ZENTRALER KREDITAUSSCHUSS

MITGLIEDER: BUNDESVERBAND DER DEUTSCHEN VOLKSBANKEN UND RAIFFEISENBANKEN E.V. BERLIN · BUNDESVERBAND DEUTSCHER BANKEN E.V. BERLIN
BUNDESVERBAND ÖFFENTLICHER BANKEN DEUTSCHLANDS E.V. BERLIN · DEUTSCHER SPARKASSEN- UND GIROVERBAND E.V. BERLIN-BONN
VERBAND DEUTSCHER PFANDBRIEFBANKEN E.V. BERLIN

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Comments of the Zentraler Kreditausschuss on the Public Consultation of the European Commission on the modernisation of the Directive 2004/109/EC
Ref.: D 1031A-2010
ZKA-Ref.: 413-EU-Transp

Dear Sir or Madam,

Please find hereafter the Comments of the *Zentraler Kreditausschuss* (ZKA)[1] on the Public Consultation of the European Commission on the modernisation of the Directive 2004/109/EC.

Yours faithfully,
For
ZENTRALER KREDITAUSSCHUSS
Deutscher Sparkassen- und Giroverband

p.p. Dr. Henning Bergmann

p.p. Patrick Büscher

enclosure

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[1] The ZKA is the joint committee operated by the central associations of the German banking industry. These associations are the Bundesverband der Deutschen Volksbanken und Raiffeisenbanken (BVR) for the cooperative banks, the Bundesverband deutscher Banken (BdB) for the private commercial banks, the Bundesverband Öffentlicher Banken Deutschlands (VÖB) for the public-sector banks, the Deutscher Sparkassen- und Giroverband (DSGV) for the savings banks financial group and the Verband deutscher Pfandbriefbanken (VdP), for the mortgage banks. Collectively, they represent more than 2,200 banks.

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Comments
on the
Consultation document
on the modernisation of the Directive 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market

Ref.: D 1031A-2010

23 August 2010

I. Attractiveness of regulated capital markets for small listed companies

General Remarks

As a general rule, regulations should be the same for all enterprises on a particular market. However, the lending industry is also interested in making the capital market attractive for small and medium-size enterprises (SMEs) in order to give them options for selecting the most affordable type of corporate financing for them from a broad spectrum of offerings. Various initiatives of the European exchanges are currently taking into account the special requirements of such enterprises, for example, for a less complex and cost-intensive reporting regime. The initiative by Deutsche Börse AG may be mentioned here as an example. Among other things, it has created the so-called Entry Standard to provide SMEs a simple, fast and cost-efficient mode of admission to exchange trading. The Entry Standard is a sub-segment within the OTC market, which is not an organised market within the meaning of the MiFID. Enterprises which desire a more visible position within the OTC market and wish to provide the capital market with more information than is normal on the OTC market opt for a listing in this segment. The increased, and thus also more cost-intensive, requirements of the organised market, however, need not be satisfied. There are also similar initiatives at other European exchanges such as the London Stock Exchange, which has created the Alternative Investment Market (AIM).

On the other hand we are hesitant regarding the idea of establishing a sub-market within the organised market having less stringent requirements. The term "organised market", which originates from the MiFID, stands for governmentally approved and supervised markets. Consequently, an enterprise's admission to such a market must be seen as a quality characteristic, on which not least the investors also rely (investor protection). If SMEs that are traded on such a organised market were burdened with less stringent disclosure standards than other enterprises traded there, this would possibly lead to an overall degradation of the "organised market" quality characteristic. In this respect, caution appears advised with regard to simplification rules for SMEs in relation to organised markets.

Nevertheless, it must be seen that fulfilling disclosure requirements is more onerous for SMEs than for other issuers. Against this backdrop, when revising the Transparency Directive consideration could be given to loosening disclosure requirements for SMEs based on quantitative criteria (thresholds) if investor protection aspects and market integrity are not jeopardised. That such an approach taking into account the principle of proportionality is not foreign to investor protection becomes evident, for example, in Article 1 paragraph 2 points h) and j) and Article 7 paragraph 2 point e) of the Prospectus Directive in the Commission's Proposal dated 23 September 2009, under which the obligation to publish a prospectus is removed for offerings below a certain annual volume and prospectus disclosures are to be adjusted to the size of the enterprise.

II. Information about holding of voting rights

The Zentraler Kreditausschuss (ZKA) has long advocated a transparent equity market. We therefore welcome the European Commission's plan, when revising the Transparency Directive, to review whether the provisions regarding shareholding notifications should be expanded such that cash-settled derivatives should also be reported in future. As part of the ZKA's comments on the CESR Consultation Paper on shareholding notifications (CESR o9-1215b), we spoke in favour of extending the current disclosure obligations to financial instruments of similar economic effect to the acquisition of voting rights. In this respect we would welcome it if the European Commission would likewise contemplate a similarly broad approach when revising the Transparency Directive so as to close any gaps in the notification regime for holdings. In addition, we would like to remark in advance that **a uniform Europe-wide regime for shareholding notifications is clearly preferable compared to national solutions**. The advantages are obvious. For example, a regulation providing for a uniform European notification regime would provide all investors within the Member States with the same information and would hence create a level playing field with respect to transparency (equal treatment of investors). From the notifying enterprises' perspective, a European notification system would result in a simplification of notifying (legal certainty) and in considerable cost savings because only a single notifying system would be maintained in future (cost efficiency). With this proviso, we would like to answer your questions as follows below:

Question 11.: Would the disclosure of holdings of cash-settled derivatives be beneficial to the market?

Yes, we believe that a disclosure obligation for cash-settled derivatives and other financial instruments that have a similar economic effect, such as the acquisition of voting rights, would make the market more transparent and hence more efficient. However, decisive are the details of the regime. For example, a disclosure obligation without appropriate triggering thresholds and exemptions (e.g., for day-to-day trading by banks) would lead to a multitude of notifications that are irrelevant for the equity market and could therefore confuse investors. Cases such as *Conti/Scheffler* have made it quite clear that the current transparency regime is incomplete. Holdings in exchange-listed companies could be expanded without the market' s having been informed thereof (in a timely manner). This could be prevented in future by appropriate transparency requirements.

Question 12.1.: If the Transparency Directive was to require holders of cash-settled derivatives to disclose their positions, should holdings of cash-settled derivatives be aggregated to holdings of voting rights and/or of financial instruments giving unconditional access to voting rights for the purposes of calculating whether the threshold triggering the disclosure obligation is reached or crossed?

No. Cash-settled derivatives with voting rights (Article 9 and 10 of the Transparency Directive) should not be aggregated with financial instruments entitling their holder to acquire, on the holder's own initiative under a formal agreement, already issued shares to which voting rights are attached (Article 13 of the Transparency Directive). Such an aggregation would lead to a detrimental accumulation of notifications that could unsettle the market. In addition, cash-settled derivatives convey only a very indirect influence on voting rights, for which reason the mingling with shareholdings and imputed voting rights (Article 9 and 10 of the Transparency Directive) and/or actually existing delivery claims (Article 13 of the Transparency Directive) holds the danger of the market's interpreting the significance of the reports erroneously (interpretation and error risk). The risk also arises that more than 100% of the capital will be reported in the market due to the considerable duplication effects. This, too, could unsettle the market considerably and/or lessen the informative value of the reports from the investor's perspective (risk of irrelevance). Finally, an aggregation would also open the possibility of triggering or "fuelling", at low capital expense, market speculation about a takeover interest in order to achieve trading gains (risk of misuse). Aggregation, which causes notification thresholds to be reached rapidly, scares away potential takeover investors because takeovers become more expensive (deterrence risk).

In any case, an additional aspect arises in Germany: For years, professional plaintiffs claiming rescission have used standard complaints and asserted alleged formal irregularities in seeking to block transactions in the general meeting in order extract a ransom for the nuisance value of the challenge raised. A violation of disclosure obligations does not only entail a criminal penalty under German law , but also affects voting rights pursuant to section 28 of the German Securities Trading Act (*Wertpapierhandelsgesetz*, "WpHG"). Plainfiffs now regularly allege at general meetings that certain shareholders are not authorised to vote because there is a violation of disclosure obligations. The notification regime thus directly impacts the corporate governance of German publicly-held companies. Clear and legally-secure disclosure obligations are thus also in the enterprises' best interest.

Question 12.2.: If the Transparency Directive was to require holders of cash-settled derivatives to disclose their positions and if such disclosure of cash-settled derivatives should be done independently of voting rights and of other financial instruments, which threshold should be applied?

The reason behind covering cash-settled derivatives is to be able to hinder or recognise "stakebuilding" on enterprises (hidden ownership). A threshold should therefore be selected that, in combination with the disclosure obligations applicable to date, makes it possible to determine whether the holding of voting rights from already notifiable financial instruments together with the holding of voting rights from the cash-settled derivatives exceeds the blocking minority relevant under corporate law.

In German stock corporation law for example, the blocking minority for dissolving the stock corporation or amending the articles of incorporation is 25% (section 262 (1) no. 2 of the German Stock Corporation Act (*Aktiengesetz*, "AktG") or section 179 (2) AktG).

We therefore consider a triggering threshold of 10% to be appropriate. That way only such transactions are covered that are of interest with regard to a hidden stakebuilding and a possible takeover, or are of interest due to the risks to market integrity affiliated with those transactions. The new and existing triggering notification thresholds together would also redraw a coherent system of notification thresholds that is oriented toward the respective proximity to the voting rights. While in principle the direct ownership of shares also conveys a direct influence on voting rights, the ability to exert influence with physically-delivered financial instruments is already a more reduced one. The influence on voting rights linked to shares from other instruments, which is only remote and/or only potential, thus justifies an increased notification threshold of 10%. Thereby, the market would also be relieved of non-significant notifications by banks, which arise solely from settling daily derivatives transactions for a multitude of clients. This would thus make specific exemptions for banks, such as the client-serving transaction exemption and the trading-book exemption, which otherwise would have to be included in the Transparency Directive, largely obsolete. Otherwise, the very broad disclosure obligation holds the risk that the market would be confronted with shareholding notifications that, in total, result in positions that extend beyond 100% of the voting rights actually existing. Even if our recommendation is not followed, the triggering threshold should not be below 5% in any case. Otherwise, the risk already existing, that the market will be flooded with a multitude of notifications that are irrelevant with respect to the legislative purpose since they are not indications of a hidden stakebuilding (relevance risk), would be further aggravated.

Transparency of holdings of voting rights after the record date in advance of the general meeting of shareholders (the question of empty voting)

Question 13.: Would the establishment of a specific disclosure mechanism for holders of voting rights who do not hold shares between the record date and the shareholders meeting be useful/effective to prevent empty voting practices?
(i) yes (please explain);
(ii) no, only limiting/prohibiting empty voting practices would be effective.

The introduction of a special notifications system for transactions between the record date and annual general meeting would merely create transparency on the existing possibility of exercising voting rights after the disposal of shares (after the record date). That voting rights and beneficial ownership may diverge is the desired consequence of the decision for the record date principle, which was only introduced in 2007 when the Shareholder Rights Directive (2007/36/EC) entered into force. Article 7 paragraph 1 b) of the Directive provides that the rights of a shareholder to sell or otherwise transfer his shares during the period between the record date and the general meeting to which the date applies may not be subject to any restriction to which they are not subject at other times. That took account of the market's need for shares that are tradeable at all times before, during and after the general meeting, and are thus liquid. Share blocking, not unusual up to that time, was done away with. The possibility associated with the record date principle of being able to exercise voting rights at a general meeting without concurrently bearing the economic risk of shares therefore remains – even with the previous disclosure requirement – a not only permissible, but rather desired result.

What is also open to question is whether a special notification regime is required at all. Generally every acquisition and loss of voting rights meeting the threshold is notifiable pursuant to Article 9 et. seq. Transparency Directive so these notifications would also be made in the period between the record date and the general meeting. However, what is not currently notifiable under the Transparency Directive is a securities lender's repayment right. Should notifying such repayment claims as financial instruments also – correctly – be considered necessary to close transparency gaps, this should be done in general and not just at certain times before the general meeting. Otherwise, market participants focused not on empty voting, but rather building a hedge position or something else, would also always have to take the general meeting calendar into account. Introducing a general disclosure obligation for a security lender's repayment claim may result, though, in both the lender as well as the borrower having to notify voting rights and therefore the market could become correspondingly confused. However, just one party, specifically, the borrower is entitled to the voting rights. This suggests covering the repayment claim as part of a new and separate disclosure obligation within the meaning of the Question 12.2 for share-based derivatives.

It also has to be considered that the transparency regarding control relationships desired by the Transparency Directive would not benefit from a separate disclosure obligation for empty voting. Market participants, rather, are already sufficiently informed in this respect on the basis of applicable law. On the one hand, from notifications as of the record date they know who can exercise significant shares of voting rights in the general meeting. And on the other, the continuing disclosure obligation in the period between the record date and the day of the general meeting extensively ensures transparency regarding changes in the allocation of voting rights from subsequent transfers.

Question 14.1.: If a specific disclosure obligation is imposed regarding the transfer of voting rights independently of the shares between the record date and the general meeting, which threshold of voting rights should be applied in order to trigger the obligation?
E.g. 0,5%, 1%, 2%, other.

No specific disclosure obligation is required in this context (see answer to 13). If at all, then the 5% triggering threshold under Article 9 Transparency Directive should apply. Otherwise, there is the risk of flooding the market with a multitude of reports, which will no longer be understood by a majority of market participants, but on the contrary, will cause unnecessary confusion.

Question 14.2.: If a specific disclosure obligation is imposed regarding the transfer of voting rights independently of the shares between the record date and the general meeting, which time-limit for the disclosure should be applied for this disclosure to be useful? E.g. immediate disclosure; no later than 1 day, other.

The time limits and procedures under Article 9 et. seq. Transparency Directive should apply. Shorter time limits would be inappropriate and laborious and contain the risk of erroneous notifications.

Intentions with holdings or voting policies disclosure

Question 15: Which is the best way to make the investment process more transparent: *-i) requesting investors to disclose their future intentions with holdings;* *-ii) requesting investors to disclose their actual voting policies;* *-iii) both;* *-iv) none;* *-v) other.*

None (iv). In our opinion, none of the proposed measures would make the investment process more transparent. The corresponding provisions of the current Transparency Directive as well as the Takeovers Directive (2004/25/EC) are reasonable and sufficient for informing the market comprehensively in a timely manner on the building of positions, and as soon as a relevant takeover threshold is reached, of the investor's specific intentions. Transparency obligations going beyond that, for instance regarding the intention to acquire additional voting rights, represent a serious encroachment on the reporting party's confidential sphere and freedom of disposal. Particularly since changes in such intentions would have to be disclosed and thus the disclosure obligation is perpetuated, possibly without a time limit. It must also be considered in this context that every investor must check in advance of a takeover when he has to submit a takeover offer. Every additional obligation would represent a "prior circumstance" for tendering a takeover offer under the Takeovers Directive, at least in those instances in which the triggering threshold is below 30%. The 30% threshold already triggers the offering obligation in many Member States (e.g., Germany, France, Italy, United Kingdom) as well as Switzerland because it is assumed that control over the target enterprise can be obtained starting out from a corresponding shareholding. A corresponding "prior transparency" would shift the weighting of conflicting interests in takeover law between the acquirer and the target enterprise significantly to the detriment of the acquirer. In addition, announcing such an intention would almost inevitably stimulate the market price of the target enterprise, which may lead to a significant increase in the cost of takeovers.

In addition, existing disclosure regulations as practised in Germany (section 27a WpHG) and France (Article L233-7 *Code de Commerce*), but in the USA as well (Article 13d Securities

Exchange Act of 1934), show that corresponding investor disclosures are meaningless and therefore transparency for the market is not increased.

Question 16.1.: If investors were required to disclose to the market which their intentions are with regard to their investment, would such disclosure be useful?
-i) this would be useful for issuers and other investors (e.g. more transparency);
-ii) this would be negative to issuers and other investors

This would be negative to issuers and other investors, because financial and corporate transactions that promote efficiency will be impaired. In addition, the true informative value of the disclosure in practice is low. See answer to question 15. Too much transparency in terms of voting policies and future intentions could allow the market value to become very volatile, if not actually totally indeterminable. Particularly since the capital market is not accustomed to information to this extent and therefore also has no practice in "pricing" such disclosures. From the current perspective it is to be feared that the negative aspects will predominate.

Question 16.2.: If investors were required to disclose to the market which their intentions are with regard to their investment, which should be the minimum threshold triggering such disclosure?
-i) the thresholds provided in Article 9(1) TD should be applied (5%, 10% etc);
-ii) the lower/initial threshold should be significant and higher than the 5% foreseen in Article 9(1) TD (e.g. at least 10% or higher);
-iii) the information should only be requested only if certain threshold are crossed and provided that the investor is among the largest 3 investors in the issuer;
-iv) other.

As already set out in the answer to Question 15, the provisions of the Takeovers Directive, which have been implemented in many Member States such that acquisition of control is assumed at a threshold of 30%, should not be undermined by an additional regulation in the Transparency Directive. Any threshold below 30% therefore appears inappropriate. If 30% or more of voting rights are held, the obligation to publish a mandatory offer is triggered so that any provisions in addition to the takeover law would be superfluous.

But in no case should the disclosure threshold for a Europe-wide investor disclosure be below 20%. In view of the typical general meeting majorities, only starting at such a holding size may an influence on the enterprise be *de facto* exerted at all, in that material corporate decisions can be blocked in the general meeting.

Question 16.3.: If investors were required to disclose to the market which their intentions are with regard to their investment, should such disclosure consist in:
-i) simple information on intentions (e.g. box ticking in a form: I intend to change/influence control of the issuer/I do not intend to change/influence control of the issuer);
-ii) more substantial information on intentions (e.g. narrative explanations on purpose of the acquisition including any plans or proposals of the investor for future purchases or sales of issuer's stock or for any changes in the issuer's management or board of directors etc.); 10
-iii) information on source and amount of funds used to acquire the securities;
-iv) arrangements to which the investor is a party relating to issuer's securities;
- v) other.

If at all, an investor disclosure should be based on information that can be requested on a form, which does not extend beyond the scope anchored in German or French provisions. This would actually limit the data content of the individual disclosure. But a more extensive obligation to disclose strategic intentions would be a considerable intrusion in the freedom and ownership rights of investors and, in addition, would raise the question of how the accuracy of the disclosure can be reviewed and which penalties would be linked to any false disclosure.

Aggregation of holdings and voting rights

Question 17.: Should holdings of shares and voting rights be aggregated with holdings of financial instruments giving unconditional access to voting rights for the purposes of calculating the relevant thresholds that trigger the notification obligation?

Due to the minimal harmonisation approach of the Transparency Directive, the rules with regard to aggregating voting rights from shareholdings and from financial instruments that entitle the holder to acquire shares to which voting rights are attached vary in the Member States . It is above all necessary to avoid this going forward, for which reason we strenuously advocate here once again for a uniform European notification regime.

To that end, we consider it sensible that holdings from held and imputed voting rights on the one hand, and on the other hand those from financial instruments that embody a (so-called physical) claim to delivery of voting shares, that is those already reportable under the current version of the Transparency Directive, be aggregated. This would then correspond to the current implementation of the Transparency Directive in Germany following the entry into force of the Risk Limitation Act (*Risikobegrenzungsgesetz*). In contrast, the cash-settled derivatives addressed in Question 11 should not be included in this aggregation, but instead be presented in a separate disclosure. Please see the reasons identified there for this differentiation.

Other cases of insufficient transparency regarding corporate ownership.

Question 18.: Are there other cases of potentially insufficient transparency regarding corporate ownership?

No. We do not believe that there are additional deficits in transparency of corporate ownership and therefore also see no need for introducing additional disclosure obligations.

III. Ineffective application of the Directive because of diverging national measures and/or unclear obligations in the Directive

Uniform EU Regime or maximum harmonisation: major holdings of voting rights

Question 19.: Would it be desirable to set up a uniform EU regime (e.g. by a directly applicable EU Regulation) for the notification of major holdings of voting rights?

Yes. A directly applicable uniform European notification system for holdings would be desirable. The minimal harmonisation approach of the Transparency Directive has resulted in differing implementations in the Member States. Member States have set different triggering thresholds for the disclosure of voting rights in particular. Germany, for example, switched over to setting a disclosure obligation for voting rights at 3% already. For investors, this means that they receive different disclosures on holdings in the various Member States (unequal treatment of investors). For the notifying enterprises, the different implementation of the

Transparency Directive results in considerable work and high costs. In particular with respect to disclosure of voting rights under the Transparency Directive, banks' existing systems have to be programmed differently depending on the issuer's country of origin or different facilities must be set aside. This causes high costs. In addition, employees must be trained in the various legal systems in order to implement the disclosure obligations in the Member States correctly. This, too, is a reason for preferring a maximum harmonisation over the current status quo. Even better would be a uniform notification regime within the European Union in the form of a regulation. This would reduce the workload and costs at notifying enterprises and at the same time give investors a uniform picture of any holdings.

Question 20.: If a fully uniform EU regime is not possible because of insurmountable legal barriers, should Member States be prevented from adopting more stringent requirements than those of the Transparency Directive regarding the notification of major holdings of voting rights?

Yes, in order to implement a presentable, feasible, and in particular, a systemically replicable disclosure obligation in practice. Please also see the answer to Question 19.

Uniform EU Regime or maximum harmonisation: disclosure by issuers

Question 21.: Would it be desirable to set up a uniform EU regime (e.g. by a directly applicable EU Regulation) regarding issuers' disclosures?

Divergent rules: calculation of holdings

Question 22.: Could you please explain in what way national rules implementing the Directive result in different methods for aggregating holdings of voting rights (and where applicable financial instruments) for the purposes of calculating whether the relevant thresholds triggering the notification obligation are reached or crossed by investors?

Unclear rules

Question 23.: Could you provide evidence of cases where unclear rules in the Directive ought to
be clarified?

IV. Any other comments

Frage 24.: Do you have any other comments regarding the Transparency Directive?

No.

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