

ZENTRALER KREDITAUSSCHUSS

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Comments on

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

Consultation Paper

Part 1: Dissemination and storage of regulated information

Ref.: CESR/04-511

28 January 2005

I. Executive Summary

The *Zentraler Kreditausschuss* (ZKA)¹ would like to thank CESR for the opportunity to comment on its consultation paper “Dissemination and storage of regulated information”. In our view, CESR has succeeded in putting forward a series of recommendations and options that are essentially balanced and largely take the interests of all market participants into account. We particularly welcome the proposal regarding non-price sensitive information which would make it possible to comply with dissemination requirements under Article 17 (Article 21) of the Transparency Directive² by disseminating a notice stating where the relevant document (e.g. annual financial report) can be viewed.

Nevertheless, we have serious reservations about a few aspects of the consultation paper. These are briefly summarised below.

- **No dissemination and storage obligations going beyond Level 1 requirements**

Under Article 18 (Article 22) of the Transparency Directive, the member states’ competent authorities are to draw up guidelines with a view to further facilitating public access to the information to be disclosed under this Directive and the Prospectus Directive (2003/71/EC). CESR proposes that the obligation under Article 17 (Article 21) to store regulated information and disseminate it throughout Europe should be extended to include information required under the Prospectus Directive (Section C, paragraph 214). There is no basis for this in either the Transparency Directive or the Prospectus Directive. On the contrary: Article 17 (Article 21) of the Transparency Directive refers only to regulated information, thus excluding information to be disclosed under the Prospectus Directive. If the Council and the European Parliament had considered it necessary for information disclosable under the Prospectus Directive to be stored and disseminated throughout Europe, they would have included it in the scope of Article 17 (Article 21) of the Transparency Directive. But the Council and European Parliament refrained from doing so and adopted the Commission’s proposal. This regulatory framework must be respected when preparing the guidelines in accordance with Article 18 (Article 22).

¹ The ZKA is the joint committee operated by the central associations of the German banking industry. These associations are the *Bundesverband der Deutschen Volksbanken und Raiffeisenbanken* (BVR), for the cooperative banks, the *Bundesverband deutscher Banken* (BdB), for the private commercial banks, the *Bundesverband Öffentlicher Banken Deutschlands* (VÖB), for the public sector banks, the *Deutscher Sparkassen- und Giroverband* (DSGV), for the savings banks financial group, and the *Verband deutscher Hypothekenbanken* (VdH), for the mortgage banks. Collectively, they represent more than 2,500 banks.

² The cited provisions of the Transparency Directive refer to the version on which the consultation paper is based. The article numbers in brackets refer to the version (2004/109/EC) since published in the Official Journal of the European Union.

- **Security of the transmission process**

The ZKA welcomes the fact that electronic filing of information with member states' competent authorities must be secure (Section C, paragraph 304). Unfortunately, no corresponding requirement is envisaged for the transmission of data from the issuer to the operator and from the operator to the media. It is vitally important, in our view, to ensure that price-sensitive information cannot be intercepted and used by third parties before its publication or dissemination. The standards addressed to operators should therefore be amended to include such a requirement (cf. our reply to Section B, question 6).

II. Specific comments

B. Consultation Paper on Dissemination of Regulated Information by Issuers and on Conditions for Keeping Periodic Financial Reports Available.

Section 1: Dissemination of Regulated Information by Issuers

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?

The ZKA would welcome issuers being able to satisfy the Transparency Directive's disclosure requirements by sending the information to an operator only. This would allow issuers to streamline and enhance their internal processes. For the operator, on the other hand, there would not be significantly more work involved in filing the data with the competent authority since it has to process the regulated information and forward it to a number of addressees anyway.

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?

Transmission of the data from the issuer to the operator and from the operator to the media should be sufficiently secure to ensure that no unauthorised third parties can access the information. Otherwise, third parties would be able to exploit insider information before its publication or dissemination, for example. We believe this is extremely important even if the operator is required to disseminate the information to the media in real time since it would still be at the discretion of the media to decide whether and when to make it public.

Question 7: Should issuers be required to use the services of an operator for the dissemination of regulated information?

No. If issuers can afford to disseminate regulated information and file it with a storage mechanism themselves, they should not be forced to outsource this task, particularly given that involving an operator will inevitably incur costs. Every issuer should be free to disseminate regulated information and file it with the central storage mechanism and the competent authority itself, either on a case-by-case or permanent basis.

Question 13: Do you agree with CESR's advice in relation to this mandate? Please give reasons.

Yes, since annual and half-yearly financial reports have to be filed with a central storage mechanism anyway under Article 17 (Article 21) of the Transparency Directive, requiring this information to remain accessible in the central storage mechanism for the prescribed period would seem to be the simplest and most cost-effective solution for all market participants.

C. Progress Report on the Role of the Officially Appointed Mechanism (Article 17.1a) and the Setting up a European Electronic Network of Information about Issuers (Article 18) and Electronic Filing (Article 15.4a)

I. The Role of the Officially Appointed Mechanism (Article 17.1a) and the Setting up a European Electronic Network of Information about Issuers (Article 18)

Section 1: Central Storage Mechanism Options (Article 17.1/17.1a)

A) Should there be one storage mechanism, or more than one?

CESR raises the question of whether there should be only one central storage mechanism or multiple officially appointed central storage mechanisms for storing regulated information and puts forward three options: (i) storing information according to type, (ii) storing all regulated information in multiple national central storage mechanisms or (iii) storing all information in a single national storage mechanism.

The ZKA argues against having several competing central storage mechanisms in each member state (option (ii)), especially if all regulated information has to be sent to all of them. This would greatly increase costs for issuers without offering any market participants, especially investors, any discernable benefit, since a fee would obviously have to be paid to all the storage mechanisms for

their services. Contrary to the assertion in Section C, paragraph 51, this fee would not be kept low by the forces of competition because no competition would exist. Storage mechanism operators would have no incentive to offer more favourable conditions than those of their competitors if the issuer had to send regulated information to all the central storage mechanisms anyway.

We would therefore advocate option (iii) – a single national central storage mechanism – preferably operated by the national competent authority. One advantage of this option is that Article 15 (Article 19) of the Transparency Directive requires the issuer to file regulated information with the competent authority anyway. As pointed out in Section C, paragraph 132, it would consequently make sense for the competent authority also to process and make the information accessible to investors. This would also enable issuers to streamline their processes quite considerably at no disadvantage to the investor whatsoever. In addition, the fee charged to the issuer in this case would reflect the actual time and effort involved in processing and storing the data. Unlike private organisations, the competent authority would have no commercial interest in making a profit. Furthermore, we do not share the view taken in Section C, paragraph 58; we see no obstacle to charging investors a fee for accessing the information. It is not unusual to pay a fee for other services provided by public authorities. There is no reason why making available information about the issuers of listed securities should be treated differently. In consequence, it would not, as suggested in Section C, paragraph 59c), be necessary to charge issuers higher fees to compensate for providing investors with a service for free.

In any event, it should be ensured that it is not made mandatory for issuers to send regulated information to more than one national central storage mechanism.

D) Issuer's responsibility to make regulated information available to a central storage mechanism

Question 13: When should an issuer's responsibility to send information to a central storage mechanism be considered fulfilled? Please explain your reasons.

According to the first sentence of Article 17(1) (Article 21(1)) of the Transparency Directive, the issuer must make regulated information “available” to the central storage mechanism. CESR discusses when the issuer should be deemed to have fulfilled its responsibilities in this regard and puts forward three alternatives: (i) when the regulated information is sent to a central storage mechanism, (ii) when the issuer receives a confirmation of receipt from the central storage mechanism or (iii) when the regulated information can be accessed from the central storage mechanism by investors.

For the issuer, it would be easiest merely to have to record that it had sent the regulated information to the central storage mechanism and thus met its responsibility to make it available. Nevertheless, deeming the availability official only when the issuer obtains a confirmation of receipt would also be a conceivable option, in our view. It would go too far, on the other hand, to demand that the information must be accessible to investors. This exceeds the requirements of the Transparency Directive. What is more, the issuer has no influence on how the central storage mechanism processes the information.

G) Who should operate central storage mechanisms?

Question 19: Which of the above do you consider to be the best option? Please give reasons for your answer.

The ZKA believes it would be preferable for the member state's competent authority to operate the central storage mechanism. Article 15(1) (Article 19(1)) of the Transparency Directive requires issuers to file all regulated information with the competent authority anyway. As Section C, paragraph 132, rightly states, it would therefore make sense for the competent authority also to process and make this information accessible to investors.

Section 2: Requirement for an electronic network (Article 18)

Question 42: Do you agree with CESR's proposal to extend Article 17 to enclose information disclosable under the Prospectus Directive? Please give reasons.

We firmly reject CESR's proposal to extend the requirement to store and disseminate regulated information across Europe to the information which must be disclosed under the Prospectus Directive. Neither the Transparency Directive nor the Prospectus Directive provide any basis for extending the scope of Article 17 (Article 21) of the Transparency Directive in this way. The European legislators only considered it necessary to require the dissemination and storage of information disclosable under the Transparency and Market Abuse (2003/6/EC) Directives. Otherwise – as in Article 18 (Article 22) – they would have extended the scope of Article 17 (Article 21) of the Transparency Directive to cover the information to be disclosed under the Prospectus Directive. The decision by the Council and the European Parliament at Level 1 of the Lamfalussy process to follow the proposal of the Commission must not be disregarded by Level 2 measures or the guidelines pursuant to Article 18 (Article 22).

II. Electronic Filing (Article 15.4a)

Question 52: Do you agree that the balance between competent authorities' needs and filers' needs is best achieved through the use of electronic sending methods, rather than none-electronic means, such as mailing of paper documents? Please give reasons.

Provided that the means of transmission is stable, swift and secure, the ZKA welcomes the possibility of filing regulated information with the competent authority electronically. This will allow both issuers and the competent authorities to make processes more efficient and less costly.
