Deutsches Aktieninstitut

ESMA's implementing measures under the Transparency Directive should ensure shareholder transparency

Exemptions from the major shareholdings notification requirements should not ease hidden ownership in listed companies

Response of Deutsches Aktieninstitut to ESMA's consultation on Draft Regulatory Technical Standards on major shareholdings and indicative list of financial instruments subject to notification requirements under the revised Transparency Directive, 30 May 2014

Introduction

Deutsches Aktieninstitut[1] appreciates the opportunity to respond to ESMA's Consultation on Draft Regulatory Technical Standards on major shareholdings and indicative list of financial instruments subject to notification requirements under the revised Transparency Directive.

We have frequently pointed out that it is the objective of the major shareholdings notifications to provide market participants with information on both the current ownership structure of listed companies and potential significant changes of this structure. Therefore, we have supported the inclusion of "instruments of similar economic effect to the holding of shares" into the Transparency Directive (TD). As the experience has shown, exemptions to the general notification obligation always bear the risk of legal loopholes that may be used for a secret stakebuilding. Given this experience, Deutsches Aktieninstitut has also always been cautious regarding the granting of exemptions unless these exemptions are well-justified.

Our detailed comments in the remainder of this paper follow this spirit.

[1] Deutsches Aktieninstitut represents the entire German economy interested in the capital markets. Its about 200 members are listed corporations, banks, stock exchanges, investors and other important market participants. Deutsches Aktieninstitut keeps offices in Frankfurt am Main, Brussels and in Berlin.

Detailed Comments

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.

Yes.

The holdings according to Art. 9, 10 and 13 need to be aggregated for the reason of calculating the market making exemption and the trading book exemption. Otherwise, significant obstacles to transparency would be created that might be used to secretly build up stakes in listed companies.

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))?

Yes.

Vertical aggregation within a group improves transparency on the economic interest in listed companies for market participants. In contrast, reporting on the entity/subsidiary level rather than on the group level would multiply the exemptions of the TD. ESMA is, therefore, right to demand vertical aggregation within a group of companies in relation to the trading book and market making exemption.

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)?

No.

The TD grants an exemption from the “vertical aggregation rule” only to holdings under Art. 12 (4) und Art. 12 (5). Deutsches Aktieninstitut has raised concerns even about this rule since it makes holdings less transparent, eases secret stake building and is not in line with the experience that normally there is a general voting policy on the group level with respect to shares held in the entire group.

Therefore, ESMA should not create an additional exemption from the "vertical aggregation rule" as such an exemption may result in new secret building strategies and will countervail the objectives of the TD. As ESMA itself states, the market making and the trading book exemptions operate separately so that a total of 10 percent of economic interest in the shares of a listed company needs not to be disclosed even if all the holdings within a group are aggregated on the group level (see item 54.). Option 2 will amplify this already substantial exemption as is illustrated by table 2 on p. 20 of ESMA's proposal.

Deutsches Aktieninstitut, therefore, strongly encourages ESMA's to choose option 1 rather than option 2.

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?

Yes.

Any exemption from the vertical aggregation rule will make the system of major shareholdings notifications and thus the enforcement by competent authorities more complex. In addition to that and as stated above room for creative compliance will be created which further adds to complexity and monitoring issues and may contrast with the TD's objectives to improve transparency concerning the ownership structure of listed companies.

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?

Yes, in principle. ESMA's proposal finds the right balance.

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.

The client services exemption has been introduced to avoid double notifications of both the final holder of a share or an economic interest in shares (the client) and the bank providing services to this holder/client. Against this background,

Deutsches Aktieninstitut basically shares ESMA's analysis regarding case 1 and case 3 provided that notification of the client is ensured.

However, as ESMA rightly points out, case 2 (responding to a client's request to trade) does not create double reporting of long positions but may rather uncover the corresponding long position to a short position of a client. From Deutsches Aktieninstitut's point of view, this case is fundamentally different from case 1 and case 3. Therefore, it should principally not fall under the exemption because any trade in a financial instrument may be regarded as responding to a client's request. In addition and as ESMA rightly states, responding to a client's request may be part of the bank's trading and/or market making activities where significant exemptions have already been granted.

Given the fact that there is already a number of exemptions that allow for the holding of shares and/or an economic interest in shares up to a significant portion of the voting rights/economic interest without any notification becoming due Deutsches Aktieninstitut is of the opinion that the client services exemption should be interpreted and applied rather narrowly.

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

See above Q16.

Q17: Do you agree with our analysis that applying the current exemptions can address certain noti-fication requirements for cash-settled financial instruments introduced by Article 13(1)(b), but this might not be sufficient to achieve the aim of the provision (i.e., avoiding unmeaningful notifications to the market)?

See above Q16.

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

See above Q16.

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

See above Q16.

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?

See above Q16.

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?

We basically agree with ESMA's analysis.

The TD takes a functional/economic approach to the question whether an instrument or agreement will fall under the notification requirement according to Art. 13(1)(b). In order to prevent circumvention strategies the notification requirements are necessarily broad.

ESMA is, therefore, in particular right not to demand a formal agreement for a notification becoming due since this would reintroduce a purely legal perspective and open room for circumvention again. In the same way, it is important that ESMA regards any instrument or agreement as principally falling under the notification requirement when a holder of a (cash-settled) position benefits from an upward movement of the respective share price. This is exactly what Art. 13(1)(b) is aiming at.

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

Deutsches Aktieninstitut welcomes ESMA's proposal as it provides market participants with guidance on what is subject to notification in any case and thus

helps to form a common understanding on which situations/agreements/contracts will be regarded as economically similar to the holding of shares. However, it is also important that ESMA clarifies that financial instruments not mentioned in the list may also fall under the notification (item 203.) if they meet the criteria of Art. 13(1).

Regarding the specific instruments mentioned Deutsches Aktieninstitut has only the following minor comment: It could be clarified if and under which circumstances pre-emptive rights (items 192 and 193), although not subject to notification under Art. 13(1)(a), may nevertheless subject to notification under Art. 13(1)(b).

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