

Committee of European Securities Regulators
11-13 Avenue de Friedland
75008 PARIS
FRANCE

Amsterdam, 29 March 2010

Our ref: 2010.B.021

Subject: Response to CESR's consultation re. extensions to major shareholding notifications

Dear Sirs/Madams,

Eumedion welcomes the opportunity to submit comments on CESR's proposal to extend major shareholding notifications. The notifications to instruments of similar economic effect, to holding shares and entitlements to acquire shares (Document Nr. CESR/09-1215b).

By way of the background, Eumedion is the Dutch based corporate governance forum for institutional investors. Our 68 Dutch and non-Dutch participants have all together more than EUR 1 trillion assets under management. The participants invest for their clients and their beneficiaries. They are also listed in companies worldwide.

Eumedion supports the approach to broaden the scope of the Transparency Directive. This is for the disclosure of financial instruments that has a similar economic effect to holding shares and entitlements to acquire shares, to which voting rights are attached. Those instruments should be disclosed as part of major shareholdings, already captured under the Transparency Directive in order to reduce the several problems that may arise with 'hidden ownership'. Eumedion prefers a pan-European approach above diverging national approaches. Since the latter would discourage the creation a level playing field and legal certainty across Europe and, at the same time, would result in more associated costs. Eumedion's approach is broadly in line with the European Securities Markets Expert Group (ESME) views on this topic.¹

A detailed response will follow which reflects the amount of questions, raised in the consultation paper.

¹ http://ec.europa.eu/internal_market/securities/docs/esme/tdcash_en.pdf.

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 generally support. CESR has identified Eumedion's concerns and issues, related to instruments of similar economic effect to shares and/or entitlements to acquire shares correctly. Eumedion considers that potential market failures may arise from non-disclosure of those instruments. Substantial economic long positions allow the use of those positions for exerting influence over the voting rights attached to the underlying shares. Due to a lack of transparency market participants are unable to examine who has such a significant economic exposure to shares and (potentially) access to voting rights. Holders of significant economic long positions themselves, on the contrary, have better information on the undisclosed economic interests and, as a result, on the free float. This may create a situation of information inequality and inefficient pricing, which potentially diminishes market confidence. It might also distort the market for takeovers by enabling avoidance of a mandatory bid at an equitable price. Reference has been made to our attached position paper on the consequences of synthetic structures for Dutch securities law and company law.

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

Yes, we generally support. Currently, instruments that create a significant economic long exposure to shares and/or entitlements to acquire shares without including legal rights to acquire those shares or entitlements to acquire shares, are generally outside the scope of the Transparency Directive (Articles 10-13). Since those instruments can be used effectively to acquire and/or exercise significant influence, it is relevant for investors and other market participants to have full knowledge of those economic interests. Consequently, we believe there is a strong case to broaden the scope of the Transparency Directive.

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?

We partly support. Eumedion believes that the proposed broad principle-based approach to base the disclosure on is sufficient to capture the right instruments. It focuses on all possible instruments that refer to and potentially have the same economic effects as instruments that give direct access to voting rights. The approach seems to be aligned with the existing regime in the UK, Europe's largest capital market. An excessively legalistic approach, on the contrary, for example based on the definition of financial instruments in MiFID, could encourage the creation of instruments to avoid disclosure. In order to mitigate that risk, it might then be necessary to

include anti-avoidance provisions. This would lead to an even more complicated regime. Therefore, we are in favour of a broad definition.

Having said this, Eumedion is not sure whether the words “similar economic effect” will give sufficient legal certainty under all circumstances. Could one, for example, speak of a “similar economic effect” in the case of an option which value only slightly changes in relation to a change in the price of the underlying equity? Eumedion suggests using an alternative wording to avoid this uncertainty. Additionally, we believe that the definition should make more clear that the broadened disclosure regime is limited to instruments with an economic exposure to shares, to which voting rights are attached. In this respect an alternative formulation might for instance be: ‘instruments whose changes in value positively correlate with the changes in the price of the underlying shares and/or entitlements to acquire shares, to which voting rights are attached’.

Q4 Please give examples on transactions or agreements that should in your view be excluded from the first option.

Supposing the choice of the proposed broad definition, and being aware of the additional disclosure this may require, Eumedion suggests considering certain exclusions from the proposed disclosure requirement. We believe that an exemption for so called client serving transactions, as set out in the FSA rules, may reduce the risk of meaningless disclosures and could therefore be appropriate. Where an investment firm or bank writes a short ‘contract for difference’ (hereafter: CfD) for a client, one can argue that the writer effectively takes a long CfD position. Requiring this writer to disclose his position may generally not be appropriate, since the writer’s firm will hold a position only to serve a client without any interest in the issuer’s performance.

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

Eumedion prefers the share equivalence to be calculated on a delta-adjusted basis. Delta represents the number of shares which the writer of an instrument in question needs to hold, in order to optimally hedge its exposure. This number is the shareholding to which the holder of the instrument potentially could have access to. For CfDs the delta would be fixed. But for cash settled options it could vary over time as the price of the underlying shares varies and the time to expiry passes by. Contrary to a nominal basis approach, delta better reflects the extent of the ‘similar economic effect’ at any particular time. In addition, it may prevent over disclosure which could be the case when disclosures are made on a nominal basis.

Having said this and with reference to our comments on question 12, we note that the additional compliance costs of a delta adjusted approach are expected to be substantial. We believe that this cost factor should be taken into account when eventually determining the notification thresholds.

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

It is not entirely clear to Eumedion which instruments CESR had in mind while preparing this question.

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)?*

We prefer a general disclosure regime above the introduction of a 'safe harbour' approach. In a safe harbour approach all instruments that potentially offer access to shares and related voting rights need to be disclosed, unless contractual provisions explicitly exclude obtaining the voting rights or influencing their exercise (safe harbour). We are concerned that a safe harbour approach would lead to a complicated and legalistic regime that may be difficult to enforce effectively. In a safe harbour approach it would still be possible for persons to hold significant economic interests in an issuer without disclosure. It would give the holder of an instrument with similar economic effect, using the safe harbour exemption, an information advantage. He knows that the writer holds the underlying shares as a hedge, which are likely to be sold when the contract is closed out. The holder could subsequently purchase the stock rather easily. A safe harbour approach may also result in additional compliance costs, including the costs for legal advice on whether a disclosure in a particular situation is needed or not.

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?*

The current procedures for the notification and disclosure of major holdings are set out in the Transparency Directive. On the base of that regime holders of shares and/or entitlement to acquire shares, which give access to voting rights, are required to notify their significant interests. Eumedion would propose to bring disclosure of instruments with a similar economic effect to shares and/or entitlements to shares within the same Transparency Directive regime. This means including the existing disclosure thresholds and exemptions. Doing so, it would be possible to require aggregation of interests across the two categories. Holdings of (entitlements to acquire) shares and instruments with similar economic effect should then be counted

together. That would subsequently create a regime that is as logical and legal certain as possible. The introduction of separate calculation thresholds for the two categories, on the opposite, would be far more complicated and burdensome.

For clarity, we additionally advise to add a provision to the Transparency Directive which requires holders to indicate whether, and to what extent, a notifiable holding consists of (entitlements to acquire) shares or (otherwise) instruments with similar economic effect.

Q9. *Do you consider there is need for additional exemptions?*

In our answer on question 4 we already mentioned to take an exemption in consideration with regard to client serving transactions. In Eumedion's view it is also worthwhile considering an exemption for intra-group transactions, which are carried out for accounting of tax motives, since these transactions may not have a similar economic effect to shareholdings or entitlements to acquire shareholdings. In this respect, the current Transparency Directive contains some exemptions for intra-group issues in Article 13.

Q10. *What kind of costs and benefits do you associate with CESR's approach?*

Extending the scope of major shareholders notification with economic long positions will have clear and substantial benefits, as mentioned in our answer on question 1. It will undoubtedly reduce hidden ownership, enhance transparency and discourage people seeking for avoiding mandatory bid rules.

The extension would not be for free however. The introduction of a broader disclosure framework would probably result in upfront costs as investors may need to change their internal systems at some point. The need to process additional notifications will also result in higher structural costs.

We believe the benefits of enhanced transparency and markets' confidence could outweigh the costs of implementing the new disclosure rules, especially when our proposals in our answer on question 12 are taken into account.

Q11 & Q12. *How high do you expect these costs, including the costs of exemptions to be?*

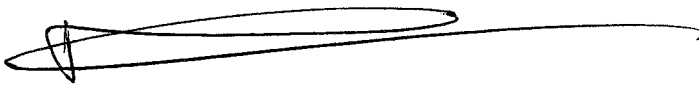
At this stage, it is rather difficult to quantify the costs precisely since the details of the new regulation are not clear yet. Our answer below is therefore limited to some high level comments.

If it is decided to choose a delta-based disclosure approach for instruments with similar economic effect without a safe harbour exemption, there might be some saving in upfront costs. As far as cash settled options concern, standard option pricing models are able to provide the delta. For many options the values for delta can be downloaded from market information providers as well. Regarding CfDs, the delta would be fixed and normally mirror the change in the underlying share price.

However, institutional investors should recalculate on a daily basis their delta-adjusted holdings as the deltas will change over time and may result in thresholds being crossed passively. This will result in substantial additional costs. Therefore, we would propose to mitigate those costs by creating in the Transparency Directive a minimum threshold of 5% on an aggregated basis under which no notification of shares and/or similar financial products would be required. For instance, when an institutional investor holds 2.5% interests in shares and 2% in cash settled derivatives he will not be subject to disclosure requirements. But in the case that the investor holds 0.5% in shares and 5% in cash settled derivatives he will be required to notify his interests. In addition, to simplify (cross-border) compliance with the notification requirements, we are also in strong favour of maximum harmonization across the European Union for all the notification thresholds under the broadened disclosure regime.

If you would like to discuss our views in further detail, please do not hesitate to contact us.

Yours sincerely,



Rients Abma
Executive Director Eumedion