German Banking Industry Committee

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Comments on ESMA's Consultation Paper on Draft Regulatory Technical Standards on major shareholdings and indicative list of financial instruments subject to notification requirements under the revised Transparency Directive (JC/CP/2014/03)

Dear Sir or Madam

the German Banking Industry Committee (GBIC) is grateful for the opportunity to comment on ESMA's Consultation Paper on Draft Regulatory Technical Standards on major shareholdings and indicative list of financial instruments subject to notification requirements under the revised Transparency Directive (JC/CP/2014/03).

Please find enclosed our comments on this consultation.

If you have any questions, please do not hesitate to contact Dr. Schröder.

Yours faithfully,
on behalf of the German Banking Industry Committee
National Association of German Cooperative Banks

by proxy

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Comments

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Berlin, 14-05-28

The **German Banking Industry Committee** is the joint committee operated by the central associations of the German banking industry. These associations are the Bundesverband der Deutschen Volksbanken und Raiffeisenbanken (BVR), for the cooperative banks, the Bundesverband deutscher Banken (BdB), for the private commercial banks, the Bundesverband Öffentlicher Banken Deutschlands (VÖB), for the public-sector banks, the Deutscher Sparkassen- und Giroverband (DSGV), for the savings banks finance group, and the Verband deutscher Pfandbriefbanken (vdp), for the Pfandbrief banks. Collectively, they represent more than 2,000 banks.

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Comments on ESMA's Consultation Paper on Draft Regulatory Technical Standards on major shareholdings and indicative list of financial instruments subject to notification requirements under the revised Transparency Directive (JC/CP72014/03) dated 28 May 2014

I. General remarks

Generally, the points of discussion raised in ESMA's consultation paper are reasonable and the answers provided therein quite well presented.

With respect to client-serving transactions, we welcome the fact that ESMA offers two options to fulfil the mandate and leaves the Regulatory Technical Standard open at this point. We are strongly in favour of option 2, because we are convinced that the exemption for client-serving transactions only makes sense if it is independent of existing exemptions, i.e. extends to situations where the existing exemptions do not yet apply under the existing directive.

II. Specific comments

On the Draft regulatory technical standard on the calculation method of the 5 % threshold referred to in the Article 9(5) and (6) exemptions (III.I)

Q1: Do you agree that the trading book and the market maker holdings should be subject to the same regulatory treatment regarding Article 9(6b) RTS?

We understand the reference to Article 9(6b) RTS is meant to be a reference to Article 9(6b) of the Transparency Directive (2004/109/EC) as revised by Directive 2013/50/EC (hereinafter all references to the Transparency Directive (2004/109/EC) as revised by and thus including all changes made by Directive 2013/50/EC shall be to the "**Transparency Directive**"). On this basis we agree with the proposal in the Consultation Paper, according to which the principles to calculate the 5% threshold as part of the trading book and market maker exemptions should be applied in the same manner. However, this does nothing to alter the fact that the trading book exemption on the one hand and the market maker exemption on the other are two different types of exemption under the Transparency Directive, for which the shareholdings have to be calculated separately in each case. This is borne out not only by the fact that both exemptions are governed by two self-contained paragraphs, but particularly because the situations in which the exemptions apply differ from each other. A market maker does not have to report shareholdings which it holds in its capacity as market maker until the 10% threshold is exceeded, as prior to this a reporting obligation pursuant to Art.9(1) of the Transparency Directive is not triggered. The situation regarding the trading book exemption pursuant to Art. 9(6) of the Transparency Directive is different. According to this, a credit institution can indeed obtain voting rights so long as its holding is no higher than 5%. But as soon as the 5% threshold is exceeded, all shares held are taken into account and must be notified accordingly. The 5% threshold functions differently in each of the two exemption scenarios.

Q2: If not, please identify reasons and provide quantitative evidence for treating trading book and market making holdings differently?

No comments

Comments on ESMA's Consultation Paper on Draft Regulatory Technical Standards on major shareholdings and indicative list of financial instruments subject to notification requirements under the revised Transparency Directive (JC/CP72014/03) dated 28 May 2014

Q3: Do you agree with the ESMA proposal of aggregating voting rights held directly or indirectly under Articles 9 and 10 with the number of voting rights relating to financial instruments held under Article 13 for the purposes of calculation of the threshold referred to in Article 9(5) and (6)? If not, please state your reasons.

Yes, based on Art. 13a of the Transparency Directive we share ESMA´s view that voting rights held directly or indirectly according to Art. 9 and 10 of the Transparency Directive and the "fictitious" voting rights resulting from financial instruments held under Art. 13 of the Transparency Directive should be aggregated. Such aggregation avoids circumvention by splitting a position into instruments falling into different categories. Moreover, the aggregation of voting rights via various notification triggers is a typical approach by lawmakers and regulators in European Member States which already provide an obligation to notify financial instruments with similar economic effect to holding shares and entitelments to acquire shares (e.g. Germany). However, this does not mean that the exemption cases in Art. 9(5) and (6) of the Transparency Directive are to be aggregated among themselves. Cf. also the answer to question 1.

Q4: Can you estimate the marginal cost of changing your general major shareholding disclosure system for the purposes of notification of trading book and market making holdings, i.e., having different buckets for the purposes of the exemptions? Please distinguish between one-off costs and on-going costs.

No comments

Q5: Do you agree that, in the case of a group of companies, notification of market making and trading book holdings should be made at group level, with all holdings of that group being aggregated (Article 3(1))?

Yes, the aggregation of reportable transactions at group level (vertical aggregation) is in line with the spirit and purpose of the Transparency Directive. In this context, it is, for the purpose of harmonising reporting obligations, also appropriate to refer to the Accounting Directive (2013/34/EU) for the determination of companies' group affiliation and not to establish a self-contained definition for "group" for the purposes of reporting obligations under the Transparency Directive.

It should be clarified, furthermore, that the regulations should apply to all subsidiaries, regardless of whether they are domiciled in the European Economic Area or not.

Q6: Do you agree that an exemption to notify at group level can apply if an entity meets the independence criteria set out under paragraph 72(Option 2)?

Yes, the interpretation in Option 2 (paragraph 72) of Art. 9(6b) of the Transparency Directive in conjunction with Art. 12(4) and (5) of the Transparency Directive is to be preferred. It takes into account that voting rights that can be exercised independently from the parent undertaking are, with regard to the trading book and market maker exemptions, not to be aggregated at group level, as in these cases the influence of the parent company is ruled out.

Again, we would like to mention that the wording of Art. 9(6b) of the Transparency Directive imposes the requirement merely that the exemptions in Art. 12(4) and (5) of the Transparency Directive are to be taken into account in specifying the method of calculation. However, this does not mean that the exemptible cases mentioned are to be restricted.

Q7: Please provide an estimate on how many times a year would your group have to report a major disclosure under the current regime in comparison to Option 1. Please include an estimate of the one-off or on-going costs involved.

No comments

Q8: Do you think that Option 2 poses any further enforceability issues than Option 1? If yes, what kind of issues can you foresee arising out of it? Can you propose an alternative approach?

No comments

On the Draft regulatory technical standard on the method of calculation the number of voting rights referred to in Article 13(1a)(a) in the case of financial instruments referenced to an basket of shares or an index (III.II)

Q9: Do you agree with the proposal that financial instruments referenced to a basket or index will be subject to notification requirements laid down in Article 13(1a)(a) when the relevant securities represent 1 % or more of voting rights in the underlying issuer or 20 % or more of the value of the securities in the basket/index or both of the above?

The Transparency Directive classifies baskets of shares and indexes as reportable instruments, although both are little suited to build up any significant holdings in an enterprise. This should be taken into account when ESMA exercises its mandate to establish minimum thresholds for holdings of individual shares in the share baskets and indices. In other words: the build up of a significant holding via a basket of shares or an index is particularly unlikely, if the shares of a particular issuer are only of a small weighting in one of the two mentioned instruments. Conversely, only a really significant weighting of an individual share, if at all, appears to justify the conclusion that a holding can be built up via a basket of shares or an index instrument. A threshold of 50% appears to be practical. In any case, the threshold should on no account be lower than 20%, as proposed.

Because of the same reasons the proposed threshold of 1%, which is only implemented in two member states, is not appropriate.

Q10: Are there any other thresholds we should consider?

No. Please refer to our answer to question no. 9.

Q11: Please estimate the number of disclosures you would have to make per year should the above mentioned thresholds be adopted. Please also provide an estimate of the compliance costs associated with the disclosure (please distinguish between one-off and on-going costs).

No comments

Q12: Do you agree that a financial instrument referenced to a series of baskets which are under the thresholds individually but would exceed the thresholds if added and totalled should not be disclosed on an aggregated basis?

Yes. In view of our answer to question 9 such an instrument appears all the more unsuited to build up a significant holding.

On the Draft regulatory technical standard on the methods of determining delta for the purposes of calculating voting rights relating to financial instruments which provide exclusively for a cash settlement (III.III.)

Q13: Do you agree that our proposal for the method of determining delta will prevent circumvention of notification rules and excessive disclosure of positions? If not, please explain.

Yes, we assume that the proposed delta calculation will not lead to circumvention of notification rules. To what extent unnecessary notifications will be avoided is less clear cut. The particular fact that the netting of positions is not allowed, may in certain circumstances result in a large number of notifications, which do not represent the actual possible holdings situation. At any rate, we are of the opinion that the proposed delta calculation will lead to better results than the method suggested in Option 1 as it avoids the determination of a "fictious" delta based on a standardised formula that in fact does not reflect the actual economic exposure under the respective instrument. Also prescribing a specific formula would not only require continuous updating. Rather, these formulas would necessarily always be lagging behind the development of the market and, as a result, leave room for circumvention.

Q14: Do you agree with the proposed concept of "generally accepted standard pricing model"?

Yes, we agree with the concept of a "generally accepted standard pricing model". In particular, the parameters mentioned, such as interest rate, dividend payments, time to maturity, volatility and price of underlying share, which should flow into the calculation are suited to value a large number of financial instruments in an appropriate manner and without any great difficulty. And even with highly complex or "exotic" products the proposed principles for delta calculation should yield appropriate results.

The introduction of a delta of 1 for financial instruments with a "linear, symmetric pay-off profile" is appropriate, since it is mathematically correct.

The principle-based approach, moreover, enables the banks to fall back on their calculation methods to determine the delta of an instrument already established under CRD IV and CRR. In this way, the effort to implement the new notification regulations becomes more easily manageable.

Draft regulatory technical standard on client-serving transactions (III.IV)

Before we answer the question, we would like to look at on the analysis made in paragraphs 110 to 122. In our opinion, with the introduction of new reporting requirements for financial instruments with similar economic effect to holding shares and entitlements to acquire shares., the decision to create for these reporting requirements also a new self-contained exemption provision for client-serving transactions was made at Level 1. The template for this appears to have been the British regulation DTR 5, item 5.3.1. of the FCA Handbook. There too the client-serving transaction exemption applies exclusively to cash-settled derivatives transactions, which arise from client business. This takes into account the fact that in these cases the clients, as holders of the instruments, continue to be under the reporting obligation and thus the desired transparency is generally achieved. Additional notifications by the credit institutions would possibly give a false picture of the holding positions. In any case, with the client-serving transaction exemption the notification of irrelevant or less relevant transactions should for the purposes of Art. 13 of the Transparency Directive be obviated. Under no circumstances, however, can Art. 13(4) of the Transparency Directive be interpreted as a limitation of the already existing exemptions. The wording is clear. The already existing exemptions (Art. 9(4), (5) and (6) as well as 12(3), (4) and (5) of the Transparency Directive) should apply analogously to the new notification requirements too. An addition is the client-serving transaction exemption, which applies exclusively to reportable cash-settled derivatives transactions. Regulatory Technical Standards affecting client-serving transactions may thus be issued only on the basis of Option 2 (paragraph 138).

Q15: Are these three types of client serving exemptions all appropriate in terms of avoiding excessive or meaningless disclosures to the market? Please provide quantitative evidence on the additional costs borne by financial intermediaries should any of these exemptions not be adopted.

Yes. We too are of the opinion that the three types of client-serving-transaction exemptions will avoid superfluous notifications.

There are currently no data available that enable a substantiated cost estimate.

Q16: Can these three types of client-serving exemption allow for a potential risk of circumvention of major shareholdings' disclosure regime?

No. Ulterior motives per se cannot be implied. If a circumvention risk is seen with the client itself, this must not lead to further notification requirements for the banking industry.

Q17: Do you agree with our analysis that applying the current exemptions can address certain notification requirements for cash-settled financial instruments introduced by Article 13(1)(b)?

We concur with ESMA insofar as out of the existing exemptions only the trading book exemption, and this one only within limits, can have an impact on the obligation to notify cash-settled financial instruments. Hence, the result is that the current exemptions are inadequate to obviate irrelevant notifications. More on this point in our remarks under Q18.

Q18: In your opinion, is the application of current exemptions sufficient to achieve the aim of this provision (i.e. avoiding meaningless notifications to the market)?

No. For the most part, the current exemptions do not affect client transactions at the outset. They are designed exclusively for the hitherto current notification obligations for share transactions and certain (fungible) financial instruments for the purpose of acquiring shares. These do not include cash-settled financial instruments. Thus, in the case of derivatives transactions motivated by client business, neither the trading book nor the market maker exemption (Art. 9(4) (5) of the Transparency Directive) will bring about a reduction in unnecessary notifications from the outset. Here, there is room for a new stand-alone exemption regulation for client-serving transactions for principally reportable cash-settled transactions. These financial instruments are generally based on client transactions. Classical cases such as hedging transactions are mentioned in paragraph 110. These transactions, principally reportable pursuant to Art. 13 of the Transparency Directive but for the notification of which also the client is as a rule obliged, should be covered by the new exemption. Otherwise, in a large number of cases, there would be duplicate notifications. This would ultimately run counter to the law maker's objective of the new notification requirements - to create more transparency.

Q19: Do you agree that the client-serving exemption should cover MiFID authorised entities as well as a natural or legal person who is not itself MIFID authorised but is in the same group as a MiFID authorised entity and is additionally authorised by its home non-EU state regulator to perform investment services related to client-serving transactions? Can you foresee any additional cost in case the exemption does not also cover non-EU entities within the group? If yes, please provide an estimate?

Yes.

Q20: Do you think that the proposed methods of controlling client-serving activities are effective? Do you envisage other control mechanisms which could be appropriate for financial intermediaries who wish to make use of the exemption?

Yes. We consider other control mechanisms unnecessary.

Definition and scope of the indicative list of financial instruments (III)

Q21: When does a financial instrument have an "economic effect similar" to that of shares or entitlements to acquire shares? Do you agree with ESMA's description of possible cases?

Yes, we go along with the opinion voiced by ESMA (paragraphs 178 – 180). The situation described in paragraph 179, in which the credit institution hedges its position with shares, which it will offer its client on contract maturity, is certainly standard practice. It ultimately results in a cash-settled financial instrument having an economic effect similar to the purchase of shares.

Q22: Do you think that any other financial instrument should be added to the list? Please provide the reasoning behind your position.

No. We currently regard the list, which is indeed not exhaustive, to be adequate. The list could, however, be supplemented with a paragraph of "non-reportable" instruments. This would in our opinion include, for example, instruments with a maturity within the usual time period for the publication of a position (four trading days accordingly to Art. 12(2) of the Transparency Directive plus three trading days according to Art. 12(6) of the Transparency Directive, i.e. seven trading days in the aggregate), which should not trigger a notification requirement. Their publication would necessarily either have to be combined with or shortly followed by a reverse publication – which rather is misleading. This would particularly help avoiding unnecessary disclosures of underwriting that tend to irritate the market.

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