ZENTRALER KREDITAUSSCHUSS

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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 Hoogervorst,

thank you very much for the opportunity to comment on the CESR proposal to extend major shareholding notifications to instruments of similar economic effect to holding shares and entitlements to acquire shares. Please find enclosed our comments. If you have any questions please do not hesitate to contact us.

Yours sincerely,
For
ZENTRALER KREDITAUSSCHUSS
Deutscher Sparkassen- und Giroverband

p.p. Dr. Thomas Schürmann

p.p. Patrick Büscher

Enclosure

ZENTRALER KREDITAUSSCHUSS

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Response to the CESR Consultation Paper on

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

31 March 2010

I. General remarks

The Zentraler Kreditausschuss (ZKA) has advocated transparency concerning shareholdings for a long time. We therefore welcome CESR´s decision to address current cases described in the consultation paper in which financial instruments were used to build up holdings in listed companies. The resulting proposal to extend the existing notification requirements of the Transparency Directive with the aim of covering instruments of similar economic effect to holding shares and entitlements to acquire shares deserves recognition too.

In individual member states of the EU as well as in Switzerland, Hong Kong and Australia these cases have already led to national legislation. The solutions described in the section entitled "National initiatives" do not reveal a uniform picture. We, therefore, hope that the consultation results in greater convergence of these provisions. Furthermore, we believe that a uniform, pan-European regulation of shareholding notifications is preferable to national solutions.

Insofar as the consultation paper already contains specific considerations for such regulation, CESR´s statements which call for a general definition do not - in our opinion - sufficiently take into account the necessity of legal certainty. The fact that violations of the notification requirements can be sanctioned with the loss of voting rights and/or fines means that a sufficiently specific definition is required which enables the addressees to understand clearly which financial instruments must be notified. To this extent a general regulation at level 1 and a further specification at level 2 could be undertaken, for example with exhaustive lists of instruments that are subject to the obligation to notify (so called "black list") and those that are not (so called "white list"). It should also be noted that more information does not necessarily mean greater transparency. With this in mind, we would like to comment on the questions as follows:

II. Comments on the 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?

Yes. We also fundamentally support the proposal to extend major shareholding notifications to instruments of similar economic effect to holding shares and entitlements to acquire shares (No. 38).

On the other hand, it is questionable whether the assumption formulated by CESR under Section 41, according to which it is likely that an investor with a significant economic interest is always in pursuit of legal control over the issuer, actually applies in this breadth. In our opinion, other considerations such as financing strategies and the hedging of transactions can also play a role in these cases.

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

Yes, we agree that the current version of the Transparency Directive does not cover instruments such as contracts for difference (CfDs), equity swaps, cash settled call options, etc. (No. 39). The scope of the directive should therefore be expanded accordingly. Hence, we consider CESR´s consultation as a preliminary step towards a revision of the Transparency Directive with the aim of covering such instruments.

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?

No. We believe that a general definition that subjects all instruments of similar economic effect to holding shares and entitlements to acquire shares to notification requirements does not provide the required legal certainty. In Germany, among other member states, the principle of legal clarity applies, according to which the addressees must be given sufficiently specific information about which types of actions are prohibited or which legal consequences are statutorily provided for and in what legal consequences any violation would result. This appears not to be the case for a general notification requirement for all instruments of similar economic effect to holding shares and entitlements to acquire shares. The required legal certainty could be achieved by means of a two-tier regulation. Level 1 would consist of a general description of the notification requirement. The precise specification of instruments that shall be notified could then take place at level 2 via the European Security and Markets Authority (ESMA). ESMA could, for example establish and maintain exhaustive lists of instruments that must be notified ("black list") and those that are exempt from this obligation ("white list"). Most of the instruments mentioned in Section 48 can then be listed in the black list.

In contrast to CESR, we do not consider "writing put options" to be subject to notification requirements. The seller of a put option does not own the right to call shares, but rather has the obligation to purchase the shares delivered to him. Thus, he has no influence on the purchase of the shares. Furthermore, notification requirements regarding the acquisition of a put option would duplicate the notification of the underlying shares. Moreover, the writing of a put option technically represents a short position in accounting, which would then have to be calculated as a long position in shares. In our opinion, such an approach does not appear to be coherent.

We also critically view the proposed notification requirement regarding baskets. First, it is doubtful whether influence over a company could be gained via the acquisition of a basket. In addition, it would be difficult to describe the weighting and the composition of the basket correctly.

If a broad definition is nevertheless still desired, unintended consequences could be corrected by adapting the legal consequences accordingly. The focus in this case lies on preventing 'creeping control'. This could be achieved by ensuring that violations of the notifications requirements for financial instruments are always sanctioned by the loss of the voting rights that can be acquired when exercising the instrument. This way, those who want to use such instruments to acquire or exercise influence in a company would lose their voting rights if they violate the notification requirement. As a result the goal of being able to exert influence on the company would be thwarted. Anyone who has violated a notification requirement but never intended to exert influence would not be substantially sanctioned by a corresponding loss of voting rights.

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.

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

We believe that a notification requirement calculated on a nominal basis is preferable. A delta-adjusted calculation reflects the actual value of the financial instrument in each case, as the

delta is oriented to the underlying and its fluctuations. Thus, the number of shares and voting rights that could be acquired via the financial instrument could be recalculated on a daily basis. Whether this would increase transparency in the capital market is questionable, as due to daily volatility a delta-adjusted calculation could - under certain circumstances - lead to a notification density that would flood the market with a multitude of reports. In addition, a delta-adjusted notification system would entail considerable expense, since it would not be possible to fall back on currently existing notification systems. Both the density of the notification and its expense would be reduced if the financial instrument in question was rated on a nominal basis. In this case it would have to be taken into account that the notification would reflect only one specific situation, for example the situation at the end of a contract when an option is exercised and the shares then acquired. In our opinion, this is the notification relevant to the capital market, as it shows the market whether the acquirer of the option would reach a notification threshold if he exercised it.

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

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 appear to be appropriate in this context, as the contractual terms can always be adapted. It must be considered whether the disclosure itself should contain a corresponding remark that the financial instrument was not acquired for the purpose of exerting 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?

Yes. We advocate an expansion of the exemptions from the notification requirements which already exist in the TD (Article 9, paras 3-6), such as the exemptions for market makers and for voting rights held in trading books.

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

Yes. The exemptions specified in paragraphs 66 and 67 should likewise be standardised when a notification requirement is introduced for financial instruments. From the viewpoint of the banking industry, the exemption for client-serving transactions is particularly important.

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

Integrating the specified instruments into the reporting systems will result in costs.

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

It is currently not possible to estimate the costs. Among other things, the costs will depend on which instruments are to be notified. A delta-adjusted calculation would certainly increase costs, as the notification systems would have to be adapted accordingly.

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

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