GRUPPO BORSA ITALIANA

CESR'S ADVICE ON POSSIBLE IMPLEMENTING MEASURES OF THE TRANSPARENCY DIRECTIVE
SECOND SET

Borsa Italiana Group welcomes the opportunity to provide comments to CESR's advice on possible implementing measures of the Transparency Directive.

We focus our reply on few issues, since we generally agree with CESR's proposal.

NOTIFICATION OF MAJOR HOLDINGS OF VOTING RIGHTS

Section 2 Control mechanisms to be used by competent authorities with regard to market maker and appropriate measures to be taken against a market maker when these are not respected.

CESR is asked to provide advice on control mechanisms as regards market makers that want to benefit of the exemption.
We share the control method proposed consisting in an ex ante notification to the competent authority of the intention to act as a market maker and that it wants to get the benefit of the exemption and that it will comply with the relevant requirements.

We share CESR's proposal to require to market makers separate accounts. This is an efficient tool for monitor the flow of major holdings depending on the market making activities.

However, we have some concerns on the necessity for market makers that want to benefit of the exemption to set up the organisational arrangements proposed by CESR in order to avoid conflicts of interest.

The requirements concerning the manage of such conflicts in investment firms are already dealt in the MIFID. These requirements have to be complied in order to get the authorisation. However, the investment firm may choose the organisational structure it considers suitable to its activities.

We argue that CESR goes ultra vires. We would not share an approach with possible implementing measures of Transparency additional as regards to the settled legal framework, thus creating overburdening for investment firms.

At last, this could be not consistent with the structure of the level I text. The mandate speaks about "competent authorities' control mechanisms" not about "market makers' arrangements".

With respect, instead, to management companies and their parents undertakings and investment firms, the comitology provision authorises the Commission to adopt implementing measures to clarify the conditions of independence to be complied with. Such a provision is not set for market maker.

With reference to the appropriate measures towards non-compliant market makers, these measures should not be different than those provided for shareholders/issuers which do not meet the obligations concerning major holdings (for example, automatic loss of voting rights attached to the share in excess of the thresholds not notified).
It is not sufficient the sole measure of the tardy notification to the issuer.
The notification to the competent authority under Mifid allows the appropriate action in the event of contextual breaches to Mifid. Pursuant to paragraph 46 of this consultation paper, Mifid does not deal with breaches to the Transparency Directive.
The competent authority under the Transparency Directive, responsible for the supervision of the use of the market makers' exemption, should be able to take toward the non-compliant market makers the same civil and/or administrative penalties which may be imposed in respect of any other persons who breach the disclosure requirements on major holdings.
The Transparency Directive has granted market makers an exemption from the obligation to disclose major holdings. The exemption is given on the basis that the market maker meets the requirements set out by the Directive. In case of violation of such requirements, the general regulation and its penalties should be applied.

Section 3 The determination of a calendar of trading days for the notification and publication of major shareholdings

The CESR has been mandated to determine a calendar of trading days for all Member States only for notification purposes.
We would welcome the definition of a uniform calendar throughout the EU. This option is not open to calendar arbitrage especially in relation to transaction executed outside of a RM. This would satisfy the necessity for a clear and general rule in order to calculate the time within which the disclosure of the notification requirements concerning major holdings has to be made.
We suggest to adopt the Long-term calendar for TARGET (Trans-European Automated Real-time Gross settlement Express Transfer) closing days established by the European Central Bank.
Otherwise, it could be adopted the solar calendar. This option is feasible since CESR proposes in its consultation paper (04-511) that operators responsible for the dissemination must be able to receive regulated information 24 hours a day, 7 days a week.
The establishment of a common calendar is deemed desirable to avoid uncertainties for financial markets.

However, CESR proposes to adopt the calendar of issuer's home Member State.
It considers prudent for the competent authority to publish which calendar applies to all of its regulated market only for the TOD's purposes. This solution may cause confusion among investors, especially among foreign investors and even more so in those jurisdictions in which there are a number of different RMs that may use different calendars.

Section 4. The determination of who should be required to make the notification in the circumstances set out in Article 10 of Transparency Directive

a) clarify who has to make the notification

The approach A reduces the inflation of notifications. However, at the same time it could reduce the level of transparency on corporate ownership structures.
As CESR recognises, the purpose of the Transparency Directive is to enhance effective control of share issues and overall market transparency of capital movements.
The approach B realises a fuller oversight. We prefer this approach.
The abundance of information consequent to approach B is balanced by the possibility to make a single cumulative notification (which may increase clarity to the market).

Section 5 The circumstances under which the shareholders or the natural person or legal entity referred to in Article 10, should have learned of the acquisition or disposal of shares to which voting rights are attached.

With reference to the concepts of acquisition or disposal, CESR refers to the execution of a contract to buy or sell securities. In CESR's opinion such execution should take place when the natural person or legal entity transfers or receives legal ownership of such securities, according to applicable national laws.
However, following CESR's discussion, a natural person, or legal entity learns of an acquisition or disposal when he or she receives notification of the execution of the transaction.
From this perspective we'd like to stress that the time when this occurs may differ from the time when the ownership of securities is finally transferred.
In Italy, it is a much debated question when this transfer happens.
On one hand it is asserted that the ownership passes with the drawing up of the contract (trade date). Others support that the ownership passes only because of the recording on the account because of the settlement of the transaction (actual settlement date).
In the first case the time frame for the disclosure of major holdings would be reduced. In the second case this timeframe would be longer.
As CESR recognises, the objectives of the TOD is to reduce the timeframe within which the acquisition or disposal of major holdings should be disclosed, in order to give to investors a timely and complete picture of corporate ownership structures.
We suggest that we have to take into account the trade date as a general principle.

The actual settlement date could be used only for establishing when a natural person or legal entity is deemed to have knowledge of the acquisition or disposal or the possibility to exercise voting rights.
It is necessary to point out that this question does not arise in the case of OTC transactions because of the direct role of the parties.
With reference to the transactions carried out on a RM, we'd point out that the investment firm has always a duty to inform the investor of the execution of the transaction (and so the trade date could be considered relevant).

Besides, the relevance of the actual settlement date in such cases would not ensure an equal treatment among persons required to make the notification and could cause a lack of harmony in the disclosure timeframe.

With reference to the circumstances under which the shareholders or the natural person or legal entity should have learned of the acquisition or disposal of shares to which voting rights are attached, we share the option a) proposed by CESR in its draft technical advice. This option reduces potential abuses, shortens the timeframe and enhances the enforcement.

Section 7
Standard form to be used by an investor throughout the Community

CESR has been mandated to draw up a standard form to be used on a pan- European basis by investors.
We believe that the proposed form has a high degree of detail. No additional requirements at national level should be allowed in this form in order to increase the availability and comprehension by investors across EU.
A standardised harmonic form may simplify the notification process throughout EU.