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**FORMAL MANDATE TO CESR FOR TECHNICAL ADVICE ON POSSIBLE
IMPLEMENTING MEASURES CONCERNING THE DIRECTIVE ON THE
HARMONISATION OF TRANSPARENCY REQUIREMENTS FOR SECURITIES ISSUERS**

The present formal mandate takes into consideration the agreement on implementing the Lamfalussy recommendations reached with the European Parliament on 5 February 2002. In this agreement, the Commission committed itself to a number of important points, including increasing transparency. For this reason, this request for technical advice will be made available on DG Internal Market's web site once it has been sent to CESR. The European Parliament has also been duly informed.

This formal mandate defines priority areas where implementing measures are needed to complete the Level 1 Directive approved on 11 May 2004 by the ECOFIN Council. This mandate is limited to those technical details which are indispensable for its effective transposition in all the Member States. Both should be completed by June 2005 at the latest.

On the equivalence of financial statements prepared under third country accounting standards, a separate mandate will be issued to CESR. Moreover, the Commission intends to issue an additional mandate after having received a first progress report by CESR in early 2005 on setting up a European network on information about issuers under Article 18 of the Transparency Directive; that mandate would deal with the role of the officially appointed mechanism responsible for storing regulated information. Furthermore, the Commission does not exclude giving further mandates to CESR on other comitology issues in the course of 2005. The Commission will consider a further mandate on electronic filing (Article 15 (4) a of the Level 1 Directive) and on officially appointed mechanisms (Article 17 (1a) in early 2005 in view of adopting level 2 measures at the beginning of 2006.

1. CONTEXT

1.1. Level 1 directive

In its conclusions of March 2000, the Lisbon European Council emphasised that in order to accelerate completion of the internal market for financial services, steps

should be taken to set a tight timetable so that the Financial Services Action Plan is implemented by 2005, including a Directive on the Harmonisation of Transparency Requirements with regard to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC¹ (the Transparency Directive hereafter).

For this purpose, the Transparency Directive follows the so-called Lamfalussy four-level approach (essential principles, implementing measures, co-operation and enforcement), as endorsed by the Stockholm European Council in March 2001 and the European Parliament in February 2002. The Commission is assisted by CESR, in its capacity as an independent advisory group, in its preparation of draft implementing measures.

The Level 1 Directive was agreed by the European Parliament on 30 March 2004. The ECOFIN Council approved the text voted by the EP on 11 May 2004. Its formal adoption is expected in autumn 2004. It will have to be transposed within 24 months thereafter.

1.2. Deadline for CESR's technical advice at Level 2

This formal mandate takes into account that CESR needs sufficient time to prepare and deliver its technical advice. Furthermore, under the Lamfalussy arrangement, the European Parliament will require three months to consider the draft implementing measures. Finally, Member States also need adequate time to transpose new EU-legislation once the Level 2 measures have been adopted.

In order to respect the necessary deadlines, the current mandate should therefore be completed within twelve months at the latest.

Indicative Timetable

Deadlines	Actions
June 2004	First mandate sent to CESR
October/November 2004 (?)	Publication and entry into force of the Level 1 directive submitted to the European Commission
June 2005	Technical advice from CESR
July 2005	Publication of a working document on possible Level 2 legislation on the Commission's web site/ Public call for comments
September 2005	Commission proposal(s) for Level 2 legislation sent to ESC and published on the Internet
December 2005	Vote in the European Securities Committee on Level 2 proposals

¹ COM(2003) 138 final.

January 2006	Formal adoption by the Commission
October/November 2006 (?)	Transposition period for Level 1 directive (and possibly for Level 2 directive) expires

In order to facilitate the implementation process, the Commission may, whenever justified, consider proposing the adoption of decisions or regulations for the implementation of Level 2 measures for a number of provisions which are covered by the present formal mandate. The Stockholm European Council, the European Parliament itself and the Lamfalussy report all urged the use of regulations whenever possible. To date, two of the five measures adopted by the Lamfalussy process for securities have been regulations. The Commission will consider this issue at a later stage and its proposal will depend on the content of CESR's advice.

2. THE PRINCIPLES THAT CESR SHOULD TAKE ACCOUNT OF

2.1. The working approach agreed between DG Internal Market and the European Securities Committee

On the working approach to be followed by CESR, the mandate should be implemented on the basis of the following approach:

- CESR should take account of the principles set out in the Lamfalussy Report and mentioned in the Stockholm Resolution of 23 March 2001.
- CESR should provide comprehensive advice on the subject matters described below covered by the delegated powers included in the relevant comitology provision of the Level 1 Directive, in the corresponding recitals as well as in the relevant Commission request included in the mandate.
- CESR should address to the Commission any questions they might have concerning the clarification on the text of the draft Directive or other parts of Community legislation, which they should consider of relevance to the preparation of its technical advice.
- The technical advice submitted by CESR to the Commission should not take the form of a legal text. However, CESR should provide the Commission with an "articulated" text, which means a clear and structured text, accompanied by sufficient and detailed explanations for the advice given, in a easily understandable language respecting whenever possible legal terminology used in the field of European securities markets and company law.
- CESR should provide advice which takes account of the different opinions expressed by the market participants (practitioners, consumers and end-users) during the various consultations. CESR will provide a feed-back statement on the consultation justifying its choices vis-à-vis the main arguments raised during the consultation.

2.2. Consultation of the public

The Stockholm European Council endorsed the Lamfalussy recommendations on consultation and transparency. In particular, it invited the Commission to make use of early, broad and systematic consultation with the institutions and all interested parties in the securities area, especially by strengthening its dialogue with consumers and market practitioners. It also stated that CESR should “*consult extensively, in an open and transparent manner, as set out in the final report of the Committee of Wise Men and should have the confidence of market participants*”.

Article 5 of the Commission Decision establishing the CESR provides that “*before transmitting its opinion to the Commission, the Committee [CESR] shall consult extensively and at an early stage with market participants, consumers and end-users in an open and transparent manner*”.

In this context, DG Internal Market draws CESR’s attention to the European Parliament’s Resolution on the implementation of financial services legislation of 5 February 2002 and the Commission’s formal Declaration in response.

DG Internal Market will ensure that the Stockholm European Council recommendations on consultation have been fully met. In particular, it will satisfy itself that CESR has consulted all interested parties on its technical advice in accordance with the CESR Public Statement on Consultation Practices. This provisional mandate will also be posted on DG Internal Market’s website.

Once the Commission has received the CESR’s advice, it will draw up draft working documents to put forward to the ESC and the European Parliament. It simultaneously will publish those texts on its Internet site. If the Commission amends its draft to reflect discussions in the ESC, those amended drafts will also be made public on its website.

Interested parties will have the opportunity to comment on published draft working documents. The Commission has set up a dedicated e-mail address (Markt-ESC@cec.eu.int), allowing all interested parties to send their contributions to the Chairman of the ESC. All such comments will in turn be made public on the above website.

Interested parties will have sufficient time to participate in this exercise because the ESC will not be asked for a vote until at least three months have elapsed from the publication of initial draft implementing rules. This will also allow the European Parliament to follow the process and, if it so wishes, to make its views known.

3. CESR IS INVITED TO PROVIDE ADVICE BY JUNE 2005 ON THE FOLLOWING PRIORITY ISSUES:

3.1. Information about major holdings (Articles 9 (3d), 11(5) and 11a (2))

3.1.1 Notification of the acquisition or disposal of major holdings (article 9 (6)).

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

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

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

3.1.2 Procedures on the notification of major holdings of voting rights (Article 11(5)) and aggregation amongst financial instruments (Article 11 a (2))

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

(1) to draw up a standard form to be used by an investor throughout the Community when notifying the required information to the issuer taking into account existing national standards. The standard form should at least cover the most frequent cases. CESR is invited to consider that this form should also be used when the issuer has to file the same information under Article 15 (3);

(2) to determine a calendar of “trading days” for all Member States for notification purposes under Article 11(5). DG Internal Market does not consider necessary to define a uniform calendar of trading days throughout the EU. Instead, it invites CESR to provide advice on the trading days of which Member State should be relevant;

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

(4) to clarify the circumstances under which the shareholder, or the natural person or legal entity referred to in Article 10, should have learnt of the acquisition or disposal of shares to which voting rights are attached;

(5) to clarify the conditions of independence to be complied with by management companies, or by investment firms, and their parent undertakings to benefit from the exemptions in Articles 11.3a and 11.3b. In particular, CESR is invited to consider:

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

- (b) conditions that management companies/investment firms and their parent undertakings should comply with to benefit from the exemption of not being required to aggregate major holdings at the level of the parent undertaking (for instance: internally between the parent undertaking and the management company/investment firm or for instance externally in terms of public disclosure, involvement of auditors and / or of the competent authority).
- (6) types of financial instruments under Article 11a.1 (i.e. financial instruments resulting in an entitlement to acquire, on the initiative of the holder, shares to which voting rights are attached and which have already been issued) and the aggregation amongst financial instruments. CESR is invited to consider the definition of financial instruments established under the Directive on Financial Instruments Markets;
- (7) nature of the formal agreement resulting in an entitlement for the holder of the financial instrument to acquire shares as referred to in paragraph (5), the content of the notification to be made, a standard form for such notification, the notification period, and to whom the notification is to be made by the holder of a financial instrument.

3.2. Publication of regulated information

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

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

- a) fast access to regulated information for investors located not only in the issuer Home Member State, but in other Member States. In particular, CESR should consider changes to the current situation at Member States level;
- b) fast access to regulated information on a non discriminatory basis. In this respect, it would be useful assessing as to whether different solutions on the method of dissemination should be envisaged according (i) to the type of regulated information, (ii) the type of issuer or the market segment where the issuer's securities are admitted to trading on a regulated market, or (iii) any other criteria.

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

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

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

3.3. Other issues

3.3.1. Procedural arrangements related to the Home Member State (Article 2(3)b) and the competent authority (Article 15 (4))

DG Internal Market requests CESR to provide technical advice on possible implementing measures on the procedural arrangements in accordance with which an issuer may elect its “Home Member State” under Article 2.1 (i) (ii).

In this respect, CESR is invited to notably consider the following issues: (a) coordination of filings between the competent authority elected by the issuer under Article 2.1 (i) (ii) and several competent authorities elected under the Prospectus Directive and (b) applicable regime in case of delisting from the regulated market of the Home Member State whilst continuing being listed in other Member States.

3.3.2. Half-yearly financial reports (Article 5 (5))

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

- (1) clarification of the nature of the auditors’ review of the half-yearly report, with the objective of ensuring a common understanding for investors on the level of assurance that investors can at least expect from an auditor’s review referred to in Article 5 (4). The Commission invites CESR to notably consider existing national standards as well as the international standards on auditing developed by the International Auditing and Assurance Standards Board (such as ISRE 2400 (*Engagement to review financial statements*)).
- (2) as to half-yearly reports, minimum content of the condensed balance sheet, profit and loss accounts and explanatory notes on these accounts where they are not prepared in accordance with international accounting standards, as adopted pursuant to the procedure provided for under Article 6 of Regulation (EC) No 1606/2002.
- (3) clarification of the notion of “major related parties transactions” as part of an interim management report for issuers of shares.

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

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

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

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

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

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

(d) interim management statements under Article 6;

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

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

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

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

(2) a list of third countries which ensure the equivalence of the independence requirements laid down in this Directive in relation to management companies or investment firms as provided for under Article 19.3c (related to Articles 11.3a and 11.3b). CESR is invited to focus its assessment at this stage to the rules applicable to management companies/investment firms located in those third countries it considers being the most relevant from the point of view of European capital markets..

DRAFT LETTER

Subject: Transparency Directive – Role of officially appointed mechanism / Setting up of an electronic network of information about issuers – Possible implementing measures

Dear,

Apart from the mandate on Level 2 measures for the Transparency Directive, I would like to invite you as well to start working on a European electronic network containing standardized information about security issuers. We would like this network to be operational and accessible throughout the European Union.

As you are aware, Article 18 of the future Transparency Directive offers the legal base for such a project which is certainly ambitious and complex with many interrelated issues on both substance and process – i.e. the appropriate Level of the Lamfalussy Process.

Accordingly, we would like to take this opportunity to clarify how we could move forward on this matter.

Article 18 of the Directive provides that the competent authorities of the Member States shall draw up appropriate guidelines to create a European electronic information network incorporating information which issuers should publish under the Prospectus Directive, the Market Abuse Directive and the Transparency Directive.

Since Article 20 of the future Directive determines that the securities regulators are the competent authorities, we believe it would be appropriate to rely on the CESR network and Level 3 of the Lamfalussy Process for determining the way forward.

Article 18 also provides for a mechanism under which Level 2 might step in after 2006. Therefore, I do not exclude that the Commission could grant a mandate to CESR in view of possible implementing measures to be adopted at a later stage.

At this stage, I suggest as a working method that CESR provides us with regular progress reports on its ongoing work provided for in Article 18. The Commission would expect a first progress report in February 2005, a report on the envisaged project by October 2005 and a final report in autumn 2006.

On the basis of those reports, the Commission will review the situation and decide in autumn 2006 whether to grant a formal mandate in view of future Level 2 measures.

On the basis of the February 2005 progress report the Commission will, in spring 2005, prepare an additional mandate to CESR for technical advice on the items to be dealt with under Article 17 (1a) with regard to the required information storage mechanism and Article 15 (4)a with regard to the electronic filing of information with the securities

regulator. Both issues are indeed closely linked to the project of a European network from a technical point of view.

I would appreciate if you could confirm to me that you agree with this approach.

I also suggest that my letter and your response should be made available on our web sites to ensure, in accordance with our standard practice, namely maximum transparency for the financial markets.

Yours sincerely