European Association of Public Banks
– European Association of Public Banks and Funding Agencies AISBL –

Committee of the European Securities Supervisors (CESR)
Corporate Finance Standing Committee
11-13, avenue de Friedland
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– submitted online via www.cesr.eu –

Ref.: CESR/09-1215b

31 March 2010

EAPB comments the CESR proposal
to extend major shareholding notifications
to instruments of similar effect to holding shares and entitlements to acquire shares

The EAPB welcomes the discussion on extending the present major shareholding notification obligations to instruments of similar effect. The various national legislations are not consistent. There is a need for pan-European provisions for this kind of notifications. However, the reasoning for a general catchall clause does not appropriately consider the need for legal certainty. The consequence that infringements against the notification obligation might lead to a loss of the voting rights and a monetary fine necessitates sufficiently defined facts. The addressee of the norm must be able to understand without a doubt which financial instruments must be disclosed. More information does not necessarily lead to more transparency.

Answers to questions

Q1. Do you agree with CESR's analysis of the issues raised by the use of instruments of similar economic effect to shares and entitlements to acquire shares?

A notification obligation for such financial instruments of similar economic effect would generally be beneficial. However, the assumption that it is likely that an investor with a significant economic long interest will always seek to influence the issuer is disputable. Other financing strategies and the hedging of positions might be a valid reason as well for the investing decision.

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Q2. Do you agree that the scope of the Transparency Directive needs to be broadened to address these issues?

In its present version the TD does not capture such financial instruments as contracts for difference, equity swaps and cash settled call options. The scope of the directive should be adjusted.

Q3. Do you agree that disclosure should be based on a broad definition of instruments of similar economic effect to holding shares and entitlements to acquire shares without giving direct access to voting rights?

We are of the opinion that a broad definition does not provide the necessary legal certainty. The rule of certainty of law demands that the norm must be sufficiently precise for the addressee to understand which conduct is forbidden, which instructions the law contains and which consequences an infringement will have. This does not seem to be the case if a broad definition applies. The necessary legal certainty could be reached through a two-tiered regulation. The specification, which financial instruments must be disclosed, would take place on what is now level 2 by the future European Securities and Markets Authority (ESMA).

We would not deem „writing put options" as notifiable in this context. The seller of a put option has the obligation to acquire the tendered shares and cannot influence this acquisition. Apart from that the disclosure obligation of the purchase of a put option would lead to a double disclosure of the ownership of the underlying shares. Furthermore, the writing of a put option signifies a short position in terms of accounting that must be calculated as a long position in shares which would not be systematically adequate.

We also deem the foreseen disclosure obligation of baskets problematic. It is doubtable if influence on a company can be gained by the purchase of a basket. Plus, the composition and the weighting of a basket should be difficult to display.

Should a broad definition continue to be considered, unintended consequences could be corrected by adjusting the legal consequences. Especially the creeping control of a target company must be avoided. This could be reached if an infringement of the disclosure obligation comes along with a loss of the voting rights which had been acquired through the specific financial instrument. It would be made impossible to gain influence over a target company this way. Those who infringe the disclosure obligation but never had the intention to exercise influence would not be substantially disadvantaged by losing their according voting rights.

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Q4. With regard to the legal definition of the scope (paragraphs 50-52 above), what kind of issues you anticipate arising from either of the two options? Please give examples on transactions or agreements that should in your view be excluded from the first option and/or on instruments that in your view are not adequately caught by the MiFID definition of financial instrument.

No comment.

Q5. Do you think that the share equivalence should be calculated on a nominal or delta-adjusted basis?

A disclosure obligation on a nominal basis is preferable. A calculation on a delta-adjusted basis might display the actual value of the financial instrument, since the delta is oriented at the base value and its volatility. It could be recalculated daily how many shares and voting rights can be acquired through the financial instrument. It remains doubtful, however, if it increases the transparency of the capital market. A delta-adjusted calculation would lead to a high number of notifications because of the daily volatility. The market would be flooded with notifications. A notification system on a delta-adjusted basis would also signify a substantial effort since existing notification systems could not be used. A valuation of the financial instrument on a nominal basis would avoid these disadvantages. In this case it would have to be accepted that the notification only reflects one concrete situation.

Q6. How should the share equivalence be calculated in instruments where the exact number of reference shares is not determined?

No comment.

Q7. Should there be a general disclosure of these instruments when referenced to shares, or should disclosure be limited to instruments that contractually do not preclude the possibility of giving access to voting rights (the 'safe harbour' approach)?

The safe harbour approach does not seem to be appropriate in this context, since the content of the treaty can always be adjusted. The notification itself should contain a specific note that the financial instrument had not been acquired to exercise influence.

Q8. Do you consider there is a need to apply existing TD exemptions to instruments of similar economic effect to holding shares and entitlements to acquire shares?

We support extending the existing exemptions from the disclosure obligation in the TD, for example those for holdings in the trading book and for market-makers.

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Q9. Do you consider there is need for additional exemptions, such as those mentioned above or others?

The exemption for client-serving transactions and the exemptions for accounting purpose should be regulated as well if a disclosure obligation for financial instruments is introduced. The exemption for client-serving transactions is of special importance for the credit services sector.

Q10. Which kinds of costs and benefits do you associate with CESR's proposed approach?

Linking the financial instruments with the notification systems would lead to higher costs.

Q11. How high do you expect these costs and benefits to be?

The costs cannot be calculated at the moment. they should, among others, depend on which financial instruments finally must be disclosed. A delta-based calculation obligation would certainly lead to higher costs, since the notification systems would need to be adjusted.

Q12. If you have proposed any exemptions or have presented other options, kindly also provide an estimate of the associated costs and benefits.

No comment.

Should you have any questions, please do not hesitate to contact us.

Kind regards,

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The European Association of Public Banks (EAPB) represents the interests of 34 public banks, funding agencies and associations of public banks throughout Europe, which together represent some 100 public financial institutions. The latter have a combined balance sheet total of about EUR 3,500 billion and represent about 190,000 employees, i.e. covering a European market share of approximately 15%.

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