Mandate to CESR for Technical Advice on Possible Implementing Measures Concerning the Transparency Directive

Response to CESR's Call for Evidence

Ref: CESR/04-284

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Deutsches Aktieninstitut e.V. is the association of German exchange-listed stock corporations and other companies and institutions which are interested in the capital markets with a particular focus on equity. Its most important task is to promote the acceptance for equity among investors and companies.

Our comments to CESR's Call for Evidence are as follows:

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

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

Item 1 Maximum length of "the usual short settlement cycle"

We agree that the "T+3 principle" is appropriate for the exemption from the notification requirements in relation to shares held for the purposes of settlement and clearing (Article 9 (3a) of the Transparency Directive).

Item 2 Market maker exemption

The relevance of "control mechanism" and "appropriate measures" against market makers under the Transparency Directive is unclear. Such measures should not only be consistent with the Directive on Financial Instruments Markets (FIMD) but also limited to measures provided for under the FIMD which establishes the supervisory framework for investment firms acting as

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market makers. By contrast, under the Transparency Directive it is only required to establish in which circumstances market makers are exempted from the notification requirements as provided for in Article 9 (3b). If a market maker does not comply with sub-paragraph (a) or, in particular, sub-paragraph (b), then it may not rely on this exemption and any failure to make a notification required would constitute a violation of the notification requirements set forth in Article 9. Under the Transparency Directive, there is therefore no room for any other regulatory measures or control mechanisms. Rather, CESR may wish to clarify in which circumstances the criteria set forth in sub-paragraph (b) of Article 9 (3b) ("neither intervene in the management of the issuer nor exert any influence on the issuer") are fulfilled.

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

Item 2 Relevant Member State to determining the trading days

For determining the trading days, the home Member State of the issuer should be relevant. In general, the primary listing of an issuer is in its home Member State so that the definition of trading days is in line with the trading dates which are relevant for the stock exchange on which the issuer is primarily listed. In the case that the issuer is listed on more than one stock exchanges in its home Member State, the trading days of the main financial market in that member state should be relevant. By contrast, if the Member State in which an issuer is "listed" were relevant for determining the trading days, this would lead to uncertainties in the case of more than one listing in various member states. Finally, it should be not too burdensome for the relevant investors (i.e. those which hold a significant shareholding of 5% ore more in a stock corporation) to find out which days are trading days in the home Member State of the issuer.

Item 3 Persons obliged to make a notification

Given that any such person referred to in item 3 is subject to the notification requirements, each person should, in our view, be responsible for its own notification. That means that in general both the shareholder and the persons referred to in Article 10 should be required to make the relevant notification. Any such notification should however clearly state in which capacity the relevant person makes the notification in order to make clear that, for instance, a person referred to in Article 10 (a), which is entitled to exercise voting of rights in the amount of 10% together with shareholder X, makes the notification in relation to shares held by shareholder X. Otherwise, the issuer, the relevant authority and the public could be misled to the effect that both hold together 20% and not only 10%.

Item 4 Circumstances under which the relevant person should have learnt of the acquisition or disposal of shares

It may be advisable that CESR provides guidance under which circumstances a company, corporate or other legal entity should have learnt of the acquisition or disposal of shares. Obviously, if the management board becomes aware of such facts, then these criteria are fulfilled. In addition, if an employee to whom the administration and sale of shareholdings is delegated has learnt, or should have learnt, of an acquisition or disposal of shareholdings, this should also trigger the notification requirement. Therefore, the management board of such entity would need to ensure by means of its internal compliance procedures that the steps required are taken in a timely manner.

Item 6 and 7 Financial instruments and formal arrangements

In our view, the definition of financial instruments established under the FIMD is not appropriate for determining the scope of Article 11a of the Transparency Directive. Only a very limited number of the financial instruments set out in Annex I, C of the FIMD may be of relevance under Article 11a of the Transparency Directive.

Clearly, cash settled derivative instruments linked to shares may not trigger a notification requirement since a holder of such instruments is not entitled to acquire the underlying shares.

Furthermore, Article 11a of the Transparency Directive provides that the notification requirement may only be triggered if the relevant financial instruments are linked to shares which are already issued. Thus, convertible and exchangeable bonds and other instruments which grant an option to acquire shares which will be issued only as a result of a capital increase are not covered by Article 11a of the Transparency Directive.

In addition, we believe that exchange traded options should not trigger a notification requirement. These financial instruments do not include a formal agreement between the buyer and the seller. Rather, they are traded in accordance with the standard terms of the relevant stock exchange on the basis of mere trade confirmations. The same should apply to warrants and similar financial instruments which are traded on a stock exchange.

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

Item 1 Clarification of the nature of the auditors' review

As suggested in our comments to the Commission's draft of the Transparency Directive, the International Standard on Review Engagements (ISRE) 2400 "Engagements to Review Financial Statements" (formerly ISA 910) should be taken into account at level 2 for determining the nature and scope of the

auditor's review. The European review standards for half-yearly financial reports should not differ from the international auditing standards. We therefore agree that ISRE 2400 should be considered for determining the scope and nature of the auditor's review.

Item 2 Minimum content of half-yearly reports not being prepared in accordance with international standards

The minimum content of half-yearly reports should be harmonised in order to ensure comparability within the EU. Such harmonisation can be effected through a small list of minimum content items based on a few key elements of IAS 34 without however imposing too many burdens on this type of issuers which, in principle, are not obliged to prepare any condensed set of financial statements in accordance with IAS 34.

Item 3 "Major related parties transactions" as part of an interim management report

With respect to related parties and related party transactions, this expression should be defined in a consistent manner in both European law and international accounting standards. Any inconsistency between these rules would not be justified and would, more importantly, confuse issuers and market participants. The level 2 measures should therefore refer to IAS 24 ("Related Party Disclosures") which contains a definition of such transactions. The same approach was taken in Annex I, 19 of the Prospectus Regulation (EC) No. 809/2004 which refers to Regulation (EC) No. 1606/2002.

CESR may, however, wish to clarify whether the term "major" should be construed in the same manner as the term "material" as used in IAS/IFRS.

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

With respect to equivalent requirements for third country issuers, we suggest that CESR establish the scope and objective of each item referred to in paragraph 3.4 of the Call for Evidence. On this basis, it can then be determined whether the relevant third country regulations meet the equivalency test.