Deutsche Bank

Winchester House,
1 Great Winchester Street
London EC2N 2DB

Regulatory Affairs Department
tel. +44 (20)754 10716
tillie.rijk@db.com

CESR
11-13 Avenue de Friedland
75008 Paris
France

31 March 2010

Re: DB Response to Consultation on Major Shareholdings (Part 1)

Dear Sir, Madam,

Deutsche Bank appreciates the opportunity to respond to your consultation on extending major shareholding notifications to instruments of similar economic effect to holding shares and entitlements to acquire shares. Please find our detailed responses to your questions below. In answer to questions 10 and 11 we have prepared an impact assessment, which we have submitted separately.

In general, we agree with your analysis. Our main comments are:

- We strongly support the harmonisation of disclosure rules across the EU;
- As the UK FSA has already put in place sophisticated and well-working rules in this area - which many of the EU's larger firms are required to follow - we would prefer any pan-European rules to mirror the FSA's Disclosure Rules and Transparency Rules (DTR);
- New rules should not carry undue burdens and should be proportionate. An impact assessment should be done at the European level to demonstrate that the proposed disclosure rules actually address hidden stake-building and "creeping-in".
- We emphasise the need for an exemption for client facilitating trades as these go beyond the purpose of the objectives of this consultation paper. Also, the inclusion of true client positions would provide a distorted view to the market of the true holdings of financial institutions (as is recognised in the current FSA regime).

Specific 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?

- We generally agree with CESR's analysis. However, we emphasise that any new notification regime should address the purpose indicated in the consultation paper (CP), i.e. it should focus on potential takeover situations and "creeping-in".

  We feel an entry threshold of 10% should be implemented. This is a good indicator of a buyer wanting to obtain a relevant stake in voting rights through "creeping in" and represents the likelihood of gaining control via e.g. cash settled derivatives. In the interest of transparency, we favour a new, separate disclosure regime which – similar to Art. 13 para. 1 Transparency Directive 2004/109/EC – "TD"). – signals the derivative position to the market. I.e. an aggregate position of voting rights either directly held (Art. 9 TD) or indirectly held via physically-settled derivatives (Art. 13 TD) and via cash-settled derivatives with similar economic effect (new Art. 13a TD).

  We also feel that the requirement to notify instruments with similar economic effect should only apply if the holder is "pursuing strategic interest" in the issuer. In this regard, for example, the German legislator introduced a special disclosure regime for crossing the 10% threshold (cp. Sec 27a German Securities and Trading Act - WpHG).

To safeguard the disclosure regime while allowing for a high entry threshold, the sanctions set forth in national implementations of Art. 17 Takeover Directive 2004/25/EC of 21 April 2004 could be extended to enable the competent authority to prohibit a takeover bid which is launched after hidden stake-building was used in breach of the disclosure regime.

- CESR's analysis assumes that instruments of similar economic effect result in actual influence on voting. Involved parties should be aware that this implied assumption is not always a given: (a) in practice, hedging is not necessarily done through physical shares; (b) making use of the trading book exemption*,* by now, requires the holder of instruments to refrain from using voting rights or the financial instrument to influence the company (see Art. 9 para. 6 lit. b TD).

- The extension of disclosure notifications should prevent a loophole strategy of investors aiming to silently build a stake. At the same time, it should constrain the normal hedging business as little as possible and keep unnecessary notifications off the markets as this would not be in the interest of well-functioning capital markets*.*

- With regard to Case 2 mentioned in the consultation (Porsche/Volkswagen), we view this share price movement as an exceptional one-time event: In our understanding it was driven by specific stock exchange rules set forth for the German lead-index DAX, which have now been modified and improved. With regard to any asserted market-abuse, existing rules suffice. We feel, therefore, that Case 2 does not give sufficient rise to a need for extended disclosure rules.

Q2 – Do you agree that the scope of the TD needs to be broadened to address these issues?

- DB generally agrees that a broad scope is appropriate.

- By setting a clear disclosure regime, the EU could take on a role as global standard setter for other capital markets around the globe. Therefore, the regime should aim to have a pragmatic approach that can be easily implemented by major firms and be copied by other jurisdictions.

- Creating a level-playing field within the EU is paramount. Various national approaches are currently being developed with limited coordination, thus increasing inefficiencies for cross-European firms. Disclosure rules should be uniformly implemented across the EU and processed in one single position monitoring system.

- Derivatives and financial instruments which are to be made subject to the new disclosure regime (further defined as the 'In-scope Instruments') should have the same economic effect as long positions, as defined in Art. 13 para. 1 TD. I.e. the holding of a put option or writing of a call option should not be in scope.

- In-scope Instruments should not be subject to netting.

- Notifications should give a clear signal to other market participants. They should exclude positions reached purely as a result of the hedging of products and client positions in the course of daily business. For this reason we would suggest a disclosure regime with a reasonably high threshold (e.g. 10%) or one which is only triggered in the context of stake building/creeping-in. If positions in In-scope Instruments are to be aggregated with voting rights and (physically-settled) long-positions (like is required, for example, in the new UK FSA disclosure regime, DTR 5.3.4 R), well considered thresholds are particularly important.

- We feel that three different levels of disclosure thresholds would echo the proximity of shares/ instruments to the actual use of voting rights and influence on a company:
    - 3%: voting rights (a new disclosure level to be introduced at a European level in Art. 9 para. 1 TD, and already existing in some national disclosure regimes, e.g. UK and Germany)
    - 5%: entitlements to acquire shares (existing disclosure level in Art. 13 TD)
    - 10%: instruments of similar economic effect (new disclosure rule based on next threshold as set forth in Art. 9 para. 1 TD, separate notification rule, aggregation of positions).

- As your example of the Swiss disclosure regimes indicates, only careful extension of the existing disclosure regime will avoid confusion of investors, and, indeed, increase market transparency. Due to the broad scope of the Swiss regime, there have been disclosure notifications of Swiss investors far exceeding 100% of actually existing voting rights (e.g. notifications of voting rights of OC Oerlikon Corporation AG between May and August 2007).

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?

- Yes, we generally agree.

- Consistent with the existing disclosure regime for long-positions with physical delivery (Art. 13 TD), In-Scope Instruments should be limited to instruments with similar economic effect, comparable e.g. with physical-settled call option and total return swaps.

- In-Scope Instruments should not encompass basket instruments or indices. In practice, an investor would not invest a multiple of the necessary amount to gain access to voting rights via a basket or index, and at the same time take the economic risk of various other stocks.

  Given differing regulatory provisions, accounting methods and the range of market data information for baskets, the disclosure of positions in other financial institutions held by a financial institution via baskets or indices might confuse markets and its regulators as to actual levels of voting rights.

  Should CESR decide to include baskets and indices, the regime should be limited to disclosure if one underlying single issuer/voting right dominates the instrument. For this a high threshold should be implemented. [1]We would favour the increase of relevant thresholds beyond levels currently implemented by FSA, e.g. 3%/50%. We do note that such thresholds will increase the complexity of the disclosure regime considerably.

- In-Scope Instruments should not encompass convertible bonds but exchangeable bonds. Convertible bonds typically refer to newly issued shares and do not form part of the current disclosure concept underlying the TD.

- REPO and share loan contracts should be disclosable as otherwise loophole strategies would enable stake-building and creeping-in. However, we point out that this would require complex monitoring which will result in increased administration cost.

- The writing of put-options (short put) is included in CESR's list. Only when a short put is physically settled does it result in a transfer of shares. Consequently, a physical short put could result in the same outcome as the exercise of a call option (long call). However, a short put is only comparable to a long call if exercise is sufficiently likely. This is difficult to monitor as it is dependent on specific parameters of the short put which are subject to change. Only in case of a deep in-the-money short put (i.e. where the current share price is (well) below the strike price) is the holder likely to exercise the put on a specific date.

  Including short puts into In-scope Instruments seems to overstretch the theory of hidden ownership. This is even more true for the writing of cash-settled put options (cash short put), as the holder will not necessarily hedge his right to sell by buying shares in the market. Therefore, the position of the writer of cash short put does not seem comparable to the holder of a cash-settled long put.

  While the writing of (physically settled) short puts could be used in loophole strategies for stake-building and creeping-in, disclosure would result in a significant increase in administration cost and

[1] To illustrate, the new UK FSA disclosure regime (see DTR 5.3.3 (G) 2.c) provides a double-threshold of 1%/20%: "*a financial instrument referenced to a basket or index of shares will not have similar economic effects to a qualifying financial instrument unless: (i) the shares in the basket represent 1% or more of the class in issue or 20% or more of the value of the securities in the basket or index, or both; or (ii) use of the financial instrument is connected to the avoidance of notification*".

would require a delta adjusted notification[2] as otherwise notifications of short puts could be misleading.

Q4 – With regard to the legal definition of the scope (para 50-52), 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 instruments that in your view are not adequately caught in 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 favour calculation on a nominal basis (contrary to new UK FSA disclosure regime, see DTR 5.3.3 G 2.b). In the context of stake-building , and if sufficiently high entry thresholds (e.g. 10%) are implemented, it seems reasonable to assume that 100% of the shares underlying the option, i.e. the nominal basis, will be transferred and not only a reduced, delta-adjusted number of shares.

- The method of delta adjustment is labour intensive and results will not be consistent unless the calculation method for delta is precisely regulated within the disclosure regime. We note:
  - Currently there is no common calculation method, and delta hedging is performed according to methods specific to each market participant. The delta is typically based on the following parameters: share price, (remaining) duration of the option, paid dividends, interest rates specific to the bank's refinancing, and volatility of the share price.
  - As delta changes daily (and shortly before the option's maturity, the delta might dramatically fluctuate on a daily basis), a delta-based approach requires constant monitoring, resulting in increased cost. It is likely to increase the amount of (technical) notifications.
  - Given that calculation parameters for delta (in particular the interest rates), are individually set by each market participant, disclosure based on each market participant's individual calculation method would create notifications which are not comparable with each other. This would require the hedging institution to inform its counterparty of its actual hedge and underlying parameters, which could lead to speculation against its hedging positions. Therefore, an institution would not want to convey such information to other market participants.

- If CESR were to opt for a delta-adjusted basis, the rules would have to set out a general calculation method. However, we do note that if a general abstract way of calculating the delta adjustment is chosen, the calculation method would not necessarily mirror actual hedging positions as market participants might not physically hedge at all, or delta hedge in accordance with specific parameters which result in a lower hedging volume.

  Should the proposed disclosure rules include financial instruments where acquiring voting rights depends on the likelihood of a derivative's exercise (in particular short puts), delta-adjustment might be reasonable despite the administrative burden.

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

- We strongly suggest that the latest Total Voting Rights stated by the issuer be used in all cases (i.e. the current number of shares in issues). Otherwise, each disclosure would depend on the particular convertibles held by the party making the disclosure. Such a situation would lead to inconsistencies between disclosures and would not contribute to overall transparency.

Q7 – Should there be 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)?

---

[2] Newly implemented UK FSA rules (see DTR 5.3.3 (G) (2) (a) "*a long position on the economic performance of the shares*") are interpreted to capture short puts. Disclosure is made on a delta-adjusted basis.

- DB favours a general disclosure regime with an increased threshold of 10% and exemptions. We note that, on a practical level, monitoring whether each and every financial instrument does not preclude the possibility of acquiring shares would require a massive expansion of banks' monitoring effort and associated cost.

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 strongly emphasise the need for exemptions with regard to the trading book and other existing exemptions. Also, there should be a general exemption for disclosed "intra-day crossings" of a threshold within the trading book (e.g. where the voting rights cross above and eventually below a threshold intra-day).

- Client-serving intermediaries should be exempted provided they do not exert any influence on the issuer (cp. UK FSA DTR 5.3.1 R). This exemption is particularly important in order for disclosures to reflect a firm's true level of economic exposure. Otherwise, all disclosures would be distorted by the inclusion of a client facilitating element.

- Unless it is implemented on a general basis, there should be a quantitative exemption for derivatives held by investment firms and credit institutions:
    - Voting rights held indirectly via cash-settled derivatives should not be subject to disclosure if they are below a 10% threshold as such derivatives (potentially in aggregation with positions directly held or held via physically-settled derivatives) do not indicate a hidden stake-building attempt when they refer to less than 10% of voting rights.
    - Exemptions should ensure that "meaningless notifications" are kept off the markets and that investors can clearly see notifications which might indicate a creeping-in or stake-building scenario;
    - Exemptions should reduce notification activity which is purely triggered by bank's positions held as hedging for products sold to clients (e.g. certificates on baskets or indices);

- There should be a general exemption for derivatives referenced to own shares:
    - Disclosure of derivatives referenced to own shares is not necessary given there is no risk of stake-building or creeping-in
    - Derivatives on own shares are usually used to hedge equity compensation of senior management; disclosure of such derivatives could give rise to misinterpretations and uninformed public debate on compensation.

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

./.

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

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

We have made an assessment to assess the impact and benefits of the approach rules. We refer you to part 2 of this letter (separately submitted) where we give a more detailed analysis.

- Our impact study shows that although a significant increase in monitoring activities will be needed, the number of reportable positions will not significantly rise. Therefore the full impact and costs will not be mirrored by an increased number of disclosures. This reflects our experience of the CfD regime in the UK (where only 2 disclosures triggered by CfD positions in last 4 months, but constant monitoring has had to take place).

    Therefore, we feel it is not evident that implementing these regulations would provide the additional transparency envisaged by CESR.

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

./.

We trust these comments are helpful. Please do not hesitate to contact us should you have any questions.

Yours sincerely,

Tillie Rijk
Regulatory Affairs Department

Winchester House,
1 Great Winchester Street
London EC2N 2DB

CESR
11-13 Avenue de Friedland
75008 Paris
France

Regulatory Affairs Department
tel. +44 (20)754 10716
tillie.rijk@db.com

31 March 2010

Re: DB Response to Consultation on Major Shareholdings

Dear Sir, Madam,

Deutsche Bank appreciates the opportunity to respond to your consultation on extending major shareholding notifications to instruments of similar economic effect to holding shares and entitlements to acquire shares. Please find our detailed responses to your questions below. In answer to questions 10 and 11 we have prepared an impact assessment, which we have submitted separately. As our impact assessment includes business specific information, we request you not to publish this part.

In general, we agree with your analysis. Our main comments are:

- We strongly support the harmonisation of disclosure rules across the EU;
- As the UK FSA has already put in place sophisticated and well-working rules in this area - which many of the EU's larger firms are required to follow - we would prefer any pan-European rules to mirror the FSA's Disclosure Rules and Transparency Rules (DTR);
- New rules should not carry undue burdens and should be proportionate. An impact assessment should be done on the European level to demonstrate that the proposed disclosure rules actually address hidden stake-building and "creeping-in".
- We emphasise the need for an exemption for client facilitating trades as these go beyond the purpose of the objectives of this consultation paper. Also, the inclusion of true client positions would provide a distorted view to the market of the true holdings of financial institutions (as is recognised in the current FSA regime).

Specific 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?

- We generally agree with CESR's analysis. However, we emphasise that any new notification regime should address the purpose indicated in the CP, i.e. it should focus on potential takeover situations and "creeping-in".

  We feel an entry threshold of 10% should be implemented. This is a good indicator of a buyer wanting to obtain a relevant stake in voting rights through "creeping in" and represents the likelihood of gaining control via e.g. cash settled derivatives. In the interest of transparency, we favour a new, separate disclosure regime which – similar to Art. 13 para. 1 Transparency Directive 2004/109/EC – "TD"). – signals the derivative position to the market. I.e. an aggregate position of voting rights either directly held (Art. 9 TD) or indirectly held via physically-settled derivatives (Art. 13 TD) and via cash-settled derivatives with similar economic effect (new Art. 13a TD).

  We also feel that the requirement to notify instruments with similar economic effect should only apply if the holder is "pursuing strategic interest" in the issuer. In this regard, for example, the German legislator introduced a special disclosure regime for crossing the 10% threshold (cp. Sec 27a German Securities and Trading Act - WpHG).