technical advice to the Commission.



SECTION 7

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

327. In the December consultation, CESR discussed in some detail what it considered was meant by each of the information requirements listed in Article 12(1) in relation to both Articles 9 and 10 situations.

328. This resulted in proposals for each information requirement, which were set out in a standardised format in a standard form.

329. Overall, CESR's proposals in relation to this mandate were supported by consultees, although there were some suggestions and concerns that were raised resulting in the need to make some changes to the original proposals. These were discussed in the April consultation and are discussed below.

Detailed overview of the responses to the December Consultation

330. Of the responses to the December consultation, 20 responded to this section.

331. In its December consultation, in addition to the proposals that were set out in the standard form, CESR asked a number of questions about other possible content requirements for this form.

332. This section of FS is divided as follows:

- a) Article 9 situations;
- b) Article 10 situations;
- c) Other considerations;
- d) Other issues raised in consultation.

a) Article 9 situations

(i) the resulting situation in terms of voting rights

333. CESR explained in paragraphs 279–288 of the December Consultation Paper what it considered this to mean and made a number of proposals about what should be disclosed in relation to both the transaction that triggered the notification requirement itself, and the resulting situation after the triggering transaction.

334. Overall, these proposals were supported by consultees, although one consultee did not consider that it was necessary to include details of the triggering transaction or the actual threshold that was crossed.

Total number of voting rights and previous notification requirements

335. In paragraph 289 of the December consultation, CESR explained that some CESR members considered it important to also include:

- a) information about the total number of voting rights in issue attached to shares overall; and

- b) if a previous notification has been made the new notification should include the total number and percentage of voting rights contained in the previous notification.

336. In relation to the total number of voting rights, the majority of respondents did not consider this to be necessary explaining that this disclosure is superfluous and that what is important is information about the threshold that has been reached or crossed. In addition, it was pointed out that the notifier is not the original source of this information, it is the issuer, who already has an obligation under Article 15 to disclose this information on a monthly basis. It was also pointed out that both issuers and competent authorities will have the ability to check whether or not the notifier has used the correct number of voting rights in calculating the percentage

337. On further consideration of this proposal and the explanations given by consultees, CESR decided not to include this disclosure requirement in its proposals. CESR points out that this information will be available to those who want it via the central storage mechanism.

338. In relation to the total number and percentage of voting rights disclosed in any previous notification, again, this proposal was not supported by the majority of consultees. As information about the previous notification has already been disclosed, this information can be obtained by looking at the previous notification, others commented that such a requirement was unnecessary because the competent authority will already have this information. Others considered such a requirement to go beyond level 1, and that a simple cross reference to the previous notification is enough.

339. On further consideration of this proposal and the explanations given by consultees, CESR has decided not to include this disclosure requirement in its proposals. CESR points out that this information will be available to those who want it via the central storage mechanism.

Disclosure about how the acquisition or disposal was made

340. In addition to the above requirements, CESR explained in paragraph 290 of the December consultation that some members considered that information about how the holder has acquired or disposed of the shares with voting rights attached and/or voting rights should be disclosed.

341. There was little support for this proposal by consultees who felt that this information was not important for market participants, and may effectively result in disclosures about trading strategies, and would be an unnecessary burden for those parent undertakings who were disclosing on behalf of their controlled undertakings. Some considered that this information went beyond level 1, some that in many cases this information was not available, the form should allow for this information to be disclosed but should not require it and that it is impracticable for investment banks in view of the different types of business that they conduct. It was suggested that there should be an option for individual notifiers to include this if they want to.

342. As explained in the December consultation, some CESR members considered that in the case of passive crossings under Article 9(2) of the Transparency Directive, the shareholder should disclose the corporate event that resulted in the changing of the breakdown in his voting rights.

343. In relation to this proposal, it was pointed out that the issuer has the responsibility to disclose this information and that an additional requirement for the notifier to also do so runs the risk of different descriptions of the same event being made thus causing confusion in the market.

344. On consideration of the responses to this proposal, CESR is not including this in its advice. It agrees that if a notifier wants to include this information, it can do so on a voluntary basis by completing the additional information box, and that those Member States that want to include this information as a mandatory requirement in relation to their issuers can do so using Article 3.

Total number of shares

345. In addition to the above, as explained in paragraph 290 of the December consultation, although the level one text only makes reference to "voting rights", some CESR members consider

that the standard form should include the number of shares to which voting rights are attached because there can be differences, e.g. pursuant to national Company Law, in the number of voting rights attached to each share. Therefore information about both the number of shares and the number of voting rights attached to the shares is necessary in order to fully understand the shareholder structure of the company.

346. As such, it was proposed that the following should be disclosed:

- a) in relation to the triggering transaction, the number of shares of each class/type that have been acquired or disposed of by the shareholder, when reaching, exceeding or falling below the thresholds specified in Article 9; and
- b) in relation to the resulting situation the total number of shares of each class/type that the shareholder holds after the triggering transaction.

347. Overall, there were mixed responses to this proposal. Some consultees considered that this information should be disclosed because in some countries for some companies, it is the number of shares as well as the number of voting rights that are important in cases where there are differences between the voting rights attached to a particular class of share. Having this disclosure facilitates both the issuer and the competent authority the opportunity to identify mistakes that the notifier may have made so that this can be corrected. In addition, others consider this information to be useful, and that it is an absolute measure which is more easily verifiable – as the number of voting rights held could be calculated differently by different people. If both the number of shares and number of voting rights are disclosable, the accuracy of the disclosure of voting rights becomes self policing.

348. In contrast, other consultees considered that this information should not be disclosed, because the responsibility lies with the issuer to make clear to the market the details of its capital structure, therefore there is no reason to require duplication of this disclosure by those making notifications. Others pointed out this was a level one issue as it been included in original commission proposals that were negotiated out of the Directive, others considered that this information was superfluous for market transparency.

349. On careful consideration of these points, CESR has decided not to mandate the inclusion of the number of shares in the standard form. Although CESR agrees with those that recommend its inclusion as it does facilitate more accurate notifications, CESR agrees that the responsibility lies with issuers to make accurate disclosures about themselves.

350. As the requirement itself stems from the differences that exist in corporate law, as set out in the April consultation, CESR is including 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.

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

351. As explained in the December consultation, CESR considers that disclosure about the chain of controlled undertakings through which voting rights are effectively held is necessary.

352. The overall majority of consultees agreed with this proposal, and CESR is not making changes to its advice.

353. It was also pointed out that paragraph 295 was potentially inaccurate in that if the controlled undertaking is the legal owner of the shares its name will be included in the notification irrespective of whether or not it holds 5% or more of the voting rights.

354. CESR points out that this is a level 1 issue, about which it can do nothing.

355. One consultee also disagreed with the proposal that full notification details are required in relation to any controlled undertaking holding 5% or more of the voting rights as this ignored the exemption in Article 12(3).

356. CESR disagrees with this point because Article 12(3) is not an exemption from disclosing the chain of controlled undertakings but only allows the parent undertaking to make the notification on behalf of its controlled undertaking

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

357. As explained in paragraphs 296-300 of the December consultation, CESR considered that the notification should include the date on which the threshold was reached, exceeded or fallen below in order to ensure that the notification has been made within the required directive time frame.

358. CESR proposed that this should be the date on which the transaction took place, and for passive crossings this date will be the date when the corporate event took effect.

359. Although concerns were raised about when the notification obligation itself is triggered as explained in the April consultation, consultees agreed with the proposals to include this date in the standard form.

(iv) 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

360. CESR explained in the December Consultation Paper that for Article 9, the identity of the shareholder must include the shareholder's full name.

361. Consultees agreed with this proposal, and CESR therefore included this in its advice.

362. In addition, as set out in paragraphs 304-311 of the December consultation, CESR explained that it was necessary to include a separate annex that is to be filed with the relevant competent authority that includes additional information relating to the identity of the shareholder.

363. Overall, very few comments were raised by consultees about this proposal, and CESR therefore decided to retain it in its advice, and to make it clear that this requirement applies to notifications for Articles 9, 10 and 13.

364. One consultee disagreed with the proposal that contact information should be given for the shareholder, the notifier and any agent making the notification on the notifier's behalf. It was proposed that only the contact details of the notifier –or its agent when one is being used should be included, on the basis that the notifier may not have this information for the shareholders (for example where the shares are held by a sub-custodian or its nominee).

365. CESR has not changed its proposals in relation to this disclosure requirement because it would simply ask the notifier to disclose this additional information, as such, it is considered easier just to have this requirement in the annex as originally proposed.

366. In addition one consultee disagreed with the proposal set out in Para 311 of the December consultation, that the methods of verifying identity should be left of each Member State, because sufficient information is name and contact address, in addition that implementation of MAD and disclosure lists has a very different approach.

367. CESR disagrees with this point, and considers that identification issues for MAD purposes are very different to those for this Transparency Directive requirement – and that it does not consider that name and contact address is enough.



368. As explained in paragraphs 379-382 of the April consultation, consultees did raise comments about the need to have additional information about the shareholder's identity in the standard form.

b) Article 10 situations

1) Article 10(a)

(i) the resulting situation in terms of voting rights

369. In the December consultation (paragraphs 312-320), CESR set out its proposals in relation to the resulting situation disclosure requirements for Article 10(a) situations.

370. CESR proposed that the disclosure for entering into, subsequent changes to, and for termination of the agreement, should show what all parties to the agreements holding was and that it was not necessary to require a break down of each parties to the agreement's individual holding.

371. Consultees agreed with the detailed disclosure proposals, and the majority agreed that it was not necessary to have disclosure about each party to the agreements holding.

372. CESR is therefore not making any changes to these proposals.

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

373. CESR proposed that for Article 10(a) the notification should include the name(s) of the controlled undertakings through which the voting rights are held. Consultees agreed with this, and this is included in CESR's advice.

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

374. Consultees agreed with the proposals in relation to the date on which the threshold was reached, exceeded or fallen below for Article 10(a) situations, and CESR is including these in its advice.

(iv) 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

375. The majority of consultees agreed with the proposal to name all the parties to the agreement, when entering into, changing or terminating the agreement. Therefore CESR is retaining this requirement in its final advice.

(2) Articles 10(b)-(g)

376. In its December consultation (paragraphs 328-342), CESR proposed a general approach for the notification requirements in relation to the situations covered by Article 10(b)-10(h), and an exemption to this approach for 10(h) situations.

377. In its April consultation (paragraphs 364-371), CESR explained that concerns were raised about the application of Article 12(1)(d) for Article 10 notifications, and a proposed change to the approach was made.

378. Other than this issue, consultees agreed with the general approach that was set out, and CESR has not made any changes to it, and it is included in the final advice.

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



379. In its December consultation (paragraphs 343-349), CESR explained that in addition to detailed disclosure requirement for Article 9 and 10 notifications, there were other issues that needed to be considered in order to establish the final requirements.

380. These issues were:

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

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

381. CESR explained that in order to provide transparency about the nature of a shareholder, natural person or legal entity's holding, it considers it necessary to distinguish between a holding of voting rights through actual shares (direct holdings) and holdings of voting rights through other means, for example, Article 10 situations (indirect holdings).¹

382. For this reason, it was proposed that the standard form should differentiate between these types of holdings.

383. Those who commented on this proposal supported it, which is therefore included in the final advice.

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

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

385. CESR proposed to include a separate section in the standard form for this additional information.

386. Some consultees considered that the standard form should not be subject to additional requirements at national level. They explained that the proposals are detailed enough and that in order to increase the availability and comprehension of this information by investors across the EU, and that a standardised form may simplify the notification process throughout the EU.

387. Others commented that there should be an additional information section, but not that member states should provide additional information for inclusion as this defeats the purpose of a standard form and that its only purpose should be to allow the notifier to disclose additional information.

388. CESR is not able to restrict member's states ability to impose additional information requirements in relation to its own issuers as the directive is a minimum harmonisation directive.

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

¹Note that the reference to direct and indirect holdings is different to, and not to be confused with the use of these terms in Article 2(1)(e).



389. As explained, the format that the notification itself has to be in, is not something that the text of the Directive deals with, although, Article 19(4) does envisage that the filing of the notification of major holdings in the home Member State enables filings by electronic means.

390. CESR considers it important at this stage to point out that none of the requirements that have been discussed above would prohibit the use of electronic means for this filing, including the requirements to file an annex with the relevant competent authority.

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

Other points that were made in consultation

392. Some consultees considered that overall, the proposals that CESR had made were beyond the requirements of level 1, and that the proposed process and detail of reporting greatly exceeds that which is mandated at level 1, that the form itself is too complicated, and there was a proposal for an alternative form, and that the form itself should be user friendly, of a technically user friendly nature and very basic covering only the information laid down in the text of the directive.

393. CESR carefully considered all these comments and in its April Consultation Paper made amendments to the standard form itself, so that it is clearer. Although CESR agrees that the form itself should be user friendly and technically user friendly, it disagrees that the proposals that it made go beyond that mandated by the Level 1 requirements themselves.

394. In addition, one consultee raised a point about discretionary fund management. Where the fund manager manages the shares – under the definition of shareholder under the directive, the shareholder would in those circumstances be the custodian – who does not exercise control over the voting rights and are themselves exempt from notification requirement under Article 9(3), it seems unnecessary to require their disclosure by fund managers making Article 10 notifications.

395. CESR would like to point out that this is a Level 1 issue, and that CESR will raise this issue with the EU Commission.

396. Other consultees explained that shareholders that have given discretion to management companies and investment firms to manage their shares and exercise control of the voting rights and that are not subject to their own notification requirements should not be identifiable. Others requested that CESR clarify its understanding of shareholder and whether or not this is the legal or beneficial owner. This refers to the interpretation of Article 12(1) (d), which is discussed below.

Detailed overview of the responses to the April Consultation

397. Of the responses to the April Consultation, 26 responded to this Section.

398. In the April Consultation CESR asked questions about :

- a) identity of shareholder in relation to Article 10 notifications;
- b) the resulting situation information disclosure when the notification is of a holding below that of the minimum threshold; and
- c) identity of the issuer.

a) Identity of shareholder in relation to Article 10 notifications



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

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

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

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

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

404. Following these comments, and on further consideration of this issue, CESR decided to change its advice on this matter. So in the April Consultation Paper CESR proposed 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.

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

406. In addition, CESR also considered it necessary to make it clear that in the case of Article 10(f) the deposit taker will have to include in its notification the identify of only those shareholders 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.

407. There were 24 respondents that answered the question about identity of shareholder in relation to Article 10 notifications. All but one agreed with CESR's approach. The one that did not agree was of the opinion that there should be no need to identify any of the underlying shareholders for the purposes of a notification under Article 10.

408. As a result of the support the proposals received, CESR is reflecting this in its final advice.

b) the resulting situation information disclosure when the notification is of a holding below that of the minimum threshold

409. Respondents to the December consultation suggested that CESR should consider changing the "resulting situation" disclosure requirements when the notification threshold falls below 5% to a simple notification of the fact that the notifier's interest is below 5%. CESR took these comments into account and was neutral on the issue of whether or not Article 12(1) (a) can be interpreted in different ways for different situations. In the April consultation CESR explained the arguments for full disclosure and the contrasting argument for disclosure that the interest is below 5%.

410. There were 22 respondents that answered the question about the resulting situation information disclosure when the notification is of a holding below that of the minimum threshold.

Sixteen consultees were of the opinion that only the fact that a notifier's interest is below 5 % should be disclosed and four thought full disclosure to be necessary.

411. On further reflection of this issue, CESR is not amending its advice in this area. This is because a large number of Member States now consider that maintaining the same disclosure irrespective of thresholds is important for the reasons pointed out in the April Consultation Paper, and that upon national implementation of the Directive, this would be required in these Member States. In an effort to minimise the number of differences that may exist upon implementation of the Directive, CESR has decided not to change its original proposals.

c) Identity of the issuer

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

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

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

415. CESR therefore considered it necessary to re-consult on this issue in the April consultation before finalising its advice.

416. There were 18 respondents to the April consultation that answered the questions about identity of the issuer.

417. A clear majority of respondents thought that identification is necessary. However, there was no consensus from respondents as to how this should be achieved. The ISIN was the most mentioned option, but not by a clear majority. CESR agrees that the issue of identification is important and as stated in the explanatory text to the standard form, recommends that another method of identification of the issuer is established in the future.

Other Issues

418. One consultee who replied in response to both consultations, proposed an alternative standard form. CESR considered this alternative form, and has taken on board some of the suggestions.

419. Some consultees proposed that the shareholder should also send the annex to the standard form to the relevant issuer. CESR does not consider that this is appropriate because the issuer is required to make public all the information it receives in relation to major shareholding notifications.



SECTION 8

FINANCIAL INSTRUMENTS

420. In establishing its advice as explained in the December consultation, CESR discussed the following areas:

- a) Relevant thresholds that trigger a notification requirement;
- b) When is notification duty triggered;
- c) Deadline within which the notification has to be made;
- d) Basis upon which the voting rights attaching to the underlying shares to which the financial instrument relates are to be calculated;
- e) Types of financial instruments;
- f) Aggregation between financial instruments;
- g) Content of the notification to be made;
- h) To whom the notification is to be made;
- i) Standard form.

421. This part of the December Consultation Paper was answered by overall 18 consultees that, in some of the questions, presented alternative proposals to those set out by CESR.

a) Relevant thresholds that trigger the notification requirements

422. In its December consultation, CESR proposed in paragraphs 389 that the same thresholds that apply to Articles 9 and 10 notificants should apply to financial instruments. Consultees did not object to this proposal, and CESR therefore assumes that consultees agreed with it, and therefore CESR is including these proposals in its final advice.

b) When is the notification duty triggered?

423. In the December consultation, CESR explained that there were two possible approaches as to when the notification duty should be triggered for these instruments. These are explained in paragraphs 390-407 of such paper.

424. Overall there were mixed responses in relation to both proposals, but of those that responded to this aspect of the Consultation Paper, a marginal majority supported the approach whereby the notification duty is triggered upon acquisitions or disposal of the instrument itself.

425. Three respondents suggested different approaches to deal with this issue. These suggestions were mainly based on considerations, such as whether the instrument was in the money or out of the money, or that the instrument should only be notifiable at the time that the instrument is actually exercised. On careful consideration of these proposals, CESR decided not to adopt them because they add unnecessary complexity to this issue.

426. Those consultees that supported the approach of notification upon acquisition or disposals explained that the alternative was open to too much uncertainty and that this is easy to apply in practice.

427. Therefore, CESR has decided to follow the approach that consultees considered to be the simplest to apply in practice which is that the notification obligation is triggered upon the acquisition or disposals of the financial instrument. This was included in the April Consultation Paper and in CESR's final advice.

428. In the December consultation, in establishing the correct approach, CESR asked consultees a number of detailed questions about the second approach and whether or not either approach was considered to be inappropriate in a particular situation.

429. Consultees did not come up with any such situations where any of the approach would be inappropriate.

430. From those respondents that considered that the notification obligation should only be triggered within a set period of time before expiry, most of them agreed that 3 months would be an adequate timeframe, and one suggested a shorter timeframe (without a concrete proposal).

431. Two of those agreeing to this view also considered relevant that a distinction is established between instruments with a European feature or American feature. One respondent considered that the same approach should be taken, irrespective of the features of the instruments.

c) Deadline within which the notification has to be made

432. In the December consultation, CESR proposed that the notification deadline for these instruments should be the same as those set out for Articles 9 and 10. Consultees showed overall support for CESR proposals in relation to this and CESR has therefore included this proposal in the April Consultation Paper and in its final advice.

d) Basis upon which the voting rights are to be calculated

433. In the December Consultation Paper, CESR explained in some detail in paragraphs 412-417 the basis upon which the voting rights should be calculated for the purposes of establishing when a notification obligation is triggered.

434. Consultees concurred with CESR in relation to these proposals and CESR therefore included these in the April Consultation Paper and in its final advice.

e) Types of financial instruments

435. In the December consultation CESR explained in detail what types of financial instruments would be covered by Article 13, and what each of the features of the instrument meant and how this applies to those financial instruments listed in MiFID (paragraphs 418-439).

436. Consultees did not raise any issues about CESR's interpretation and concurred with its views relating to what each of the features means. CESR therefore included this in its April Consultation Paper and in its final advice.

437. CESR asked consultees whether or not it was necessary to define what the meaning of a financial instrument is for the purposes of the Directive. Most considered that CESR should not provide an additional definition of financial instruments for the Directive purposes and that the MiFID definition would suffice.

438. CESR is therefore not providing a separate definition of what a financial instrument is for the purposes of the Transparency Directive.

439. CESR set out in the December consultation both a positive and negative list of MiFID instruments that qualified as financial instruments for Transparency Directive purposes and asked if consultees considered it possible or necessary to establish a list of financial instruments that qualify as financial instruments for Transparency Directive purposes.

440. Consultees showed some support to have a list of those instruments that qualify as financial instruments for Transparency Directive purposes, and made some additional proposals in this area. CESR considered these proposals and has decided that providing a negative list of instruments that qualify for Transparency Directive purposes is more practical than providing a positive one, giving a certain degree of certainty in terms of what cannot qualify, and at the same time provides the necessary flexibility in this matter as to future developments in the market.

441. Consultees were supportive of the list of financial instruments that CESR identified in the December consultation as not qualifying under Transparency Directive, and CESR has therefore maintained that list and included it in the advice itself.

f) Aggregation between financial instruments

442. In its December consultation in paragraphs 440-451, CESR set out in some detail its proposals and rationale in relation to how financial instruments should be aggregated in establishing when a notification obligation in relation to these instruments is triggered.

443. CESR asked whether or not consultees agreed with CESR's proposals, and if there was any reasons why certain financial instruments should not be aggregated for Transparency Directive purposes.

444. The majority of respondents agreed with CESR proposals in relation to aggregation of financial instruments and there was no indication that certain financial instruments should not be aggregated. Therefore, CESR has retained its original proposals in this matter.

g) Content of the notification to be made

445. In its December Consultation Paper, paragraphs 452-467, CESR set out in some detail its proposals and rationale in relation to the content of the notification that is to be made when financial instruments are acquired and/or disposed of.

446. CESR asked consultees for views on these proposals, whether more or less information than was being proposed should be required, and whether the total number of voting rights in the previous situation should be included. Therefore CESR retained its original proposals in the April Consultation Paper and in its final advice.

447. Consultees did not respond specifically to these questions, but commented on the proposed standard form and its content as discussed below.

448. Consultees did not consider it necessary to include information about the total number of voting rights in issue and on the previous situation. CESR is therefore not requiring this information in its final advice.

449. CESR also asked if the ISIN code of the underlying share was considered to be relevant information that should be included in the standard form.

450. Although most of the respondents considered that the ISIN would not provide additional relevant information, CESR has decided to present an alternative approach to this issue in the April Consultation Paper to test whether the ISIN would help to identify the issuer.

451. CESR has decided not to mandate the use of the ISIN as explained in this feedback statement.

h) To whom the notification is to be made

452. In its December Consultation Paper, paragraphs 468-472 CESR set out in some details its proposals and rationale regarding to whom the notification about the acquisition and or disposal of financial instruments should be made.



453. CESR asked consultees for their views on these proposals and consultees agreed with CESR that the notification should be sent to the issuer of the underlying shares and not the issuer of the financial instrument itself, for the reasons set out in the December consultation paper.

454. In addition, consultees also agreed that the notification should also be sent to that issuer's competent authority.

455. CESR therefore retained its proposals in the April Consultation Paper and included them in its final advice.

i) Standard form

456. In its December consultation, CESR included in its draft technical advice a standard form for financial instruments and asked consultees if they agreed with its proposals.

457. Most of the respondents that commented about the content of the standard form requested a simpler and less demanding approach, and repeated the comments that they have made in relation to the standard form for Articles 9 and 10. In consideration of these responses, CESR has taken a consistent approach in both standard forms as explained previously above.

Additional comments to the April Consultation Paper

458. Although no questions were asked, a handful of respondents commented on the financial instruments advice in the April Consultation Paper.

459. One consultee suggested that CESR made drafting amendments to the negative list as provided in MiFID, which CESR considers to be unnecessary for Transparency Directive purposes.

460. Another consultee suggested that CESR should mandate the aggregation of financial instruments with Article 9 and article 10 holdings. CESR points out that this is against level 1.

461. Another consultee asked CESR to make it clear that the notification requirements under Articles 9 and 10 and those of Article 13 are to be considered separately. CESR has made this clear in its final advice.

CHAPTER III

HALF-YEARLY FINANCIAL REPORTS

- 462.** CESR's draft advice on issues related to half yearly reports was released for consultation on 13 December 2004.
- 463.** The period for comments expired on 4 March 2005 and the public consultation also included an open hearing held on 17 February 2005. During the consultation period 20 responses on these issues were sent by various organisations.
- 464.** The draft Concept Paper on half-yearly financial reports generally received broad support from those who responded to the consultation and participated in the open hearing.
- 465.** An in-depth analysis of all comments received led to CESR making some changes to the Concept Paper. A new version of the draft advice was re-consulted on. At the end of the consultation period (27 May 2005) only a few responses were received on the issues related to the half-yearly report and the respondents agreed with the changes made to the document. All comment responses received on both consultations have been published on the CESR website.
- 466.** In the following sections of this feedback statement, CESR provides its views on the most critical points raised by respondents to the first public consultations and indicates how these comments are reflected in the new draft paper which received wide consensus.

SECTION 1

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

- 467.** CESR observes that few respondents to the consultation have diverging views on the use of the IAS 34 for the purpose of defining the minimum content of the half-yearly financial statements prepared by issuers that are not required to prepare consolidated accounts. They observed that the non-consolidated accounts are governed by the national laws of each Member State.
- 468.** The issuers that have to prepare consolidated accounts have to follow the provision established by the Transparency Directive (Article 5(3)) and therefore, are not obliged to prepare a set of non-consolidated half-yearly financial statements. Where issuers are not required to prepare consolidated accounts, the half-yearly financial report has to be prepared following the same principles of recognition and measurement applicable to those of annual financial reports. The mandate for CESR is limited to providing technical advice on the minimum content of the condensed balance sheet, profit and loss accounts and explanatory notes only for those companies who do not have to prepare consolidated accounts.
- 469.** CESR considers that, in order to achieve a level playing field between all companies that have shares or debt listed in the market, it is important for all of these companies to provide information that is comparable for investors. To this aim, CESR believes that the information required by IAS 34 is useful in understanding the principal events that have an impact on the performance of the issuer in the first six months of the year. Therefore, this information should be included also in the half-yearly reports prepared under the national accounting standards. Regarding the format, IAS 34 does not require issuers to prepare balance sheets and profit and loss accounts with formats different from the annual accounts, but to show each of the headings and subtotals included in the most recent annual financial statements.
- 470.** One respondent asked for clarification of the definition of the terms “material” and “important event” used in the information that should be included in the explanatory notes of the half-yearly report. CESR believes that these definitions should be interpreted in accordance with the applicable framework for annual reports. CESR believes that it is not necessary and appropriate to develop specific definitions solely for the purpose of the implementation of the Transparency Directive.
- 471.** Regarding comments about the inclusion of the cash flow statement and the statement of changes in equity as part of the minimum content of the half-yearly reports, CESR is in favour in principle, but these documents are not required by the Transparency Directive. Other respondents suggested including the earnings-per-share information as is required for consolidated accounts. CESR considers that if an issuer not required to prepare consolidated accounts has voluntarily included earnings per share information in its annual income statement, it has to include this information its half-yearly report, in line with the principle that issuers have to include all of the headings and subtotals included in the annual reports in their half-yearly reports.



SECTION 2

MAJOR RELATED PARTIES TRANSACTIONS

- 472.** Some respondents to the consultation asked for clarification on the definition of the terms “major” and “material”. CESR considers that the definition of “major” does not introduce a different definition of materiality, but only requires a different level of disclosure. In particular, in the half-yearly reports, issuers do not have to describe all the related party transactions, but only those that have a significant impact on the financial position or the performance of the issuer in the first six months of the financial year. In order to make this concept clearer, CESR has modified some wording in the advice. Regarding the related party transactions that are described in the annual report, issuers have to report in the half-yearly financial statement only those transactions that have materially changed in the first six months. CESR believes that providing a different definition for these terms to be used only for the requirement of the Transparency Directive may create confusion. On the basis of one of the respondent’s comments, CESR has modified the wording of the advice from “ the financial position and the performance...” to “... the financial position or the performance...” as it is in line with CESR’s intent.
- 473.** Several respondents commented that if specific third country GAAP has been determined to be equivalent to IFRS, the definition of related party transactions for the purpose of the half-yearly management report should then be based on these equivalent GAAP. CESR has included this statement in the final document as it is in line with the aim of the Directive.



SECTION 3

AUDITORS' REVIEW OF HALF YEARLY REPORT

474. On the topic of auditor's review, almost all respondents agreed on the CESR approach. Regarding the adoption at the national level of a single standard to which audit reviews are conducted almost all respondents believed that there is no such need given the already existing broad level of convergence in auditors' review of half yearly reports, and that the large majority of Member States use the standard "International Standard on Review Engagement (ISRE) 2400 issued by IFAC. There is a general consensus that a European standard is preferable to a national one.



CHAPTER IV

EQUIVALENCE THIRD OF COUNTRIES INFORMATION REQUIREMENTS

FIRST CONSULTATION

475. Out of the responses received on the whole Consultation Paper, 27 commented on Chapter 3 related to Equivalence of Third Countries Information Requirements.

476. Although respondents were broadly supportive of the general approach of equivalence, many of them urged CESR to amend its advice to the Commission to offer more flexibility to third countries issuers. Notably, several commentators requested that CESR limit the equivalence assessment to a global one.

477. CESR has taken into account these requests of commentators to the extent possible, bearing in mind that Level 1 text as well as the mandate from the European Commission are detailed and specific, restricting room for a very broad, flexible and high level approach of equivalence.

General considerations

478. Some respondents suggested that CESR consider an approach of equivalence of third countries information requirements, which would be based on reciprocity. CESR believes that such an approach would be against Level 1 relevant provisions and inconsistent with the setting up of a mechanism ensuring the establishment of equivalence of information requirements under the Directive.

479. One respondent suggested that there should be a statement setting that equivalence pronouncements will not change unless there is a fundamental change in the relevant third country requirements. CESR agrees with this proposal.

480. Moreover, CESR has taken advantage of the comments received to propose the addition of a summary of high level principles governing equivalence in general.

481. One respondent suggested that the proposed general approach of equivalence should use the same wording than the one used in the CESR's concept paper on equivalence of certain third country GAAP. CESR agrees to reformulate its advice accordingly.

482. As regards the question of equivalence in terms of time limit requirements, CESR has not read convincing arguments from commentators to change its advice and allow expended time limits.

483. Some additional drafting remarks have been incorporated in the new proposed text.

Annual management reports

484. As regards CESR's proposal to require a description of the issuer's financial condition and information on operating results, CESR agrees that, on a legal point of view, the reference to EC Regulation n° 809/2004 for third countries issuers of shares could lead them to bear more ongoing requirements than EU issuers. Consequently, this proposal has been deleted. Nevertheless, CESR continues to believe that the text in question reflects more accurately current investors' expectations in terms of the content of a management report of an issuer of shares.

485. One respondent suggested that CESR would integrate in its equivalence methodology a requirement relating to information on environment and employees in annual reports. CESR



believes that this requirement would be too detailed and is not necessary to meet equivalence according to a “principle-based” approach of equivalence.

Half-yearly (interim) management reports

486. CESR has taken into consideration comments suggesting a more flexible approach and, consequently, proposes a new text in this area.

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

487. CESR understands from the comments received that the proposed advice was not clear enough, as the proposed methodology for assessing equivalence did not require that the accounts would be publicly signed, but that the applicable legal framework would make somebody responsible. CESR proposes to clarify its proposal on this item.

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

488. One respondent suggested that additional information requested by CESR in its draft advice as regards individual accounts of the issuer as a standalone, when necessary, would be provided separately from IFRS or equivalent GAAP accounts and on an unaudited basis. CESR believes that, while not impairing investors’ protection, it may be useful to offer to the issuers falling under this provision the flexibility to prepare separate disclosures, prepared under local GAAP. Nevertheless, it will be necessary for such disclosures to be audited.

SECOND CONSULTATION

489. Out of the responses received on the whole revised Consultation Paper, 17 commented on Chapter 3 related to Equivalence of Third Countries Information Requirements.

490. 12 responses were simply supportive to the revised draft advice.

491. One respondent requested CESR to carry out a global and holistic assessment, focussing only on significant differences in transparency requirements between the EU and Third Countries, without going into technically detailed line-by-line comparisons. CESR holds the view that the set of high level principles incorporated in the revised draft advice addresses this request. As regards the detailed assessment, CESR is committed to respond to the items mentioned by the Commission in its mandate.

492. Similar comments were made on the fact that the item-by-item assessment is too prescriptive. They trigger the same answer and CESR reiterates that this item-by-item assessment is part of the advice, as requested by the Commission.

493. One respondent suggested that introducing a general principle indicating that when the fulfilment of the equivalence principle will generate a conflict and or a contradiction with the issuer’s national legislation, the national legislation will prevail. CESR cannot retain this proposal as it appears to go against Level 1 text.

494. As regards the time limits, no further argument was presented in favour of a more flexible approach. In particular, the proposal to accept reasonably similar time frames has not been retained, as the concept of “reasonably similar” seems difficult to define in that context. Consequently, CESR keeps its draft advice unchanged.



- 495.**Some respondents were concerned by that fact that the wording “likely future” in interim reports would be more stringent than the one of “risk and uncertainties”, which is imposed by the Level 1 text to EU issuers. CESR has chosen “likely future” as it seems to be less specific than “risk and uncertainties” and thus allows more flexibility.
- 496.**One respondent came back on the issue of the responsibility of the financial statements, calling CESR to take into account, in the assessment of equivalence with the statements to be made by the responsible person, broader legislative and regulatory factors which apply in the country concerned. Such a broader approach would not meet the underlying objectives of the Level 1 requirement.
- 497.**As regards disclosures on individual accounts when the issuer provides consolidated accounts, it seems clear enough that there would not be any disclosure requirement when the Third Country legislation ignores the concept of individual account, even for dividends computation, minimum capital or equity requirements. A negative statement in that sense in the draft advice seems cumbersome.



EQUIVALENCE AS REGARDS ISSUERS

Transparency about major holdings of voting rights or financial instruments

Introduction

497. This section deals with point 1(g) of the mandate, namely establishing the principles in relation to:

"transparency about major holdings of voting rights or financial instruments".

498. CESR set out its proposals in relation to this mandate in its December consultation.

499. The consultees that responded to the December consultation in relation to this issue were supportive of the proposals, but disagreed with the lack of flexibility proposed in relation to the time limits within which the notifications have to be made. This is discussed in more detail below.

500. As explained in its December consultation (paragraphs 557-560), equivalence provisions in the Transparency Directive is limited to the following 3 articles:

- a) 12(6)
- b) 14;
- c) 15

a) Article 12(6)

501. In the December consultation, CESR proposed that 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 7 trading days. The notification has to be made within the shorter time frame; or
- b) the notification and publication period (i.e. the period of time upon which the notification is to be made to the issuer and is to be made public) is in total a 7 trading day period, but the time frames between notification to the issuer and the subsequent making of this notification public are different to those set out in Articles 12(2) and 12(6).

502. Some consultees supported this proposal, others considered that if third countries have requirements to make the notification public within a certain time frame, then competent authorities should be allowed to accept this, even if this time frame is longer than the 3 trading days required, which may result in the total period being longer than 7 days.

503. Other consultees considered that a more relaxed approach authorising the extension of time limits was necessary in order to permit third country issuers to keep in line with their national legislation.

504. A consultee considered that provided the notification was made within a reasonable time frame, this should be considered as meeting equivalent requirements. However, there was no specific proposal as to what a reasonable time frame could be.

505. As explained in its April Consultation Paper, all these proposals result in tests which are arbitrary and do not facilitate the creation of certainty as to whether or not a notification deadline to which a shareholder is already subject under the laws and regulations that apply in the country where the issuer is incorporated is equivalent.

506. CESR did not change its advice in relation to this requirement for the April consultation.

507. Although in its April Consultation Paper, CESR did not ask any specific questions in relation to this, one consultee commented on this point, stating that whenever the applicable legislation in the third country establishes a shorter time frame this time frame should be considered equivalent. CESR agrees with this approach but would like to point out that a longer time frame is not equivalent and the content of the notification or the method by which it has to be made public need to comply with the Directive requirements as the Level 1 does not allow equivalence in relation to these issues.

508. Therefore CESR is not changing its advice in this area.

b) Article 14 - acquisition and disposal of own shares

509. In its December consultation CESR proposed that 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.

510. 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. 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%, then it will have to make a notification of this at 10%, and then comply with its own national legislation.

511. Some consultees did not agree with the proposals, suggesting that equivalence should be deemed to exist in its home jurisdiction the issuer is allowed a holding of 10% or more of its own shares, others commented that CESR only proposed to allow thresholds that are less than 5% & 10%, and that there should not be such a restriction, so for example if a third country has 6% & 12% thresholds, these should also be allowed.

512. These comments resulted in some changes to CESR's advice that were set out in the April consultation.

513. Consultees raised no issues in relation to this in response to the April consultation. Therefore CESR is retaining the advice contained in the April consultation.

C) Article 15- notification following increase or decrease in capital

514. In its December Consultation Paper, CESR proposed that 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.

515. Some consultees did not agree with this proposal on the basis that more flexibility should be given for time limits, and that provided the notification was made public, even if this was done after 30 calendar days, this should still be considered as being equivalent.

516. As explained, the Transparency Directive does not only impose notification requirements, but also sets time limits within which these notifications have to be made in order to meet the overall objective of transparency. For this reasons, time frames can not be flexible as the limits set in the Directive are those that EU considers to be reasonable to meet transparency objective.

517. CESR did not therefore make any change in relation this part of this advice for the April consultation.

Other points that were made in relation to Equivalence

518. In response to both the December and April consultations, one consultee requested that CESR make it clear as part of its level 2 advice on the standard form that where a notification to a non- EU issuer has been made under equivalent requirements under the law of that third country where the issuer has its registered office, no additional notification under the Transparency Directive is necessary. The lack of such an equivalence provision would mean filing two different notifications, increasing significantly the burden of compliance for shareholders with respect to non-EU issuers and resulting in a potentially very confusing situation for the issuer.

519. In addition, one consultee also pointed out that CESR should establish a general principle indicating that when the fulfilment to the equivalence principle would generate a conflict and/or a contradiction with the issuer's national legislation the national legislation would prevail. CESR considers that it is unable to apply this approach as it is prohibited from doing so by the Level 1 text.

520. CESR can only explain that equivalence will need to be granted on the basis of Article 23 and its Level 2 advice which is restricted to Articles 12(6), 14 and 15 of the Directive.

521. Additional comments were raised in response to the April consultation. One consultee pointed out that CESR should take the most flexible approach possible as these requirements also affect shareholders. CESR points out that its ability to create a test of equivalence for major shareholding notifications is limited and does not cover all major shareholding requirements covered in the Directive.

522. One consultee that agreed with the proposals made by CESR, asked CESR to explain how equivalence could be assessed in cases where Member States impose additional requirements. CESR would like to point out that the Level 2 advice cannot deal with how Member States will implement the Directive in relation to super-equivalence.

SECTION 2

EQUIVALENCE IN RELATION TO THE TEST OF INDEPENDENCE FOR PARENT UNDERTAKINGS OF INVESTMENT FIRMS AND MANAGEMENT COMPANIES

523. In the December Consultation Paper (04-512c) CESR dealt with the following four issues:

- a) The need to establish a test of equivalence in relation to third country incorporated entities;
- b) The reference to “authorisation” in the Level 1 text;
- c) The requirements for management companies and investment firms registered in a third country;
- d) The declaration to the competent authority;

524. In relation to the above issues, CESR asked a number of detailed questions.

525. Of those who responded to the December consultation, nine answered questions about this area. The nature of these responses was broad coming from the market and especially from the banking sector, investment firm’s organisations, investment firms management companies, issuers, a shareholders’ associations and securities’ exchanges.

526. CESR notes that this issue is of particular importance to those respondents that have management companies and investment firms registered in a third county and CESR paid particular attention to those respondents who fall into this category as they are the best placed to comment on this. Although this is the case, CESR was pleased to note that there was a broad category of respondents who addressed the issues raised in this part of the consultation.

527. All respondents found CESR’s approach reasonable and were positive about CESR’s proposals in all the specific issues. Therefore, overall CESR retained in the April Consultation its original approach. However, some requests of clarifications were raised, which have, as discussed below resulted in CESR making some changes to its draft advice.

a) The need to establish a test of equivalence in relation to third country incorporated entities

528. Regarding the need to establish a test of equivalence in relation to third country incorporated entities, CESR concluded in the December Consultation Paper that establishing a test of equivalence for third country investment firms and management companies may not be necessary as the framework under which they operate is not in itself enough to ensure that they meet the test of independence (paragraph 596-602 of the December Consultation Paper). However, CESR also presented an alternative approach which would consist in establishing in addition the rules of independence applicable to management companies/ investment firms located in third countries considered as most relevant for European capital markets (like the US, Canada and Japan). All respondents agreed that it is not necessary to create a list and that the alternative approach will not create any added value since:

- The firms involved would still be required to meet the test of independence on a case-by-case basis
- In any case, the competent authorities in the EU member states and in third countries should exchange information and views on how independence is assured theory and daily life
- Focusing on US, Canada and Japan is not sufficient because major fund management activities are located in other states.

527. Therefore, in relation to the approach to take, CESR followed the first approach as set out in the April Consultation Paper and is including this approach in its final advice. This means there will be no test of equivalence and third country incorporated entities have to apply the same test of independence as that set out for EU incorporated entities with the exception of an additional



requirement for conflicts of interest which reflects the fact that they are non-EU incorporated entities.

b) The reference to “authorisation” in the Level 1 text

528. With regard to the reference of the Level 1 text to the “authorisation”, CESR concluded in the December Consultation Paper (paragraphs 603 to 609 of the December Consultation Paper) that said reference is to the activity itself that the management company or investment firm carries out, which under the European legislation requires authorisation. Although authorisation itself is not a requirement for the grant of the exemption, CESR considered that the controlled undertakings (management companies or investment firms) should be supervised by the third country competent authorities. There was a unanimous agreement to CESR’s approach. Thus, CESR retained its original conclusion in the April Consultation Paper, and is including this in its final advice to the Commission.

c) The requirements for management companies and investment firms registered in a third country and d). The declaration to the competent authority

529. In relation to the requirements for the exemption and the declaration to the competent authority consultees were asked in the December consultation whether they agreed with CESR’s proposals. All consultees supported CESR’s proposals. Therefore this was included in the draft advice in the April consultation and CESR is including it in its final advice.

530. In addition, to these specific points as set out in the April advice, CESR has replicated the changes made to Section 6 to make these approaches consistent.

Requests for clarification

531. Two respondents to the December consultation asked CESR to confirm if the following rules that apply to EU incorporated entities apply also to third country incorporated entities:

- a. that the exemption also applies when the exercise of voting rights is delegated to a third party provided that the third party exercises the voting rights independently from the parent undertaking.
- b. that the exemption applies in relation to the financial instruments under Article 13.
- c. that the management company or investment firm is free to exercise the voting rights (and not all the rights) independently.

532. In addition, a respondent claimed that there is no need for a declaration when the parent undertaking is no longer eligible for the exemption (paragraph 623 of the December Consultation Paper).

533. In response to these comments which replicate those made in response to the advice in Section 6 of the December consultation, CESR made the relevant drafting changes in the discussion part as well as in the draft advice of the April Consultation Paper. CESR has replicated the changes made to Section 6 to make these approaches consistent.

534. A consultee who responded to the April consultation, expressed concern in relation to the requirement that in cases where the exercise of the voting rights is delegated to a third party this must be done under the requirements of the UCITS Directive or MiFID as applicable. The consultee pointed out that the UCITS Directive or MiFID would not be applicable to these entities. This was not the intention of the drafting, which was just to explain the basis on which the delegation can take place. CESR has therefore amended its final advice to make it clear that the delegation needs to comply with the relevant legislation applicable to these entities.

535. There were no other responses to the April consultation which commented specifically on the draft advice in relation to equivalence in relation to the test of independence for the parent



undertakings of investment firms and management companies. Therefore CESR is not making any other changes to its advice to the Commission.

CHAPTER V

PROCEDURAL ARRANGEMENTS WHEREBY ISSUERS MAY ELECT THEIR “HOME MEMBERS STATE”

538. CESR set out its proposals in relation to this mandate in its December consultation, which is divided into two issues:

- 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

539. Overall those who responded in relation to the proposals in this part of the mandate were supportive of CESR's proposals. However some disagreed with the proposals that issuers are obliged to send Prospectus Directive information to the central storage mechanism. Despite these concerns CESR retained its original proposal in the April consultation.

540. Upon reflection of similar comments received in relation to the April consultation, CESR wishes to point out that in fact neither the Transparency Directive nor the Prospectus Directive imposes an obligation to send the Prospectus Directive information to the central storage mechanism. Notwithstanding this, Article 22 of the Transparency Directive requires that some time in the future information required under the Prospectus Directive will have to be linked with the regulated information required under the Transparency Directive. Therefore, CESR considered that as long as the storage mechanisms will have to be set up, CESR considered that this could be used also to store information required under the Prospectus Directive. This was the basis upon which that statement was included in the previous Consultation Papers.

541. CESR has in its final advice made this clearer.

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

542. CESR set out its proposals in relation to this part of the mandate in the December and April consultations. Responses to both consultations were supportive of CESR's proposals so CESR has retained its original proposals in its final advice.

543. In addition to the proposals made in the December consultation, CESR proposed in April, that once an issuer has chosen its relevant competent authority for Transparency Directive purposes it should make a declaration about its choice.

544. This proposal was supported by all those that responded to this part of the April consultation and therefore CESR has added this to its final advice.