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FESE COMMENTS ON THE ESME GROUP REPORT ON THE TRANSPARENCY DIRECTIVE

1. Timeframe for notification

ESME recommendation

- There should be at least three days in which to notify the issuer to enable data to be gathered and verified, so that accurate disclosure can be made;

FESE comments

European Member States have different requirements for the timeframe for notification of major shareholdings. This situation, especially for multi-listed companies, is problematic and makes European markets less appealing to International institutional investors who might be discouraged to invest in a system with different reporting timeframes in place. Therefore, a unified approach to the timing of reporting of holdings would be significantly helpful both for issuers – who want disclosure as soon as possible - and competent authorities.

FESE welcomes and is supportive of ESME recommendation that harmonisation of timeframes and thresholds for notification is pursued. ESME suggests that there should be at least three days in which to notify the issuer to enable data to be gathered and verified, so that accurate disclosure can be made. FESE would recommend an even tighter timeframe and suggests that it is set at 2 business days for investors[1] to notify and 2 days for the Issuer or the Competent Authority to report this information to the public.

- **FESE would be supportive of a T + 2 + 2 reporting timeframe**

2. Reporting requirement thresholds

ESME recommendation

- A uniform threshold to be set at or above 3%;
- The Commission to adopt a right for companies to ask for shareholder identification.

FESE comments:

As it was said with regard to the harmonisation of timeframes, a uniform reporting requirement threshold at the EU level would be welcome and we agree with ESME that it would be desirable to both investors and issuers. According to the TD, when a shareholder reaches, exceeds or falls below a certain threshold of stockholding, he/she is obliged to inform the issuer. This threshold varies across Member States. In the Netherlands, in Germany and in Greece, the first threshold is 5%, in the UK and in Spain is 3% while in Italy disclosure is required above 2%. FESE welcomes

[1] More days – i.e. 4 – could be allocated for foreign investors whereas this provision is foreseen by national legislation.

ESME's recommendation to harmonise the reporting requirements across the EU and we are supportive of lowering the threshold to 3%. Standardisation will make it easier for investors to manage the notification of major shareholdings across the EU and will make European markets more attractive for International institutional investors.

Another topic on which we would like to comment is the ESME recommendation regarding the right for companies to ask for shareholder identification. Some Member States have national laws that grant this right to companies; in others, debate exists whether to implement national rules and regulations.

In the UK this provision is regulated by section 793 of the Companies Act 2006 that states that a company may send a notice to any person it knows or has reasonable cause to believe (a) to be interested in the company's shares, or (b) to have been so interested at any time in the previous three years. If the person fails to give the company the information required by the notice within the time specified in it, the company may apply to the court for an order directing that the shares in question be subject to restrictions. A person who fails to comply with a notice or makes a false/reckless statement, commits an offence (unless he can prove that the requirement to give information was frivolous or vexatious).

The German Federal Cabinet approved in October 2007 the Investment Risk Limitation Act, expected to come into force in 2008. If approved, the Act would amend existing legislation with regard to notification requirements, disclosure regarding the acquisition of shares, the legal concept of acting in concert and shareholder identification. With regard to shareholder identification, it proposes the following:

- Art. 67(4) company law - new version - obliges every bank in a chain of custodian banks to help identify the client one further link up the chain. This should help improve the quality of the share register which has been notoriously bad in the past.
- Furthermore, companies can decide in their statutes to institute an ad hoc identification procedure. Here, at a particular moment management can decide - at its own cost - to require all intermediaries to lay open the final beneficiaries of shares held in that company. Intermediaries do not have the obligation to know the final investor but they have to help go up the chain. Companies can decide to put in thresholds i.e. only ask for identification of positions of 1% or more.

ESME recommends that the Commission considers adopting a right for issuers to ask for shareholders' identification on an EU-wide basis. If, on the one hand, FESE encourages further debate and is aware that, where in place, such a mechanism works well; on the other hand, we would be cautious with regard to new European regulation, which at this stage could be premature. In fact, differences among national systems (e.g. registered shares environment vs. bearer shares environment) make it unlikely for a European recommendation to work uniformly in every Member State, at least for the time being.

- **FESE would support changes to harmonise the threshold for notification of major shareholding at the EU level at 3%.**
- **FESE believes that Member States should not be discouraged to implement the right for issuers to ask for shareholders' identification in their jurisdictions but would not support new European regulation.**

3. **Mechanics for disclosures of major interests:**

ESME recommendation

- Competent authorities to notify public rather than the issuer
- In the longer term, alter the notification from the issuer to the competent authority, so that investors notify the competent authority who is to inform the issuer and the public

FESE feedback:

Article 12 (6) and (7) of the TD leave it to Member States to decide whether the disclosure of the information contained in the notification should be made by the Issuer or the Competent Authority[2]. If the requirement for publication rested solely with the competent authority, the system would not necessarily end up being more efficient. In addition, it would reverse the basic principle that it is the companies that alert the public to important information concerning them. In any case, we are not aware of any inefficiency in the competitive model run by commercial operators (e.g. in the UK).

ESME argues that it is hard to identify who to notify at the issuer and who to contact at the investor. We do not share this concern since sending it to the Company Secretary or Finance Director would suffice and contact details of the investor are contained at the bottom of any notification. Any investor reaching, exceeding or falling below the 3% threshold is quite likely to ascertain who to contact at the issuer. In any case, if this is truly problematic then we suggest that guidelines at Level 3 could be produced in order to enable clearer identification by the company as to who to contact, rather than overhauling the whole system under the Directive.

- **FESE would not support changes to the current mechanics of disclosure foreseen by the TD.**

4. **Stock lending:**

ESME recommendation

- CESR/the Commission to monitor whether a more detailed disclosure becomes appropriate depending upon how market practice develops in view of the increase in lending policies and guidance;
- CESR/the Commission to consider permitting netting of borrowed and lent positions by investors in reporting and to consider the disclosure of actual/potential rights

FESE feedback

The lending of securities is a practice that has a number of extremely useful applications such as improving and maintaining market liquidity, allowing market operators and asset managers to run short positions and reducing the

[2] In Spain, a mixed system is in place. While investors have to notify both Competent Authority and issuer, it is the Competent Authority to disclose major shareholdings to the public. This way, the issuers have access to investors' notifications before Competent Authority discloses it to the public.

risk of failed trades. Moreover, investors/lenders could be interested in enhancing an additional return on their existing investment by disposing of their voting rights.

FESE would be very cautious regarding the introduction of regulatory measures which could interfere with the well established use of securities lending[3]. The treatment of stock lending should be left to RMs and their competent authorities; MSs should be free to rely on the application of broad principles based on best practice within the industry (such as the SLRC Code in the UK[4]) which work well and, if necessary, could apply across the EU. On the other hand, we are supportive of ESME's suggestion to "investigate certain jurisdictions' concept of disclosure of actual holdings and potential holdings where an investor has recall facilities over shares". Where this mechanism is in place (e.g. in Greece), there is a clear view within each end-investor's account of the exact status of the securities contained therein, and therefore it is easy to tell whether the securities are lent or borrowed.

- **FESE would not support the introduction of regulatory measures which could interfere with the well established use of securities lending but would support further analyses of mechanisms allowing to distinguish between actual and potential holdings.**

5. **Additional Topic:** The interaction between Article 10 of the Prospectus Directive and the dislcosure obligations under the TD

Article 10 of the PD foresees that issuers whose securities are admitted to trading on a regulated market shall at least annually provide a document that contains or refers to all information that they have published or made available to the public over the preceding 12 months. Because of the timing of the two directives, this requirement became obsolete and overlaps with the disclosure obligations of the TD. We are aware that the Commission has asked ESME to look into this topic; our recommendation would be that, since the TD regime already guarantees thorough and exhaustive disclosure obligations for issuers, Article 10 of the PD could be deleted.

[3] Respecting this, one could point out the relevant advantages of a direct holding system with separate account balances for lent and borrowed stocks. This permits the central registration of all borrowers, lenders and actual holders of equities allowing issuers to receive this kind of information in a timely manner.

[4] The next meeting of the Stock Lending and Repo Committee (SLRC), which produces the voluntary Code for stock lending in the UK, will discuss the updating of the Code in the June meeting. Therefore it is likely that changes to the Code will be in place by the end of this year.