

17 November 2008

## **European Securities Markets Expert Group**

### ***Preliminary views on***

### ***The definition of "acting in concert" between the Transparency Directive and the Takeover Bids Directive***

The European Securities Markets Expert Group (ESME) provides legal and economic advice to the European Commission on the application of the EU securities Directive. ESME was created by Commission Decision 2006/288/Ec of 30 March 2006 (OJ L 106, 19.4.2006, p.14).

The list of ESME members is available at:

[http://www.ec.europa.eu/internal\\_market/securities/esme/index\\_en.htm](http://www.ec.europa.eu/internal_market/securities/esme/index_en.htm)

## *INTRODUCTION*

The **definitions of “acting in concert”** in Article 10 (a) of the Transparency Directive and in Articles 2.1(d) and 5 of the Takeover Bids Directive are not identical.

- According to the Transparency directive, the notification requirements prescribed by the Directive apply also to cases of an “*agreements*” which “*oblige*” to adopt, “*by concerted exercise*” of the voting rights, a “*lasting common policy towards the management*”. Therefore the necessary conditions for the EU legislation for the obligation to arise, are: an agreement between the parties, the aim of adopting a common policy towards the issuer, the duration of the common policy (“*lasting*”), the object of the policy (not the issuer per se but the management of the issuer), and, finally, the rising above the relevant threshold (5% or less).
- According to the Takeover Bids directive, persons acting in concert – for the launch of a mandatory bid - shall mean natural or legal person who “*cooperate*” with the offeror or the offeree company “*on the basis of an agreement*”, either express or tacit, either oral or written, “*aimed*” either at acquiring control of the offeree company or at frustrating the successful outcome of a bid. The conditions required in this case are: the cooperation, an underlying agreement, the aim acquiring a company or frustrating a bid; the relevance is given only to the crossing of the threshold for the mandatory bid;

The **goals** pursued by the two directives, though complementary, are different:

- Article 10 of the Transparency Directive aims, *inter alia*, to provide transparency as to who has the power to exercise voting rights when voting-rights holders agree on pooling their votes.
- Articles 2.1. (d) and 5 of the Takeover Bids directive aims at protecting minority shareholders by requesting the launch of mandatory bids at equitable prices when shareholders act in concert to acquire control.

Different definitions given by the two directives may lead to **uncertainties in practice**, especially for cross-border institutional and private shareholders, if diverging interpretations are adopted by Member States on key concepts such as “*lasting common policy*” (in the Transparency Directive), or “*acquiring control*” (in the Takeover Bids Directive) or “*agreement*” (in both Directives).

ESME decided to assess whether there are inconsistencies on the definitions of acting in concert between the Transparency directive and the Takeover Bids directive and in national laws implementing both Directives.

The work is still in progress. In fact, the deadlines for the transposition were January 20, 2007, for the Transparency directive and May 20, 2006 for the Takeover Bids directive. Quite all the Member States have notified to have implemented both the directives<sup>1</sup> but really in some cases the secondary regulation has not been adopted yet. Transitional periods have been granted. There are no sufficient cases dealing effectively with the new rules:

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<sup>1</sup> See [http://ec.europa.eu/internal\\_market/company/docs/official/080825trans-play\\_en.pdf](http://ec.europa.eu/internal_market/company/docs/official/080825trans-play_en.pdf).

decisions by competent authorities and courts deal with the old rules. Furthermore the Commission prepared in cooperation with CESR two standard forms for the notification of transparency obligation requirement (including the concerted action)<sup>2</sup> in order to promote the harmonization throughout EU competent authorities; the Commission requested CESR<sup>3</sup> to ask CESR members to make it available to market participants for a testing period ended on June 30, 2008 but no public feedback has been published yet.

### ***DIFFERENT IMPLEMENTATION OF THE DIRECTIVES BY MEMBER STATES***

The ESME subgroup had several conference calls and gathered detailed information on the implementation laws or bills in quite all Member States.

CESR and the OECD Steering Group on Corporate Governance are also working on the topic<sup>4</sup>. The ESME subgroup exchanged information on the implementation of the Directives with CESR and OECD.

A **preliminary analysis** shows that the key issue is not necessarily the different definition of acting in concert in the Takeover Bids Directive or the Transparency Directive, though it is possible that there are overlapping cases where the notification requirements of the transparency directive are due to agreements relevant for the takeover directive and *viceversa* and complying to both directives requires different contents of the notifications. The possible compulsory adoption by all competent authorities of a common standard at least for the transparency obligation may help.

A lot of attention has been devoted on the wide interpretation of the acting in concert provision in some Member States in the context of the transparency obligation and, especially, of the takeover bids.

In particular the **takeover directive** is a minimum harmonization one: there is wide room for interpretation for Member States, also due to the fact that the definition of the takeover directive is necessarily generic. In addition, most of the current interpretations derives from the application of the rule in specific cases and market practices. In some cases a lot of behaviors beyond the notion of the directive are presumed to be “acting in concert”.

This may lead to great **uncertainties in market behavior**, especially where cross-border shareholdings is concerned; in many case, investors are not sure of the consequences of their behaviour.

***De facto* the directive should be considered by member states and competent authorities, with respect to the acting in concert notion, as a maximum harmonization one.** Either the definition of acting in concert given by the takeover directive should be considered more “binding” and implemented as such (but the problem is that this definition is far too generic, as pointed out before) or the

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<sup>2</sup> See [http://ec.europa.eu/internal\\_market/securities/docs/transparency/standard\\_forms\\_en.pdf](http://ec.europa.eu/internal_market/securities/docs/transparency/standard_forms_en.pdf).

<sup>3</sup> See [http://ec.europa.eu/internal\\_market/securities/docs/transparency/letter\\_cesr\\_en.pdf](http://ec.europa.eu/internal_market/securities/docs/transparency/letter_cesr_en.pdf).

<sup>4</sup> For the OECD work see [http://www.oecd.org/document/11/0,3343,en\\_2649\\_34831\\_40669067\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/11/0,3343,en_2649_34831_40669067_1_1_1_1,00.html).

implementation of such definition, detailed with juridical meaning in the different Member States, should be coherent.

### ***EFFECTS ON CORPORATE GOVERNANCE AND MARKET PRACTICES***

**Shareholders' activism** is considered a cornerstone in good governance practices. The co-ordination problems facing dispersed shareholders may result in under-monitoring of boards of management, thereby giving rise to agency costs.

**Recital 3 of the Shareholders' Rights directive** clearly states that “*effective shareholder control is a prerequisite to sound corporate governance and should, therefore, be facilitated and encouraged*”. Consistently, the directive enhances shareholders' rights with reference to proxy solicitation, adding item and proposal to the general meeting agenda, and, in general, information rights before the meeting.

In the same directions, **Principle II.G of the OECD Principles of Corporate Governance** recommends that “*shareholders, including institutional shareholders, should be allowed to consult with each other on issues concerning their basic shareholder rights as defined in the Principles, subject to exceptions to prevent abuse*”.

In order to enhance good corporate governance, especially in case of cross-border shareholdings, it is of major importance that shareholders know when they are able to exchange information and work together without any fear of their action triggering undue obligations.

For instance, (institutional) shareholders are increasingly working together in the execution of their corporate governance (or more broadly: environmental, social and governance<sup>5</sup>) policies towards corporations, without seeking any controls of these corporations.

Therefore, **a dividing line between shareholder activism and acting in concert should be drawn.**

### ***PRELIMINARY INDICATIONS***

- The definition of acting in concert given by the Transparency and the Takeover directive should respectively be implemented by Member States in a uniform way and consistently with their goals<sup>6</sup>.
- The compliance to the obligation the way to disclose should be as standardized as possible<sup>7</sup>.

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<sup>5</sup> In some countries, shareholders necessarily coordinate in order to get to the threshold necessary to present a slate of candidates to the board of a listed company.

<sup>6</sup> For example, in the take-over bid case, the concerted action relates only to “acquire control” or “frustrating a bid”, and not to other cases.

<sup>7</sup> See also the previous ESME report on the transparency directive at [http://ec.europa.eu/internal\\_market/securities/docs/esme/05122007\\_td\\_report\\_en.pdf](http://ec.europa.eu/internal_market/securities/docs/esme/05122007_td_report_en.pdf).

- Greater certainty on for the investors would be given by a “concerted action of regulators” possibly through CESR guidelines: the market needs “negative presumptions” (i.e. examples of cases where it behavior is surely NOT be considered as concerted action) and “positive presumptions” (i.e. cases where a behavior is presumed to be a concerted action, even if persons should possibly demonstrate that this is not); those positive cases should be in line with the notions of the directives. Besides, the opportunity of drafting common guidelines on the interpretation of concepts such as "agreement" or "acquiring control" is to be considered.
- Close monitor on the implementation and application of the directive by the European Commission and CESR is necessary.
- The publication, by competent authorities or CESR, of legislation, rules and interpretations in a language customary to the field of finance would be useful for both institutional and private investors.
- Given the preliminary stage, ESME will keep its attention on the topic in order to publish a report possibly by 2009.

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