



Brussels, 17.12.2014  
C(2014) 9656 final

**COMMISSION DELEGATED REGULATION (EU) No .../..**

**of 17.12.2014**

**supplementing Directive 2004/109/EC of the European Parliament and of the Council  
with regard to certain regulatory technical standards on major holdings**

(Text with EEA relevance)

## **EXPLANATORY MEMORANDUM**

### **1. CONTEXT OF THE DELEGATED ACT**

Articles 9(6b), 13(1a) and 13(4) of Directive 2004/109/EC (the “Directive”), as amended by Directive 2013/50/EU, empower the Commission to adopt by delegated act, following the submission of draft standards by the European Securities and Markets Authority (ESMA) and in accordance with Article 10 to 14 of Regulation (EU) No. 1095/2010 establishing ESMA (the “ESMA Regulation”), regulatory technical standards with respect to the notification requirements applied to major holdings in listed companies.

In accordance with Article 10(1) of the ESMA Regulation, the Commission shall decide within three months of receipt of the draft standards whether to endorse the drafts submitted. The Commission may also endorse the draft standards in part only, or with amendments, where the Union's interests so require, having regard to the specific procedure laid down in those Articles.

### **2. CONSULTATIONS PRIOR TO THE ADOPTION OF THE ACT**

In accordance with the third subparagraph of Article 10(1) of the ESMA Regulation, ESMA has carried out a public consultation on the draft technical standards submitted to the European Commission.

A consultation paper (ESMA/2014/300) was published on the ESMA internet site on 21 March 2014 and the consultation closed on 30 May 2014. ESMA also sought the views of the Securities and Markets Stakeholder Group (“SMSG”) set up in accordance with Article 37 of the ESMA Regulation, the Consultative Working Group of the Corporate Finance Standing Committee and the national competent authorities of the Member States, to draw on their experience in this field. Together with the draft technical standards, ESMA has submitted an explanation on how the outcome of these consultations has been taken into account in the development of the final draft standards submitted to the Commission.

Together with the draft technical standards, and in accordance with the third subparagraph of Article 10(1) of the ESMA Regulation, ESMA has also submitted its analysis of the costs and benefits related to the draft technical standards submitted to the Commission.

The ESMA report containing all these elements is available at:  
[http://www.esma.europa.eu/system/files/2014-1187\\_final\\_report\\_on\\_draft\\_rts\\_under\\_the\\_transparency\\_directive.pdf](http://www.esma.europa.eu/system/files/2014-1187_final_report_on_draft_rts_under_the_transparency_directive.pdf).

### **3. LEGAL ELEMENTS OF THE DELEGATED ACT**

Directive 2013/50/EU updated the regime for notification of major holdings of voting rights under the Directive, inter alia by introducing requirements regarding the aggregation of holdings of shares with holdings of financial instruments and provisions harmonising the calculation of notification thresholds and exemptions from the notification requirements.

This delegated act supplements the provisions of the Directive, with regard to the method of calculation of the 5% threshold referred to in the exemptions from the notification requirements applicable for market making and for voting rights held in the trading book, including in the case of a group of companies.

This delegated act contains provisions to ensure a harmonised approach to the methodology for the calculation of notification thresholds applicable to financial instruments where those instruments are referenced to a basket of shares or an index and, in the case of financial

instruments which provide exclusively for a cash settlement, the methods for determining delta for the purposes of calculating the voting rights relating to those cash-settled instruments.

The delegated act is structured as follows:

- Articles 2 and 3 set out the requirement for the aggregation of holdings for the purposes of calculating the 5 % threshold referred to in the market maker and trading book exemptions under Article 9(5) and (6) of the Directive, including at group level, as required by Article 9(6b) of the Directive;
- Article 4 sets out a methodology for calculating the number of voting rights associated with financial instruments referenced to a basket of shares or an index, as required by Article 13(1a)(a) of the Directive;
- Article 5 sets out a methodology for determining delta for the purpose of calculating voting rights relating to financial instruments which provide exclusively for a cash settlement, as required by Article 13(1a)(b) of the Directive;
- Article 6 clarifies the application of the trading book exemption to client-serving transactions, as required by Article 13(4) of the Directive;
- Article 7 provides for the date of application of this delegated act to be aligned with the date prescribed for the transposition into national law of the requirements of Directive 2013/50/EU.

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THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC<sup>1</sup>, and in particular the third subparagraph of Article 9(6b), the fourth subparagraph of Article 13(1a) and the fourth subparagraph of Article 13(4) thereof,

Whereas:

- (1) Directive 2004/109/EC establishes transparency requirements relating to information about issuers whose securities are admitted to trading on a regulated market. That Directive also requires development of regulatory technical standards to ensure consistent application of the regime for notification of the acquisition or disposal of major holdings and related exemptions.
- (2) The thresholds for the market making and trading book exemptions should be calculated by aggregating voting rights relating to shares with voting rights related to financial instruments (that is entitlements to acquire shares and financial instruments considered to be economically equivalent to shares) in order to ensure consistent application of the principle of aggregation of all holdings of financial instruments subject to notification requirements and to prevent a misleading representation of how many financial instruments related to an issuer are held by an entity benefiting from those exemptions.
- (3) In order to provide an adequate level of transparency in the case of a group of companies, and to take into account the fact that, where a parent undertaking has control over its subsidiaries, it may influence their management, the thresholds should be calculated at group level. Therefore all holdings owned by a parent undertaking of a credit institution or investment firm and subsidiary companies should be disclosed when the total sum of the holdings reaches the notification threshold.
- (4) The disclosure regime for financial instruments that have a similar economic effect to shares should be clear. Requirements to provide exhaustive details of the structure of corporate ownership should be proportionate to the need for adequate transparency in major holdings, the administrative burdens those requirements place on holders of voting rights and the flexibility in the composition of a basket of shares or an index. Therefore, financial instruments referenced to a basket of shares or an index should only be aggregated with other holdings in the same issuer where the holding of voting

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<sup>1</sup> OJ L 390, 31.12.2004, p. 38.

rights through such instruments is significant or the financial instrument is not being used primarily for investment diversification purposes.

- (5) It would not be cost-efficient for an investor to build a position in an issuer through holding a financial instrument referenced to different baskets or indices. Therefore, holdings of voting rights through a financial instrument referenced to a series of baskets of shares or indices which are individually under the established thresholds should not be accumulated.
- (6) Financial instruments which provide exclusively for a cash settlement should be accounted for on a delta-adjusted basis, with cash position having delta 1 in the case of financial instruments having a linear, symmetric pay-off profile in line with the underlying share and using a generally accepted standard pricing model in the case of financial instruments which do not have a linear, symmetric pay-off profile in line with the underlying share.
- (7) In order to ensure that information about the total number of voting rights accessible to the investor is as accurate as possible, delta should be calculated daily taking into account the last closing price of the underlying share.
- (8) To decrease the number of meaningless notifications to the market, the trading book exemption should apply to financial instruments held by a natural person or legal entity fulfilling orders received from clients, responding to a client's request to trade otherwise than on a proprietary basis or hedging positions arising out of such dealings.
- (9) The provisions in this Regulation are closely linked, since they deal with the requirements relating to notification of major holdings in listed companies. To ensure coherence between those provisions, which should enter into force at the same time, and to facilitate a comprehensive view and compact access to them by persons subject to those obligations, including investors that are non-Union residents, it is desirable to include certain of the regulatory technical standards required by Directive 2004/109/EC in a single Regulation.
- (10) This Regulation is based on the draft regulatory technical standards submitted by the European Securities and Markets Authority (ESMA) to the Commission.
- (11) ESMA has conducted open public consultations on the draft regulatory technical standards on which this Regulation is based, analysed the potential related costs and benefits and requested the opinion of the Securities and Markets Stakeholder Group established by Article 37 of Regulation (EU) No 1095/2010<sup>2</sup>.
- (12) The application of this Regulation should be deferred in order to align its date of application with the date prescribed for the transposition of Directive 2013/50/EU of the European Parliament and of the Council in Article 4(1) of that Directive<sup>3</sup>,

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<sup>2</sup> Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC (OJ L 331, 15.12.2010, p. 84).

<sup>3</sup> Directive 2013/50/EU of the European Parliament and of the Council of 22 October 2013 amending Directive 2004/109/EC of the European Parliament and of the Council on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market, Directive 2003/71/EC of the European Parliament and of the Council on the prospectus to be published when securities are offered to the public or admitted to trading and Commission Directive 2007/14/EC laying down detailed rules for the implementation of certain provisions of Directive 2004/109/EC (OJ L 294, 6.11.2013, p. 13).

HAS ADOPTED THIS REGULATION:

*Article 1*  
*Subject matter*

This delegated Regulation lays down detailed rules for the implementation of Article 9(6b), Article 13(1a)(a) and (b) and Article 13(4) of Directive 2004/109/EC.

*Article 2*  
*Aggregation of holdings*

For the purpose of calculation of the 5 % threshold referred to in Article 9(5) and (6) of Directive 2004/109/EC, holdings under Articles 9, 10 and 13 of that Directive shall be aggregated.

*Article 3*  
*Aggregation of holdings in the case of a group*

For the purpose of calculation of the 5 % threshold referred to in Article 9(5) and (6) of Directive 2004/109/EC in the case of a group of companies, holdings shall be aggregated at group level according to the principle laid down in Article 10(e) of that Directive.

*Article 4*  
*Financial instruments referenced to a basket of shares or an index*

1. Voting rights referred to in Article 13(1a)(a) of Directive 2004/109/EC in the case of a financial instrument referenced to a basket of shares or an index shall be calculated on the basis of the weight of the share in the basket of shares or index where any of the following conditions apply:

- (a) the voting rights in a specific issuer held through financial instruments referenced to the basket or index represent 1 % or more of the voting rights attached to shares of that issuer;
- (b) the shares in the basket or index represent 20 % or more of the value of the securities in the basket or index.

2. Where a financial instrument is referenced to a series of baskets of shares or indices, the voting rights held through the individual baskets of shares or indices shall not be accumulated for the purpose of the thresholds set out in paragraph 1.

*Article 5*  
*Financial instruments providing exclusively for a cash settlement*

1. The number of voting rights referred to in Article 13(1a)(b) of Directive 2004/109/EC relating to financial instruments which provide exclusively for a cash settlement, with a linear, symmetric pay-off profile with the underlying share shall be calculated on a delta-adjusted basis with cash position being equal to 1.

2. The number of voting rights relating to an exclusively cash-settled financial instrument without a linear, symmetric pay-off profile with the underlying share shall be calculated on a delta-adjusted basis, using a generally accepted standard pricing model.

3. A generally accepted standard pricing model shall be a model that is generally used in the finance industry for that financial instrument and that is sufficiently robust to take into account the elements that are relevant to the valuation of the instrument. The elements that are relevant to the valuation shall include at least all of the following:

- (a) interest rate;
- (b) dividend payments;
- (c) time to maturity;
- (d) volatility;
- (e) price of underlying share.

4. When determining delta the holder of the financial instrument shall ensure all of the following :

- (a) that the model used covers the complexity and risk of each financial instrument;
- (b) that the same model is used in a consistent manner for the calculation of the number of voting rights of a given financial instrument.

5. Information technology systems used to carry out the calculation of delta shall ensure consistent, accurate and timely reporting of voting rights.

6. The number of voting rights shall be calculated daily, taking into account the last closing price of the underlying share. The holder of the financial instrument shall notify the issuer when that holder reaches, exceeds or falls below the thresholds provided for in Article 9(1) of Directive 2004/109/EC.

#### *Article 6*

##### *Client-serving transactions*

The exemption referred to in Article 9(6) of Directive 2004/109/EC shall apply to financial instruments held by a natural person or legal entity fulfilling orders received from clients, responding to a client's request to trade otherwise than on a proprietary basis, or hedging positions arising out of such dealings.

#### *Article 7*

##### *Entry into force and application*

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

It shall apply from 26 November 2015.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 17.12.2014

*For the Commission*  
*The President*  
*Jean-Claude JUNCKER*