

1 September 2006

European Commission  
DG Internal Market Services

Dear Sir/Madam

Draft directive implementing the Transparency Directive


The International Capital Market Association (**ICMA**) is pleased to comment on the draft directive implementing the Transparency Directive (the **TD**), dated 24 May 2006 (the **TD Level 2**). ICMA is the self-regulatory organisation and trade association representing the investment banks and securities firms issuing and trading in the international capital markets worldwide.

We welcome the publication of the TD Level 2 text and the marked improvements which have been made against the Working Document ESC/34/2005 Rev. 2 (the **Working Document**). Most of our concerns expressed in relation to the Working Document have been addressed. Our comments, attached as an **Annex I** to this letter, are limited and most of them are of a technical nature.

We have also taken the opportunity to comment on the proposed European Commission's decision on extension of the equivalency decision under the TD (the **Decision**) and to suggest for your consideration a few general points related to the TD. These comments are included in **Annex 2** and **Annex 3** to this letter, respectively.

We would be pleased to discuss our comments with you at your convenience.

Yours faithfully,

A handwritten signature in black ink, appearing to read "Ondrej Petr".

Ondrej Petr

## **ANNEX 1 Comments on the TD Level 2**

### **General Comments**

In the interest of the clarity of the text, we suggest that any definitions used in the TD Level 2 (e.g. those in its Article 10) should appear in a separate article in the beginning of the operative text of the TD Level 2.

### **Half-yearly non-consolidated financial statements (Article 3)**

The second sentence of Article 3(2) requires inclusion of additional line items if their omission would result in the financial statements not giving a true and fair view. The TD Level 2 does not specify the true and fair view standard for condensed financial statements, in particular any difference there may be from that of "regular" financial statements. This situation may lead cautious issuers to expand condensed financial statements to the full scope of "regular" financial statements, ensuring compliance with the true and fair view test, but defeating the intention behind condensed financial statements. We would therefore prefer if the requirement to include additional line items was deleted. If it is retained, guidance should be put in place to clarify its scope.

There is no third country equivalence provision for half-yearly non-consolidated financial statements. It would appear not necessary if such a third country issuer satisfied the requirements of Article 3(2) and (3) of the TD Level 2 but a clarification of this point would be helpful.

### **Control mechanisms regarding market makers (Article 6)**

We strongly support the revised wording of Article 6, in particular the fact that a market maker will have to notify only its own, "MiFID" competent authority. This competent authority would be the sole authority responsible for policing the compliance by the market maker with its duties under the TD.

Article 6 assumes that MiFID has been implemented in the home Member State of a market maker before the TD Level 2, but this may not be case. To avoid interpretation which could adversely affect the rights of a market maker under the TD Level 2, it should be made clear that authorisation under the Investment Services Directive is considered (or, more precisely, under the national legislation originally implementing the Investment Services Directive, which Directive will at that point have been repealed) equivalent.

We also note that the term "market maker authorised under MiFID" should not be understood as implying any specific regulatory authorisation for market-making activities. Article 4(1)(8) of MiFID defines a market maker factually, as "a person who holds himself out on the financial markets on a continuous basis as being willing to deal on own account by buying and selling financial instruments against his proprietary capital at prices defined by him." Such an entity therefore only needs to be an investment firm licensed under MiFID (or, as suggested, ISD-implementing national legislation) to deal on own account.

For the avoidance of doubt, the first sentence of Article 6(2) TD Level 2 should provide that the market-maker “shall not” (rather than “may not”) be required to segregate the shares in a separate account.

### **Deemed knowledge of major shareholding (Article 9)**

The related Recital 10 continues to suggest different treatment of exchange and off-exchange transactions. In the first case, the transaction “should be executed” when orders are matched, while in the latter case only when the position is legally transferred. This contradicts one of the key aims of MiFID, a level playing field for the various trading venues, namely exchanges, other regulated markets, MTFs and systematic internalisers. More importantly, it might in practice affect transparency and integrity of the major shareholdings notification regime as some participants might seek to delay notification of significant shareholdings by restructuring the underlying contracts and routing their transactions to “non-exchange” venues. We understand that the purpose of this distinction is to cater for “private transactions”, such as certain privately-negotiated corporate acquisitions, where the conclusion of the underlying agreement may not necessarily confer on the purchaser the rights required to make the notification. We query whether such a specific regime is necessary given that even in such transactions, the purchaser usually acquires some degree of control over the exercise of voting rights prior to the formal transfer of shares or voting rights and this should be properly notified. If it is nevertheless felt that such a regime is needed it should be carefully worded to avoid creating a loophole which could be used to circumvent the purpose of the major shareholding notification regime.

If retained, Recital 10 should also provide that “a transaction is considered to be executed” rather than “a transaction should be executed” to avoid the impression that it is prescribing how execution should work, which is outside the scope of the TD.

### **Notifiable financial instruments (Article 11)**

We support the revised definition of the financial instruments which are to be subject to the notification regime.

We are concerned that neither the TD nor the TD Level 2 makes it clear that the entire notification regime, including the various exemptions in Article 9 TD, applies not only to shares/voting rights under Articles 9 and 10 TD but also to financial instruments under Article 13 TD. In particular, we are concerned that some may interpret this as meaning that some of those exemptions do not apply to financial instruments, although this was clearly not an intention of the TD. This is because Article 13 TD refers only to “notification requirements” of Article 9 TD and, at the same, time, the exemptions in Article 9 TD refer to only “shares” or “voting rights” and not expressly to “financial instruments.” Article 6(2) helpfully suggests that the market-making exemption extends to financial instruments, but no similar clarification is provided, e.g., for the custodian or trading book exemption. We would therefore welcome a clarification, e.g., in the form of a recital or guidance, that the entire notification regime under the TD applies not only to shares/voting rights under Articles 9 and 10 TD but also to financial instruments under Article 13 TD in full, even where the wording of a particular provision does not expressly refer to financial instruments.

The word “moment” in Article 11(3)(d) should be replaced with “date or time period” to avoid the impression that the shareholder needs to disclose other details, such as price

conditions, under which the shares may be acquired. We suggest this for the sake of clarity, despite the fact that financial instruments where acquisition of the underlying shares is dependent inter alia on market price or other conditions than the will of the instrument holder are, according to Recital 12, outside the major shareholding notification regime.

Finally, we note a typo in the numbering of the last section of Article 11 – it should be 5, not 3.

### **Aggregation among notifiable holdings**

The TD Level 2 should also make it clear how aggregation among various notifiable holdings is expected to work. The investors should be required to aggregate the holdings of shares under Article 9 TD with the voting rights arrangements under Article 10 TD. At the same time, they should not be required to aggregate the holdings under Articles 9 and 10 TD with the holdings of financial instruments under Article 13 TD (as the par. 375 of CESR's Final Technical Advice (CESR/ 05/407) noted). We understand this is in both cases the intention, but suggest, for the sake of clarity, that it is made clear in the TD Level 2 or the accompanying recommendation on standard notification forms.

We are aware of the Commission's concerns about non-disclosure of parallel below 5% holdings of shares under Articles 9 and 10 TD and financial instruments under Article 13 TD. Assuming the investors report on both kinds of holdings separately, as suggested, we would not object to an anti-avoidance mechanism under which a notification would be required if both kinds of holdings together exceeded 5%.

### **Dissemination of regulated information (Article 12)**

We strongly support the revised wording of Article 12 which removes the absolute obligation of an issuer to ensure that the dissemination complies with the TD standards even when it has entrusted a professional service provider with the dissemination. The TD Level 2 nevertheless still (correctly) assumes that the proper dissemination is the responsibility of the issuer. Some Member States will have authorised such professional service providers to disseminate the information for issuers. As a part of their authorisation, such entities will normally be required to show compliance with the applicable dissemination standards. We suggest that a "safe harbour" is adopted under which communication of the information by the issuer to an authorised/regulated professional services provider discharges the issuer from its duties.

Where Article 12 refers to an "issuer" it should also refer to "the person who has applied for admission to trading on a regulated market without the issuer's consent", in line with Article 21 of the TD.

If the issuer (or the person who has applied for admission to trading on a regulated market without the issuer's consent) engages a professional services provider to disseminate the information, it will not be in the position to provide certain information required by Article 12(5), namely those listed under (a), (c). In such a case, the duty of the issuer should be interpreted accordingly.

We do not understand the term "security validation details" in Article 12(5)(b) and suggest that the information required be clarified or the reference deleted.

### **Equivalence provisions in general (Articles 13 to 23)**

We support the revised wording of the equivalence provisions in the TD Level 2 subject to the specific comments below and, most importantly, subject to our comments on the shareholder disclosure equivalency in Annex 3.

### **Responsibility statements (Article 15)**

We note that in some jurisdictions it is likely to be an issuer who is responsible for the accounts, rather than any specific individual.

### **Consolidated annual reports (Article 17)**

The phrase "minimum capital and equity requirements and liquidity issues in Article 17(b) is unclear and should be either clarified or deleted.

### **Standard notification forms**

We understand that the currently proposed standard notification forms are still in the version which has been published together with the Working Document. We continue to strongly support mandated use of such forms for EEA issuers but suggest that the identification of a custodian and detail of triggering transactions are removed from the forms. These requirements would be extremely difficult to comply with in practice and in any case go beyond the TD requirements.

The disclosure requirements in the standard notification forms should be aligned with the TD and the TD Level 2 and, as a matter of principle, TD Level 2 and the standard notification forms should not create more onerous disclosure obligations than anticipated in the TD.

### **Implementation of TD Level 2 (Article 24)**

The period of implementation of the TD Level 2 should be as short as possible. Even so, there will most likely be a gap between the implementation date of the TD and the TD Level 2 in most Member States. In principle, the absence of TD Level 2 should not deprive the market participants of the benefits of the TD as most of the provisions of the TD can function on its own. Some provisions of the TD Level 2, however, are indispensable for the TD regime and should be in practice applied even during the interim period at least as guidance. This includes, by way of an example, the duties of market-makers, deemed knowledge of a major shareholding, specification of the financial instruments subject to the notification regime or aggregation principles.

## **ANNEX 2**

### **Comments on proposed decision on extension of the equivalency decision under the TD**

#### **General Comments**

We strongly support a prompt adoption of the proposed measures under the Prospectus Directive (the **PD**) and the TD extending the equivalency decision for another two years. The current uncertainty has a very negative effect on the appeal the EU regulated markets have for third country issuers and, if unremedied, could lead to such issuers switching to non-EU regulated markets.

We welcome the revised formal draft of the Decision, in particular because of the flexibility of its application to accounting standards of other third countries than US, Canada and Japan.

#### **Specific Comments**

Our specific comments do not affect our endorsement of the revised formal draft of the Decision and its prompt adoption. The European Commission may nevertheless wish to consider whether any of these comments should be reflected in the final Decision or otherwise addressed.

#### ***Non-consolidated accounts of third country issuers***

The Decision does not apply to non-consolidated accounts of third country issuers. Article 18 of the TD Level 2 requires that they apply IFRS or equivalent standards to annual financial statements. There is no equivalency provision for half-yearly financial statements but the substantive Article 3 of the TD Level 2 suggests that they could use their local accounting standards subject to the minimum requirements of that Article. If third country issuers are given another two years to apply their accounting standards to consolidated financial statements, it would appear inconsistent to require them to apply IFRS to non-consolidated annual financial statements. We therefore suggest that the scope of the Decision is extended to cover non-consolidated financial statements as well.

#### ***Specification of financial statements subject to the Decision***

Article 2 of the Decision specifies that the exemption applies to financial statements "prior to financial years starting on or after 1 January 2009." We are aware that the language is identical to that used in the TD but nevertheless believe it could potentially be misinterpreted. By way of an example, an issuer with a financial year ending on 31 December publishes its annual report for 2008 in March 2009. The consolidated financial statement in the annual report, being for 2008, should clearly be covered by the extension but some may argue it is not, the exemption only applying until the end of 2008. We therefore suggest that the text itself or a recital make it clear that the exemption applies to financial statements "for financial years starting before 1 January 2009."

## **ANNEX 3 Related Comments on the TD**

### **General Comments**

IPMA (the predecessor of ICMA) was actively involved in the preparation of the TD. We appreciate the open and transparent procedure leading up to its adoption which allowed for active feedback from the industry. Nevertheless, issues continue to be identified at the current stage of the run-up to the implementation of a directive in the Member States and preparation of Level 2 measures, as attention focuses on details.

We therefore highlight below several such issues which we believe merit the attention of the European Commission or CESR. While some might be addressed by guidance, others would require a modification of the TD. Some of them were described in more detail in our response to the UK FSA's consultation on the implementation of the TD in the UK which we have provided to you earlier. We will be happy to provide you with more detail or otherwise discuss any of the issues at your convenience.

### **Alignment of the TD with the Prospectus Directive**

The disclosure regime before and after admission to trading on a regulated market should be aligned. In particular, securities subject to a specific regime or benefiting from specific exemptions under the PD should be subject to a similar regime or benefit from similar exemptions under the TD. While this is generally the case, divergences appear in some specific, but important areas. By way of an example:

- Certain securities have unclear debt/equity classification under the TD or one that is inconsistent with the PD. For example GDRs (non-equity under the PD) and convertible securities (equity under the PD) appear to be neither debt nor shares under the TD and therefore outside its scope while the regime of non-voting preference shares (usually considered non-equity under the PD) is unclear.
- Certain issuers benefit from a lighter regime under the PD which is not replicated under the TD, e.g., issuers of asset-backed securities or issuers guaranteed by public sector and quasi-public agencies.

### **Shareholder disclosure equivalency**

Shareholders of third country issuers will in practice be subject to major shareholding disclosures in accordance with the third country laws of those issuers. If the issuers are at the same time admitted to trading on EEA regulated markets, a shareholder will have to comply with at least two major shareholding disclosure regimes with respect to the same issuer. The disclosure regime under the third country laws will be in a number of aspects different from the TD regime but in most cases will achieve sufficient degree of transparency. This is to a certain degree recognised in Article 19 TD Level 2 in relation to the subsequent disclosure by the issuer, but not in relation to the disclosure by the shareholder itself.

Compliance with two substantially equivalent disclosure regimes will involve a significant burden on shareholders without any apparent benefits. It should be kept in mind that the majority of shareholders subject to the major shareholding disclosure regime are

institutional investors with a multitude of potentially notifiable holdings around the globe. The direct and indirect costs for such institutions of complying with several sets of disclosure regimes are considerable and should be taken into account. In addition, the subsequent disclosure by the issuer of two sets of similar, but probably slightly different, figures may also cause confusion among other investors. To address this situation, the TD should take account of the fact that disclosure was made under third country laws. Where a shareholder is required to make a shareholding disclosure under a third country regime which is in principle equivalent to the TD regime, it should not be required to make a duplicit disclosure under the TD regime.

For full effect, this may require modification of the TD but the Commission, together with CESR, should consider if any relief could be provided to the shareholders in the interim period. For example, where the TD requirements are met by a third country disclosure, the shareholders should be considered to have fulfilled their duties under the TD.

#### **Availability of prospectuses in officially appointed mechanisms (OAMs)**

Availability of a prospectus in an OAM should eventually be considered a proper prospectus publication method under the PD. This would require an amendment to the PD.

#### **Disclosure of home Member State**

The identification of a home Member State of a third country issuer is not always straightforward. This may result in a shareholder not knowing the law of which Member State governs its major shareholding disclosure duties. Given that the national disclosure regimes will most likely differ across the EU, this exposes the shareholder to a considerable legal risk. The TD Level 2 recognises this and requires disclosure of the choice of the home member State under Article 2(i)(ii) TD, but we believe that information about a home Member State of any third country issuer should be made publicly available in the same manner.

#### **Pan-European liability for reports under the TD**

The pan-European dissemination of information under the TD may have unintended impact on domestic liability regimes. Theoretically, investors who consider a particular report incomplete or misleading could bring their claims against the issuer and its directors directly and under the law and before a court of any Member State. This exposes such issuers and their directors to a considerable legal risk and creates difficult conflict of law issues. While the liability regime is the responsibility of the Member States, the EU could take steps to prevent investors from "shopping" for the most beneficial liability regime, e.g., by providing in the Rome II Regulation that such liability is governed only by the law of the place of incorporation of the issuer or of the place where the securities are admitted to trading.