European Association
for
Listed Companies

EALIC

Mr. A. Docters van Leeuwen
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BY E-MAIL

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Your ref.
Our ref. \276\20232217\Position Papers\b021-276a(TransparencyII).doc

Re. Second part of CESR's advice on possible implementing measures of the Transparency Directive (CESR/04-512-c).

Dear Mr. Docters van Leeuwen,

Ealic, the European Association for Listed Companies, aims to represent European listed companies and to promote their common interests on the European level. Ealic was incorporated in December 2002 as a non-profit association. Its membership is growing. Presently sixty-five public companies are member. A membership list is attached for your convenience.

Ealic is pleased to respond to the proposals set forth in the consultation document "CESR's advice on possible implementing measures of the Transparency Directive". Ealic would like to note that its comments are based on the text of Directive 2004/109/EC, as published in the Official Journal L 390/38 of 31 December 2004. Since CESR's consultation paper refers to a previous, unofficial version, the numbering of the articles quoted in this paper may be different from that referred to in the consultation paper.

As a general remark, Ealic would like to point out that under the Transparency Directive one can distinguish: (a) the obligation of the shareholder or the holder of voting rights to notify to the issuer the situation in terms of voting rights (article 12.2); (b) the obligation of the shareholder/holder of voting rights to file the above information with the competent authority (article 19.3); and (c) the obligation of the issuer to make public all

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the information contained in the notification (article 12.6), unless it is exempted because the information is made public by the competent authority (article 12.7). Ealic considers that, in order to allow investors to have easy access to corporate information, dissemination by the competent authority, instead of dissemination by issuers, should be encouraged. This is in line with Ealic's position regarding the need for a single information filing system (managed by the competent authority, a market operator or a third party). In such system, information is filed with the applicable authority, which stores it and simultaneously makes it available to the entire market. For a detailed discussion of the issue of concentrating filing, disseminating and storage functions, please refer to Ealic's response to CESR/04-511, sent on 28 January 2005.

Chapter 1 – Notifications of major holding rights

Section 1 (questions 1-3)

For the purpose of the exemption of notification under article 9.4, Ealic regards a proper interpretation of "usual short settlement cycle" to be a T+3 clearing and settlement cycle. Such meaning should be identical in relation to shares and other financial instruments relevant for applicable notification duties.

Section 3 (question 7)

For the purpose of determining the calendar of trading days under article 12.2, Ealic agrees with CESR's proposal to use the calendar of trading days of the issuers' home Member State. Ealic welcomes CESR's proposals (a) to ask the competent authorities to attach such calendar to the standard form of notification available on the authority's website, and (b) to ask that each Member State draws up a list of issuers it supervises. With respect to the latter, Ealic considers that it should be stipulated that the list of issuers is drawn up solely for the purposes of the notification duties under the Transparency Directive. A different solution could be to draw up a single calendar of trading days, although this may imply some difficulties in coordinating the working days of the different Member States or stock exchanges.

Section 4 (questions 8-11)

In determining who should be required to make the notification in the circumstances set out in article 10, Ealic has examined both approaches A and B. Ealic understands that the different approaches lead to the same solution in the circumstances provided by articles 10(a), 10(e) and 10(g). As regards the other circumstances – from 10(b) to and including 10(h) – Ealic believes that Approach A may be followed. Therefore, in those circumstances, the notification duty only would apply to the person who is entitled to exercise the voting rights, in order to avoid the risk of a duplication of notifications. For market transparency purposes, it suffices that the identity of the shareholder, if the latter is not entitled to exercise the voting rights, is disclosed under article 12.1.d and

via the standard form provided by Section 7. Moreover, this standard form shall include all the relevant information about the transaction which gave rise to the notification duty (e.g. pledge), as detailed below.

Finally, Ealic agrees with the possibility of making a single notification in the event of joint notification duties.

Section 5 (questions 14-16)

With respect to the question when a natural person or legal entity should be deemed to have knowledge of the acquisition or disposal under article 12.2, Ealic agrees with CESR's discussion regarding the duty of care of a natural person (or legal entity) that arises when giving an order to an intermediary. In these cases, Ealic deems such person to have knowledge of the acquisition or disposal on the day when the transaction was actually executed (in this respect it could be considered to clarify the moment the transaction is "actually executed").

Section 7 (questions 23-30)

As a general remark, Ealic welcomes the adoption of a standard form to be used on a pan-European basis by investors and wishes Member States not to introduce relevant modifications to this standard. As regards the content of the standard form, Ealic believes that a distinction could be drawn, where applicable, among voting rights in the annual general meeting, voting rights solely in extraordinary meetings and voting rights limited to specific issues (e.g. appointment of directors). It is also to be considered that in some legal systems (as in Italy) voting rights limited to specific issues may be attached to financial instruments different from shares. Such a distinction may result in the first column of the standard form ("Class/type of shares or financial instruments"). Such differences should be considered in the calculation of the total percentage of voting rights (in the third column of the standard form).

Question 23: in order to take into consideration the differences among voting rights, Ealic believes that the total number of voting rights held after the triggering transaction should be split into each class of voting rights.

Question 24: Ealic believes that no information regarding the previous notification shall be due; this information is already available to the market.

Question 25: in Ealic's opinion, information on the transaction which triggered the notification duty is useful and is adequately covered by paragraph 2 of the proposed Standard Form.

Question 26: Ealic believes that information regarding the number of shares could be useful.

Chapter 2 – Half Yearly Financial Reports

Question 50: The consultation paper (§§ 496 and 505) implies that IAS/IFRS must be applied by all issuers publishing consolidated accounts. Ealic however would like to underline that IAS/IFRS are not mandatory with respect to non-consolidated financial statements, which are governed by the national laws of the Member States. With regard to such statements, even for those points subject to implementing measures (cf. article 5.6 of the Transparency Directive), it is necessary to take into account the provisions adopted by the Member States in the context of the European Regulation on the application of IAS and of other Directives.

Ealic furthermore considers that it is also possible to take European implementing measures solely with respect to the points laid down explicitly by the Transparency Directive, i.e., in this case, the condensed balance sheet and profit and loss accounts and explanatory notes to these accounts, where they are not prepared in accordance with international accounting standards. Reporting on related parties, which is not referred to by the Transparency Directive, must therefore be excluded.

Given that the non-consolidated financial statements of issuers, who are required to draw up consolidated accounts, are governed by national laws, it follows from article 5.3 of the Transparency Directive that the set of condensed half-yearly financial statements of such issuer should be prepared on a consolidated basis. Therefore, the issuer cannot be required to prepare a set of non-consolidated half-yearly financial statements as well. In other words, publication in consolidated form dispenses the parent company from publishing non-consolidated half-yearly financial statements.

Pursuant to article 5.3, an issuer who is not required to prepare consolidated accounts follows the same principles for recognising and measuring as when preparing annual financial reports, which therefore applies mainly to its non-consolidated accounts. Therefore, within the meaning of article 5.3, condensed half-yearly financial statements means the following :

1. For the issuer who is not required to prepare consolidated accounts, non-consolidated condensed financial statements are prepared using the same principles for recognising and measuring as when preparing annual financial reports;
2. For the issuer preparing consolidated accounts in accordance with international accounting standards, consolidated condensed financial statements are prepared in accordance with the international accounting standard applicable to interim financial reporting.

Ealic would like to underline that a requirement relating to presentation formats and reporting applicable to non-consolidated half-yearly financial statements, which would

not rely on any Community legal basis, could contradict the provisions laid down in accordance with the principle of subsidiarity, and would have low added value since interim financial reporting is published on a consolidated basis. Consequently, Ealic believes that it should be stated explicitly that the draft CESR advice (§§ 498 and 499), relating to non-consolidated half-yearly financial statements not prepared in accordance with international accounting standards, can only be an obligation for an issuer who is not required to prepare consolidated accounts.

Question 51: Concerning the concept of related party transactions under article 5.4, Ealic agrees to make reference to IAS 24 with regard to a half-yearly management report prepared on a consolidated basis exclusively. In this case, it should however be specified that reference to IAS 24 is to be deemed as reference to the IAS 24 principle as endorsed in Regulation n. 2238/2004 EC of 29 December 2004 (published in the Official Journal L394/110 of 31 December 2004). Moreover, considering that state-controlled entities are within the scope of IAS 24 and that the number of transactions between state-controlled entities could be so high as to make the cost of providing the information excessive compared to the benefit derived, it could be recommended to evaluate the materiality of these transactions so as to include only the most significant ones.

As regards the half-yearly management report which is not prepared on a consolidated basis, Ealic considers that applicable provisions drawn up by the Member States ensure consistency of principles for both half-yearly and annual reports. Ealic therefore believes that it should not be required to mention major related parties transactions using the definition provided in IAS 24.

Ealic would be pleased to enter into a further dialogue with CESR regarding this subject matter.

Sincerely,

Paul Cronheim
Chairman Legal Committee

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