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Additional Information

Level 1 Regulation
Transparency Directive (TD) Directive 2004/109/EC

Topic
Notifications of major shareholdings

Subject Matter
The scope of the major shareholder obligation in Article 9.1 of the Transparency Directive

Question
Does the major shareholder obligation in Article 9(1) of the Transparency Directive apply to holdings in issuers whose shares are not admitted to trading on an EU regulated market if depository receipts (DRs) in respect of that issuer's shares are admitted to trading on an EU regulated market?

Legislative background:
We note that one of the amendments to Directive 2004/109/EC (the Transparency Directive) by Directive 2013/50/EU (the Amending Directive) relates to the definition of “issuer”. Recital 18 of the Amending Directive states: “In order to clarify the treatment of non-listed securities represented by depository receipts admitted to trading on a regulated market and in order to avoid transparency gaps, the definition of ‘issuer’ should be further specified to include issuers of non-listed securities represented by depository receipts admitted to trading on a regulated market”. Accordingly, the Amending Directive revised the definition of “issuer” in Article 2(1)(d) of the Transparency Directive as follows: “‘issuer’ means a natural person, or a legal entity governed by private or public law, including a State, whose securities are admitted to trading on a regulated market. In the case of depository receipts admitted to trading on a regulated market, the issuer means the issuer of the securities represented, whether or not those securities are admitted to trading on a regulated market.”

However, Article 9(1) of the Transparency Directive specifically describes the major shareholder notification obligation as applying in respect of “an issuer whose shares are admitted to trading on a regulated market and to which voting rights are attached.” Therefore, if an issuer has shares admitted to trading on a regulated market, the major shareholder notification rules apply to holdings in that issuer. For completeness, we note that the definition of “shareholder” in Article 2(1)(e) of the Transparency Directive makes it clear that a holder of DRs is treated as a holder of the underlying shares represented by the DRs.

Question for clarification:
Whilst the general definition of “issuer” in Article 2(1)(d) of the Transparency Directive includes issuers of non-listed securities represented by DRs admitted to trading on a regulated market, the scope of Article 9(1) is limited to issuers with shares admitted to trading on a regulated market. As a DR is not itself a share, the fact that a DR may be admitted to trading on an EU regulated market does not, in itself, bring the issuer of the underlying shares represented by the DRs within the scope of Article 9(1) of the Transparency Directive. Our reading of Article 9(1) is that the major shareholder notification rules are not intended to apply to holdings in an issuer whose shares are not admitted to trading on a regulated market, even if DRs in respect of that issuer’s shares are admitted to trading on a regulated market. Please could you confirm this understanding?

ESMA Answer

24-10-2023

Original language

Answer provided by the European Commission in accordance with Article 16b(5) of the ESMA Regulation

Article 9(1) of the Transparency Directive 2004/109/EC[1] (TD) requires Member States to ensure that all shareholders, following the acquisition or disposal of shares of an issuer of shares admitted to trading on an EU regulated market, in the sense of Article 4(1), point 21, of Directive 2014/65/EU, and to which voting rights are attached, inform the issuer of the resulting proportion of voting rights they hold where that proportion reaches certain thresholds.

Considering that:

1. pursuant to Article 2(1)(e) TD[2] , persons that hold depository receipts are considered as “shareholders” of an issuer when they hold underlying shares represented by the depository receipts; and that

2. pursuant to Article 2(1)(d) TD[3] , “issuers” encompass issuers of the securities represented by the depository receipts, whether or not these securities are admitted to trading on an EU regulated market,

the holders of a depository receipt listed on an EU regulated market are subject to the provisions set out in Article 9(1) TD, including when the underlying shares of an issuer are not admitted to trading on an EU regulated market.

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1 Article 9(1) TD - Notification of the acquisition or disposal of major holdings - 1. The home Member State shall ensure that, where a shareholder acquires or disposes of shares of an issuer whose shares

are admitted to trading on a regulated market and to which voting rights are attached, such shareholder notifies the issuer of the proportion of voting rights of the issuer held by the shareholder as a result of the acquisition or disposal where that proportion reaches, exceeds or falls below the thresholds of 5 %, 10 %, 15 %, 20 %, 25 %, 30 %, 50 % and 75 %. […].

2 Article 2(1)(e) TD: "shareholder means any natural person or legal entity governed by private or public law, who holds, directly or indirectly: (i) shares of the issuer in its own name and on its own account; (ii) shares of the issuer in its own name, but on behalf of another natural person or legal entity; (iii) depository receipts, in which case the holder of the depository receipt shall be considered as the shareholder of the underlying shares represented by the depository receipts".

3 Article 2(1)(d) TD: "'issuer' means a natural person, or a legal entity governed by private or public law, including a State, whose securities are admitted to trading on a regulated market. In the case of depository receipts admitted to trading on a regulated market, the issuer means the issuer of the securities represented, whether or not those securities are admitted to trading on a regulated market".