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CESR's advice on possible implementing measures of the Transparency Directive – Part II (Ref.: CESR / 04-512c)

Dear Mr. Demarigny,

BVI¹ welcomes the opportunity to comment on CESR's Consultation Paper concerning advice on possible implementing measures on several aspects of the Transparency Directive (2004/109/EG) – Part II. We have focused our comments on CESR's advice in respect to the notification of major holdings of voting rights, as this section of the Consultation Paper has the most direct impact on our member companies and the corporate groups they are affiliated to.

General Remarks

According to Article 1 (2) of the Transparency Directive, its provisions do not apply to units issued by collective investment undertakings other than the closed-end type, nor to units acquired or disposed of in such collective investment undertakings. Thus we would like to point out that trade in units incorporating shares in collective investment schemes does not fall within the scope of the new regulation. However, we do recognise that in their capacity as investors in shares to which voting rights are attached,

¹ BVI Bundesverband Investment und Asset Management e.V. represents the interests of the German investment fund and asset management industry. Its 76 members currently manage more than 7,500 investment funds with assets under management in excess of € 1,000 bn. The units of these funds are held by some 15 million unit holders.

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investment companies are subject to equal treatment in relation to other market participants and therefore have to comply with transparency requirements imposed by the Directive.

Specific Comments

In representation of the German investment management industry, BVI would like to comment on the following issues:

I. Conditions of independence under Article 12 (4) (formerly Article 11 (3a)) of the Transparency Directive

Question Q17 – Definition of the “management company”

With respect to Question Q17, we emphatically support the reasoning of the “second view”, as outlined in Paragraphs 190 to 196 of the consultation document, since only this approach is capable of achieving the objective of Article 12 (4) (formerly Article 11 (3a)).

The notification requirements on changes in major holdings, as laid down in Chapter III, Section I (Articles 10 et seqq., formerly Articles 9 et seqq.) of the Transparency Directive, primarily serve the purpose to inform issuers and (potential) investors about changes in the actual allocation of voting powers in the issuer’s general meeting (cf. recital 18, formerly recital 11). The aggregation rule in Article 10 (e) in connection with Article 12 (3) (formerly Article 11 (3)) aims at depicting the factual allocation of power rather than the legal allocation of ownership rights.

Therefore, in determining the scope of the exemption from the obligation to aggregate shareholdings in Article 12 (4) (formerly Article 11 (3a)), the decisive criterion must be whether there is any risk of a concentrated control of voting rights within the same corporate group.

Companies managing collective investment schemes in accordance with the UCITS Directive are obliged to act in the sole interest of their investors. These circumstances do not depend on the management company or its products being legally authorised under the UCITS Directive, but rather on factually following the management standards required by this regulation.

Thus, we strongly urge CESR to extend the application of Article 12 (4) of the Transparency Directive to all management companies that conduct their management activities under the conditions laid down in the UCITS Directive, provided that the management company exercises the voting rights independently from the parent undertaking.



The same arguments apply to voting rights resulting from holdings in portfolios of investments managed by management companies in accordance with Article 5 (3) (a) of the UCITS Directive (mandates given by investors on a discretionary, client-by-client basis). Within these mandates, the allocation of voting powers is on a par with the situation within collective investment schemes. Therefore, equal treatment concerning aggregation of holdings is imperative, especially since in these cases the management company is not an investment firm authorised under MiFID.

Paragraphs 244 b., 249 to 253 – prerequisites for exemption from aggregation rules and Q18 – Additional confirmation of independence

Purpose and practical impact of the provisions laid down in Paragraphs 244 b. and 249 to 253 of the consultation paper remain unclear to us. Does CESR imply that any parent undertaking has to send a declaration to the respective competent authority of the issuer either

- of every single share it holds (since the controlled management company might also hold, buy or sell these very shares any time – this would create an enormous notification workload for both the parent undertaking and the competent authorities) or
- of every share it holds which at the same time is also being held by the controlled management company (i.e. the situation in which the parent undertaking would actually benefit from the exemption rule – this would require a continuous data flow from management company to parent undertaking and cause a high frequency of notifications to the competent authorities, thereby thwarting the benefits of the exemption rule) or
- in any case the aggregated holdings of parent undertaking and controlled management company would trigger a notification requirement according to Article 10 (e) disregarding the exemption rule of Article 12 (4) (formerly Article 11 (3a) – this would virtually reinstall the notification requirement which was supposed to be eliminated by the exemption rule, only with a change of addressee)?

None of these interpretations is even remotely feasible nor does it in any way serve the purpose of the exemption rule of Article 12 (4) (formerly Article 11 (3a)).

As explained in further detail above, the purpose of this provision is to depict the “real” world rather than the “legal” one. This aim is achieved as soon as the notification requirements on holdings follow



the actual decision-making powers and not any group structures. Additional requirements to issue “statements of independence” to competent authorities do not help this purpose any further and have no legal basis in the Transparency Directive.

For the same reasons, we strictly object to any confirmation obligations on behalf of the management company (Q18).

We could envisage, however, a general notification requirement of the parent undertaking to the competent authority or to CESR about the fact that, within a certain group structure, the requirements of the exemption rule are complied with on a continuous basis. This would satisfy the needs of both the supervisors and market players involved for information on the actual allocation of voting rights.

Q19 – Methods for demonstration of independence

We consider the other methods proposed by CESR being appropriate to demonstrate the necessary level of independence.

Q20 – Appointment of a senior individual

In order to ensure the independence between the management company or investment firm and their parent undertaking, the creation of an additional office is definitely not required. It appears that CESR's advice is unnecessarily detailed and prescriptive at this point and would impose additional regulatory costs to investment managers. The monitoring and control of the relationships between aggregated undertakings might very well be performed within the general compliance function.

Q21 – Direct and indirect instructions

From the practical point of view, it is essential to restrict the definition of “indirect instructions” to activities that are conducted **with the intention to influence the way of exercising the voting rights**. Without this constraining criterion, most of the relationship within a group of companies would qualify as potentially generating indirect instructions, because each way of exercise of voting rights may be assessed as having beneficial or detrimental impact on the business operations of the parent undertaking. In order to cope with the current approach, management companies or investment firms would effectively have to abandon any business ties with their controlling company, which appears neither economically prudent nor practically feasible and certainly does not correspond with the purpose of CESR's proposal.

Concerning the suggested “mechanisms through which parent undertakings could demonstrate that they have not used instructions to influence” the exercise of voting rights (Paragraph 256 of the consultation paper), we would precautionarily like to point out that those control mechanisms may in no case lead to a reversal of the burden of proof. Such an approach would impose an unacceptable duty upon the parent undertaking, as it is virtually impossible for a person to prove that he has generally not acted in the breach of law.

Q22 – Application of the exemption rule on “financial instruments”

Concerning the “statement of independence” with respect to holdings in financial instruments as defined in Article 13 (formerly Article 11a) of the Directive, the same reasoning applies as laid down above with respect to Paragraph 244 of the consultation paper.

II. Financial Instruments under Article 13 (formerly Article 11a) of the Transparency Directive

Q32 – Q36: Point in time, at which the notification requirement is triggered

Under the UCITS Directive, financial instruments entitling the holder to acquire shares to which voting rights are attached qualify as “eligible instruments” for the purpose of managing collective investment schemes and thus constitute a legitimate part of the investment strategy. In particular, management companies use call options on shares to hedge their primary investment decisions and therefore have an intelligible interest not to reveal their hedging policy before due time. Corresponding to market developments, these instruments are quite often not held until the date of expiry or conversion and their preliminary holdings do not reflect any potential changes in the proportion of voting rights.

From this point of view, we are in favour of the second approach which triggers the notification duties at a set point of time before the underlying shares can be acquired. In order to establish this moment, it seems necessary to find out at which point of time the holder of the financial instrument usually takes into consideration the exercise of his acquisition title. Only from this time on there is any potential change in the allocation of a company’s voting rights which justifies the requirement of a public disclosure. In our opinion, this point of time should be settled at about two months till six weeks before the expiry date.



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

Yours sincerely

BVI Bundesverband Investment und Asset Management e.V.

A handwritten signature in blue ink, appearing to read "Stefan Seip".

Stefan Seip

A handwritten signature in blue ink, appearing to read "Marcus Mecklenburg".

Marcus Mecklenburg