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Bundesverband Investment
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Mr. Carlo Comporti
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CESR proposal to extend major shareholding notifications to instruments of similar economic effect to holding shares and entitlements to acquire shares (Ref.: CESR / 09-1215b)

Dear Mr. Comporti,

BVI¹ appreciates the opportunity to contribute to CESR's consultation on the proposed extension of major shareholder notifications to instruments of similar economic effect to holding shares and entitlements to acquire shares. The recent occurrences of "creeping acquisitions" in the capital market have been giving cause for serious concern regarding instruments which do not give a right to acquire but "granting holders a special proximity to the physical share" and a "de facto control over the voting rights attaching to the shares held as hedge".

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?

We agree with CESR's analysis of the economical impact of financial instruments that create economic exposure without giving potential access to

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¹ BVI Bundesverband Investment und Asset Management e.V. represents the interests of the German investment fund and asset management industry. Its 84 members currently manage assets of some € 1.7 trillion, both in investment funds and mandates. BVI's ID number in the EU register of interest representatives is 1575282143-01. For more information, please visit www.bvi.de.

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voting rights. It will be challenging, however, to adjust the general principles of major holdings disclosure in a manner that combined positions such as long/short forwards vis-à-vis short/long direct holdings are being reflected in a meaningful way.

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

Financial instruments concerned are similarly qualified interfering with efficient pricing and sufficient transparency in the capital markets. Consequently, the scope of the Transparency Directive needs to be broadened to cover economical holdings without access to voting rights as well.

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

We agree. A broad definition could help reducing potential cases of circumvention of the disclosure requirements. It should be clear, however, that investment funds are not to be regarded as “instruments of similar economic effect to holding shares and entitlements to acquire shares”. Just like a fund management company is legally prevented from gaining controlling influence on portfolio companies, the funds themselves can not be used for building up significant holdings in voting rights. Given that the fund investors usually have no information on the actual composition of the fund, they must not be burdened with disclosure of (potential) voting rights his fund investment might represent.

Similarly, it would be disproportionate to add derivatives or other financial instruments which give exposure to an index to the list of “instruments of similar economic effect”. Realistically, such instruments can not be used to obtain creeping control over the company which are part of the index.

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.



We welcome the reference to the MiFID definition of financial instruments as a valuable step towards the harmonisation of the single financial market.

Option 1 would give appropriate consideration to transparency and simplicity as well the development of emerging products.

Option 2 can only guarantee the necessary legal certainty as long as the market has not created new instruments which should also be covered by the Transparency Directive according to the regime's purpose. Furthermore, transaction / agreement structures could be subject to manipulation attempts in order to avoid the disclosure requirements.

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

The share equivalence should be calculated on a delta-adjusted basis. The advantage of a delta-adjusted disclosure obligation is the more accurate indication of a holder's real economic exposure to the underlying shares. Furthermore, this approach considers the difference between a call option which is out-of-the-money by a significant margin and therefore has little real economic value as opposed to a call option over the same number of shares which is in-the-money and has a real economic value. Only the second case affects the legislative purpose of the Directive and should be covered by its scope.

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

These trades should be considered at a fixed level of e.g. 30% of total shares issued with voting rights. The burden of proof in terms of a lower level of share equivalence should lie with the holder addressed by the notification duty. Thus the holder may have an economical incentive to report a correct share equivalence amount.

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 general disclosure would ensure transparency to all market participants, comply with the simplicity approach of the current Transparency Directive and lead to a reduction of potential attempts to evade the disclosure requirements.

Although the limitation to instruments that contractually do not preclude the possibility of giving access to voting rights would reduce compliance costs, it does not address appropriately the concerns of corporate issuers regarding the increased use of undisclosed economic holdings. Under the “safe harbour” approach, the holder may still build up a position which economically enables him to get access to underlying shares and / or voting rights. Furthermore, holders may change later their intention to act outside the “safe harbour” policy. This means that the holder could delay the date on which the disclosure of a significant holding shall take place.

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?

Existing TD exemptions should be applied to instruments granting economic holdings which allow influencing the company's management as well. There is no need for different handling of those instruments. As a result, BVI is supportive of a straightforward and simple regulatory framework.

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

There is no need for additional exemptions for the reasons mentioned above.

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

On the plus side, the proposal will lead to an effective ban of clandestine creeping attacks on corporate issuers. Creeping may lead to huge costs to financial markets as evidenced by Porsche's acquisition of undisclosed VW stocks. This case caused an extraordinary index adjustment with the resulting consequence of a permanent DAX distortion of estimated 80 %.



On the other hand, additional administration costs for collecting and reporting data to the supervisory authority should be carefully considered. Compliance with the requirements of the Transparency Directive would require significant adjustments of IT systems and the underlying work flow. The actual costs of this can only be evaluated after the scope and content of the envisaged extension of the Prospectus Directive.

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

The additional costs can not be ascertained yet, but it is likely that the transparency requirements would particularly increase the expenses for fund accounting, depending on the scale of transparency requirements applying for each relevant financial instrument.

We hope that our comments are helpful for CESR's work on improving the Transparency Directive and remain at your disposal for any further discussion.

Yours sincerely

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