POSITION PAPER REGARDING THE PROPOSAL FOR AMENDMENT OF THE TRANSPARENCY DIRECTIVE (COM(2011) 683 FINAL)

Summary

Most of the proposed amendments to the Transparency Directive (hereafter: the proposed Directive)[1] can rely on Eumedion's support. This relates in particular to the proposal to extend the scope of the Transparency Directive to certain cash settled financial instruments, and to the proposal for maximum harmonisation of the regime for the notification of a major holding. Additions should be made to the proposed Directive on two points in our opinion:

1) Not only maximum harmonisation with regard to the major holdings disclosure requirements, but also with regard to the notification thresholds. The proposed option for EU Member States and for individual listed companies to set extra notification thresholds (above the thresholds mentioned in the Transparency Directive) should be withdrawn, in order to significantly reduce the administrative burden for institutional investors.
2) The European Securities and Markets Authority (ESMA) should be given a role in providing clarification of the term 'acting in concert', so that convergence is achieved in the interpretation of the concept of 'acting in concert'.

The above elements are set out in more detail below.

1. No maximum harmonisation of notification thresholds for major holdings

The second paragraph of the new article 3 (2) of the proposed Directive reads as follows: "The home Member State may not make a holder of shares, or a natural person or legal entity referred to in Articles 10 or 13, subject to requirements more stringent than those laid down in this Directive, except setting lower notification thresholds than those laid down in Article 9(1)". Eumedion interprets this provision to mean that every Member State is not only free to include a

[1] Proposal for a Directive of the European Parliament and the Council amending 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 and Commission Directive 2007/14/EC (COM (2011) 683 final).

lower first notification threshold in its national legislation than that referred to in the Directive (5%), but also to include extra notification thresholds between the various notification thresholds inside the range of 5% to 75% stipulated in the Directive. Moreover, individual listed companies are free to include additional notification thresholds in their articles of association.

As a consequence of this freedom permitted to EU Member States and to individual listed companies to set their own notification thresholds, institutional investors with an internationally diversified equity portfolio will be forced to set up tailored notification systems at Member State level and sometimes at company level. This is very expensive for an institutional investor of this kind, as was also acknowledged by the European Commission in its 2010 report on the operation of the Transparency Directive.[2] One of the objectives of the European Commission is to reduce the administrative burden on enterprises. Maximum harmonisation of the notification thresholds would save institutional investors a lot of time and money and can make a significant contribution, therefore, to achieving this objective.

Therefore, we would be in favour of a maximum harmonisation of the notification thresholds in the EU Member States. Maximum harmonisation was also recommended by the European Securities Market Expert Group (ESME) in 2007 and was designated a "high priority"[3] by this group of experts. Maximum harmonisation should not apply to Member States alone, but to the listed companies as well, to ensure that the stipulation of extra notification thresholds in the articles of association is no longer possible. It is true, of course, that extra thresholds cannot be included in the articles of association without the agreement of the shareholders' meeting. Minority shareholders, however, can be ignored in a vote on an amendment to the articles when the decision-making process in the shareholders' meeting is dominated by major or majority shareholders who are usually 'associates' of the management board of the company in question.

2. Failure to address varying interpretations of the concept of 'acting in concert'

Eumedion members experience differences in the interpretation given within the EU to the definition of 'acting in concert' in article 10, paragraph a of the Transparency Directive, principally with regard to the components "agreement" and "a lasting common policy towards the management of the issuer in question". Institutional investors are reticent about sharing information and research efforts when preparing for shareholders' meetings (for example), if there is a lack of clarity concerning the interpretation that supervisory authorities give to the facts and circumstances that transform "normal cooperation between shareholders" into "collusion" and

[2] See paragraph 12 of the report of 27 May 2010 from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on the operation of Directive 2004/109/EG on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market (COM(2010)243 final).
[3] First Report of ESME on the Transparency Directive, 5 December 2007.

consequently create a joint notification obligation when the joint interest is such that a notification threshold is crossed. This is detrimental to effective preparation for shareholders´ meetings and does not contribute to the objective of casting "informed votes" at general meetings. ESME already identified this point as well.[4] In addition, the feedback statement from the European Commission in response to the consultation held in 2010 also reports that many respondents asked for clarification of the definition of 'acting in concert'.[5] To Eumedion's disappointment, the European Commission has failed to act on these comments. We would recommend that the proposed Directive includes a request to ESMA to provide guidance on the definition of 'acting in concert'. For the sake of clarity, we would like to emphasize that we are not advocating amendment of the definition in the Directive itself.

3. Problems of hidden ownership are rightly being addressed

The European Commission is rightly proposing that the scope of the Directive be extended to certain cash settled financial instruments, thereby following the examples of a.o. the United Kingdom, France, Germany and the Netherlands. The problems of 'hidden ownership' will be addressed effectively in all EU member states in this manner and institutional investors with an internationally diversified share portfolio will benefit greatly as a result. Eumedion is also in favour of the proposal to aggregate interests held in shares with the economic interests that a party holds, and that information must be provided on the nature of the interests.

4. Abolition of obligation to publish quarterly financial reports

On the grounds of the proposed Directive, EU member states will no longer be able in future to require listed companies by law to publish three-monthly trading updates on their financial position and performance in those three months. The European Commission is making this proposal to reduce the administrative burden for listed companies and relieve the short-term pressure on listed companies, as well as to encourage investors to take a long-term view. Eumedion supports the proposal and the considerations on which it is based. In addition, Eumedion agrees with the European Commission that the companies must continue to have the option of publishing quarterly reports at their own discretion.

5. Publication of payments made to governments by oil, gas, mining and logging companies

The European Commission proposes requiring logging, mining, gas and oil companies with stock exchange listings in the EU to make increased disclosure of their payments to governments. On

[4] ESME, 'Preliminary views on the definition of "acting in concert" between the Transparency Directive and the Takeover Bids Directive", 17 November 2008.
[5] European Commission, 'Feedback Statement; Summary of responses to the consultation by DG Internal Market and Services on the Modernisation of the Transparency Directive' (Annexe 10 to the Impact Assessment of the proposed directive).

the grounds of the new article 6 of the Directive, these companies must publish information on "material" benefits paid to governments, including tax on profits, royalties, fees and so-called sign-on and production bonuses, and for license and concession rights. The information must be broken down by country and specific project on an annual basis. We support this proposal. From the point of view of clarity and user-friendliness, however, we would like to recommend that the payment summary is included as a component of the annual financial report, as referred to in article 4 paragraph 2 of the Transparency Directive. Furthermore, we would consider it advisable if the European transparency requirements for oil, gas, mining and logging companies in relation to payments to governments were fully in line with the imminent US transparency obligations, so that these mostly international companies with different stock exchange listings do not have to deal with conflicting regulations.[6]

[6] SEC Proposed Rule *Disclosure of payments by resource extraction issuers*, File No. S7-42-10, 28 January 2011. The final transparency provisions will probably be adopted by the Securities and Exchange Commission at the end of 2011.