

**SUMMARY RECORD OF THE 63RD MEETING OF THE EUROPEAN SECURITIES COMMITTEE
(ALTERNATES)
11 FEBRUARY 2009**

Working document ESC-3-2009

In the morning, the joint meeting of the European Securities Committee and the Working Party IV on Direct Taxation was chaired by Mr. Emil Paulis, Director of Financial Markets, DG Internal Market and Services. The Chairperson welcomed the members and expressed his wish to have a good meeting and take full advantage of this cooperation opportunity. He paid a special welcome to Mr. Ed Barret, the observer from the OECD, and stressed the good cooperation between the EU and the OECD on fiscal compliance procedures. In the afternoon, the meeting of the European Securities Committee was chaired by Ms. Maria Velentza, Head of the Securities Markets Unit, DG Internal Market and Services.

1. ADOPTION OF THE DRAFT AGENDA

The agenda was adopted.

2. FISCO – ECONOMIC BUSINESS CASE

JOINT MEETING OF THE MEMBERS OF THE EUROPEAN SECURITIES COMMITTEE AND THE WORKING PARTY IV ON DIRECT TAXATION

Further to the FISCO report, the Commission services – together with a group of experts – have been analysing the potential economic impact of improved withholding tax relief procedures. The expert group met again on 29 January. The Commission services will present the state of play as regards this analysis.

The Commission services gave a detailed presentation of the draft Economic Business Case, indicating that improved withholding tax relief procedures could increase EU GDP growth by 0,14 % per year amounting to €184 billion over a 10 year period, and stressing the potential benefits for Member States, investors and intermediaries. Some Member States insisted that the Economic Business Case should include the cost of the potential risk of fraud in case of foreign financial intermediaries acting as withholding agencies.

3. FISCO RECOMMENDATION

JOINT MEETING OF THE MEMBERS OF THE EUROPEAN SECURITIES COMMITTEE AND THE WORKING PARTY IV ON DIRECT TAXATION

Presentation by the Commission services of an updated discussion paper concerning the improvement of withholding tax relief procedures.

The Commission services presented the 2nd Discussion paper on the "Improvement of withholding tax relief procedures". Many Member States recalled they were still considering that the Commission was not competent for writing a recommendation on direct taxation

which is an exclusive States' competence. Some Member States were rather critical, expressing mainly concerns about the proposed obligation to allow foreign financial intermediaries as withholding agencies. The major concern was the potential lack of control over foreign intermediaries and thus the risk of losing tax payers' money. Some Member States also indicated that this would entail a change of their domestic legislation, which they considered particularly problematic given the legally non-binding character of the anticipated Recommendation. In the same vein, some Member States rejected the idea of a roadmap that would have to be submitted pursuant to the adoption of the non-binding Recommendation. While acknowledging the issue of control/fraud, other Member States welcomed the plans of the Commission services, stressed the potential win-win situations, and suggested better use of modern technology to avoid fraud.

The Commission services responded to the questions from Member States and took note of the general wish from Member States to have more clarity on the conditions that Member States may pose on foreign intermediaries as regards control and prevention of fraud.

The Chairperson invited Member States to make further comments on both the Economic Business Case and the 2nd discussion paper by 27th February 2009. He indicated that the Commission services would probably organise another meeting to continue the discussions. Some Member States expressed their opposition to a next joint meeting.

4. TRANSPARENCY - MARKET ABUSE (WORKING DOCUMENT ESC-1-2009)

Presentation by the Commission services of a discussion paper on transparency of holdings of cash-settled financial instruments, followed by discussion.

The Commission services introduced the debate by presenting the discussion paper on transparency of holdings of cash-settled financial instruments which was previously distributed to the delegations. The Commission services explained that the paper was drafted in order to collect opinions of the Member States on the issue which is subject to increased concern expressed by market participants. Following these concerns the Commission services decided to address the cash-settled derivatives issue and consider application of the notification regime to these products. The Commission services further explained that under current regime applicable to the disclosure of major holdings of voting rights laid down by the Transparency Directive, most of the cash-settled derivative positions are not subject to disclosure. But this situation seems to be unsatisfying, in particular following recent cases in several Member States and in the United States which showed that these instruments could be used in order to build a secret stake in a listed company or to acquire and exercise a potential influence in such a company through the use of empty voting. The Commission services also mentioned that some Member States have adopted or are in process of adopting rules requiring disclosure of economic interest in equities, in particular in UK where FSA is preparing a set of measures requiring systematic disclosure of long positions in contracts for differences.

The Commission services then asked Member States to express their opinions on the subject, in particular on the following questions:

- a) Could the non-disclosure of the cash-settled derivative positions be problematic with regard to market transparency?
- b) Should there be a systematic disclosure of cash-settled derivatives positions or should it be limited (i.e. to cases where the derivative was entered into in connection with a control transaction)?

c) Is Commission action needed in this field?

All delegations which took the floor and the CESR acknowledged that the non-disclosure of the cash-settled derivative positions creates a real problem with regard to the transparency and that there is a need for the disclosure of holdings of these instruments in order to improve market efficiency and investor protection.

In several Member States the issue has been or is being studied internally. One Member State informed the Committee that the disclosure of cash-settled derivatives is being discussed in its national Parliament. Another Member State's delegation informed other members that it has adopted a particular disclosure regime for cash-settled derivative instruments.

However, delegations also emphasised the complexity of the issue and the importance of finding a balance between the need for more disclosure and the danger of invading the market with too much information, which would be counterproductive. Some representatives and the CESR expressed concern that too much information could have an adverse impact on market efficiency and result in less than more market transparency. Two Member States in particular stressed the need to avoid the huge administrative burden on market participants.

The delegation of one Member State expressed itself in favour of a systematic disclosure with a set of exemptions to prevent overdisclosure. Another Member State favoured a limited disclosure but said it did not have much experience and was open for other solutions. Moreover, a Member State explained that under its notification regime, purely cash-settled instruments were subject to a particular disclosure requirement outside any crossing of thresholds.

On the possible EU action, several delegations did not see the need for immediate action on the Commission's side but were in favour of letting Member States take necessary measures according to their needs and the state of development of their derivatives markets.

However, they were not opposed to Community action in long term. Other delegations favoured a common EU approach in order for the issue to be solved in a consistent way throughout the Member States. Two Member States emphasised the need to avoid an excessive administrative burden for market participants which would have to comply with different rules for notification in different Member States. A Member State especially mentioned that the Transparency Directive is a minimum harmonisation directive and if each Member State takes individual measures, this would undermine the harmonisation even further.

The CESR representative also stressed that the issue of cash-settled financial instruments is a cross-border issue and from the investor protection point of view a harmonised solution on European level has some merits. He also expressed the opinion that although letting Member States develop a national solution could be justified because the level of derivatives trading varies a lot from one Member State to the other, in case the solutions adopted on national level were inconsistent, it would be difficult to reconcile them in CESR.

Some Member States' delegations said they were open to an EC action but stressed the need for a careful study and evaluation of the situation before any action would be decided by the Commission. All delegations underlined the importance of a thorough prior analysis and a careful impact assessment of the issue before the Commission decides to take any initiative in

the field of cash-settled derivatives. A Member State delegation especially asked the Commission services to carefully consider the impact of any measure on the market for corporate control. All delegations emphasized the complexity of the cash-settled derivatives issue and welcomed a further work by CESR and the Commission on the subject. A Member State delegate informed the members of the Committee that they are in process of preparing a non-paper for CESR on the cash-settled derivatives disclosure which would further advance the debate on this issue.

The CESR representative in particular stressed the difficulty of the subject and its interconnection with Take-over Directive and general principles of corporate governance which requires careful analysis. The Commission services replied that they will continue to study the issue and carry out an impact assessment before introducing any proposals in the report on the application of the Transparency Directive and would take into account the views and opinions expressed by the members of the Committee. It was agreed that the Commission services would invite the delegations to submit their written opinions on the subject.

5. REVIEW OF THE PROSPECTUS DIRECTIVE (2003/71/EC)

Presentation by the Commission services of the public consultation document on the Prospectus Directive review.

The Chairperson presented the public consultation launched on 9 January 2009 on the proposal for the modification of the Prospectus Directive. She explained that the proposal was presented in the context of the Simplification Exercise (Action Programme for the reduction of administrative burden in the EU - Stoiber Group) and as a consequence of the review required by Article 31 of the Prospectus Directive.

The Chairperson pointed out that the issues covered by the proposal were selected from those highlighted in the reports from CESR and the European Securities Markets Expert Group (ESME) and that inputs were received also from different stakeholders. In relation to the timetable for adoption, she said that the closing date for replies was 10 March 2009 and that the final adoption depended on the priorities and timetable of the European Parliament.

The Commission Services summarized the changes put forward in the proposal and the background document (both texts are currently displayed on the Commission's website). These comprised in particular the following:

- modification of the definition of qualified investors;
- free choice of the Home Member State for the issuers of debt (suppression of the €1.000 threshold);
- clarify the issue of the "retail cascade";
- abolition of duplicative disclosure obligations after the entry into force of the Transparency Directive by deleting Article 10 of the Prospectus Directive;
- harmonisation of the time frame for the exercise of the right of withdrawal establishing a common period of at least two days;
- widening of the scope of the exemption granted for Employee Shares Schemes.

In addition, the Commission services mentioned that the consultation also requests stakeholders' views on following issues: effectiveness of the prospectus summary; disclosure

requirements for offers with Government guarantee schemes, for small quoted companies and for rights issues; definition of offers of securities to the public; liability regime and equal treatment of shareholders.

The Chairperson strongly invited Member States to participate in the consultation and send their view by 10 March 2009. Moreover she informed the delegations about the Commission's initiative on Packaged Retail Investment Products and that a White Paper on this topic would be published by March-April.

The two delegations which took the floor stated their support for all Commission proposals especially in light of the reduction in the administrative burdens in the EU. Nevertheless, one delegation expressed its concern on certain modifications proposed in the consultation and background documents; in particular, it stated that modifying certain thresholds of the Directive (notably the increase of the € 2.5 million threshold for small quoted companies) would undermine investor protection.

CESR's representative informed the delegations of the Member States that, in response to a Commission's request on the Employee Shares Schemes and based on the interpretation of the existing Prospectus Directive, CESR had published on its website a "light touch regime" for offers to employees in those cases where a prospectus was required. The Commission services' representative explained that the temporary interpretation solution was needed pending the amendment of the Directive.

The ECB representative raised a general comment relating to the recent financial crisis. He stressed out the need to check the effectiveness of all Directives dealing the issue of disclosure in relation to the financial crisis.

6. INVESTOR COMPENSATION SCHEME DIRECTIVE (1997/9/EC)

Information by the Commission services on the call for evidence.

The Commission services informed the members that a call for evidence on the Investor Compensation Schemes Directive (ICSD) has been launched on 9 February 2009. The Commission services explained rapidly the main issues covered by the call for evidence, most of which had already been presented during the ESC meeting in November. The issues of money market funds and the coverage of UCITS were specifically mentioned. ESC members have been invited to send their contributions by 8 April 2009.

7. A.O.B

Discussions were held on the possibility of having a further joint ESC/Joint Working Party IV meeting on the draft Economic Business Case and the discussion paper on the "Improvement of withholding tax relief procedures". The Commission would inform the members of a possible date.

No other additional points were raised during the meeting. The next meeting ESC is scheduled for 7 April.