

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

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?

Yes.

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

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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.

In our view this approach is in line with the intention of the Transparency Directive.

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.

n/a

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))?

We agree, as this approach still leaves open the possibility to maintain multiple trading books within a group, provided the requirements stipulated in Article 3 (2) are introduced as well.

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)?

Please refer to our response to Q5. We would deem the possibility of an exemption necessary and we believe the suggested exemption mechanism may be workable.

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.

n/a

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.

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?

We do not entirely agree with the proposal. We would like to emphasize that using index- or basket-linked financial instruments to secretly build up voting rights would be a rather expensive and therefore uneconomic behavior. Therefore, whereas in our view the 20% threshold seems pragmatic, the alternative 1% voting rights threshold is unclear and therefore open for interpretation, lacks practicability and would trigger rather burdensome implementation efforts for market participants in order to establish the required long position monitoring.

The 1% criteria could be interpreted to capture index- or basket-related financial instruments held by a person, if such financial instruments represent 1% or more of voting rights attached to shares of the specific issuer. The 1% criteria would, thus, not lead to the qualification or disqualification of a specific index or basket as such, but to the qualification or disqualification of a specific position in index- or basket-related financial instruments with respect to the shares of a specific issuer. Subsequently, the question arises whether the 1% test will have to be applied to a specific financial instrument on an ISIN-by-ISIN basis, all financial instruments referenced to a specific index, or all financial instruments referenced to any index in which a specific share is represented. In any event position monitoring becomes very complex such that the purpose of the exclusion of certain index- or basket-related financial instruments (i.e. to facilitate the monitoring) may no longer be fulfilled. The 1% threshold adds significant complexity to the monitoring of index/basket-linked instruments and we can't see which added value can be expected in relation to increasing transparency.

We would therefore strongly vote for a simplified rule when dealing with index/basket-linked instruments, i.e. leave only the 20% weight as a threshold and drop the alternative entirely. We do not believe that this would leave room for a significant risk of circumvention.

Should ESMA however be concerned that this could still be the case, we would support a provision allowing the competent authority to intervene in case of indication that certain products are used for the purpose of circumvention.

Q10: Are there any other thresholds we should consider?

Taking into account our answer to Q9: No.

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).

n/a

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 totaled should not be disclosed on an aggregated basis?

Yes.

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.

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

Yes.

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.

In our opinion, whereas the general determination by ESMA of the cases of client serving is correct, we would strongly vote for a separate exemption of those under Art. 13 (4) of the revised TD. We appreciate that lawmakers did not succeed entirely when trying to transfer their legislative will into the wording of Art. 13(4) sub sentence 2 and ESMA is now in an uncomfortable situation to find a workable, practicable, comprehensible rule in their RTS which is covered by a) the will of the lawmaker and b) the wording of the mandate. We are convinced that this balancing act is impossible for ESMA to make. We therefore recommend to either have the Commission issue a clear and legally reliable opinion on which ESMA can found their RTS in this point (i.e. draft a set of rules on the basis of a separate exemption for financial instruments which are client serving transactions) or amend the wording of Article 13 (4) in such a way that ESMA is put in a position to draft proper RTS. We believe that the current proposal is challenging in terms of practicability and clarity and we would expect many market participants to simply not use such exemption. This then may lead to the situation that the market is flooded with notifications which are actually meaningless as regards to the transparency directive or – if the exemption should be understood to be mandatory – are simply wrong.

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

No.

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)?

n/a

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

n/a

Q19: Do you agree that the client-serving exemption should cover MiFID authorized entities as well as a natural or legal person who is not itself MiFID authorized but is in the same group as a MiFID authorized entity and is additionally authorized 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?

n/a

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?

n/a

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.

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

No.