Draft Regulatory Technical Standards on major shareholdings and an indicative list of financial instruments subject to notification requirements under the revised Transparency Directive. November 2014.

ESMA has published, on the 29th September 2014, the final report on draft regulatory technical standards on major shareholdings and an indicative list of financial instruments subject to notification in Directive 2013/50/EU, of 22 October 2013, amending Directive 2004/109/EC on the harmonization of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market. The revised Transparency Directive broadens the definition of financial instrument subject to the notification of major shareholdings to include financial instruments having a similar economic effect to holding shares and entitlements to acquire shares in order to ensure that that issuers and investors have full knowledge of the structure of corporate ownership taking account of financial innovation.

The report contains a summary of the feedback from the public consultation (March 2014), and the new ESMA proposals on regulatory technical standards and on the indicative list of instruments subject to notification. The European Commission has three months to decide whether to endorse the draft regulatory technical standards.

According to then revised Transparency Directive, ESMA proposes the following **regulatory technical standards** to:

1. Specify the **method of calculation of the 5 %** threshold referred to in article 9 paragraphs 5 and 6, including in the case of a group of companies, taking into account article 12. 4 and 5. (Art. 9.6 b of Directive 2004/109 as amended by Directive 2013/50).

Article 9 refers to two different cases in which the notification obligation does not apply: i) the acquisition or disposal of a major holding reaching or crossing the 5% threshold by a market maker acting in its capacity provided that it is authorised by its home Member State and it neither intervenes in the management of the issuers nor exerts any influence to buy shares or back the share price, and ii) voting rights held in the trading book of a credit institution or investment firm provided that the voting rights do not exceed 5%. Paragraphs 4 and 5 of article 12 establish that management companies´s and investment firms´s parent undertakings are, respectively, exempted from making the required notification.

ESMA states that, for purposes of calculating the 5% threshold referred to in paragraphs 5 and 6, the different categories of assets described in Articles 9, 10 and 13 will be aggregated to compute the major shareholdings: shares (art. 9), voting rights (art. 10), and other financial instruments that on maturity give the holder the right or the discretion to acquire shares or others that have similar economic effect (art. 13). (**Horizontal aggregation**).

ESMA also indicates that for the purpose of calculation of the 5% threshold provided for in article 9. 5 and 6, holding shall be aggregated at group level according to the principle laid down in article 10 e) related to the voting rights which are held or may be exercised by an undertaking controlled by that the person or entity subject to the notification requirement. (**Vertical aggregation**).

2. Specify the **method for calculating the number of voting rights referred to in article 13.1 in the case of financial instruments referenced to a basket of shares or an index. (**Art. 13.1a a) of Directive 2004/109 as amended by Directive 2013/50)

Article 13.1 includes: a) financial instruments that, on maturity, give the holder, under a formal agreement, either the unconditional right to acquire or the discretion as to his right to acquire shares to which voting rights are

attached, already issued, of an issuer whose shares are admitted to trading on a regulated market, and b) financial instruments which are not included in a) but which are referenced to shares referred to in that point and with economic effect similar to that of the financial instruments referred to in that point, where or not the confer a right to a physical settlement.

ESMA proposes that the method for calculating the number of voting rights in the case of a financial instrument subject to notification and which is referenced to a basket of shares or an index shall be calculated **on the basis of the weight of the share in the basket or index** and if at least one of the following conditions apply:

- The voting rights in a specific issuer held through financial instruments referenced to the basket or index represent 1 % or more of voting rights attached to shares of that issuer; or

- The shares in the basket or index represent 20 % or more of the value of the securities in the basket or index.

When 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 calculating the thresholds of 1% and 20% above mentioned. .

3. Specify the **methods for determining delta for the purposes of calculating voting rights relating to financial instruments which provide exclusively for a cash settlement** as required by article 13.1 (Art. 13.1a b) of Directive 2004/109 as amended by Directive 2013/50)

ESMA states that the number of voting rights relating to an exclusively cash-settled financial instrument 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.**

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.**

A generally accepted standard pricing model is one that is generally used in the finance industry for that financial instrument and sufficiently robust to consider the elements that are relevant to the valuation of the instrument. Those elements that are relevant to the valuation include at least the following: interest rate, dividend payments, time to maturity, volatility; and price of underlying share.

When determining delta the holder of the financial instrument shall ensure that the model used covers the complexity and risk of each financial instrument and that the same model is used in a consistent manner for the calculation of the number of voting rights of a given financial instrument.

IT systems used to run the calculation of delta shall ensure consistent, accurate and timely reporting of voting rights.

The number of voting rights shall be calculated daily, taking into account the last closing price of the underlying share.

4. Specify the **cases in which the exemptions** to the notification obligation, mentioned in in paragraphs 4, 5 and 6 of article 9 and paragraphs 3, 4 and 5 of article 12, **will apply to financial instruments in clients serving transactions**, that is, held by a natural person or a legal entity fulfilling orders received from clients or responding to a client's requests to trade otherwise than on a proprietary basis, or hedging positions arising out of such dealings. (Art. 13.4 Directive 2004/109 as amended by Directive 2013/50).

ESMA states that the exemption provided for in Article 9.6 of Directive 2004/109 (voting rights held in the trading book) apply to financial instruments held by a natural or legal person who: i) fulfil orders received from clients, ii) respond to a client´s requests to trade otherwise than on a proprietary basis and iii) hedge positions arising out of such dealings. These three categories of transactions on behalf of clients (client serving) are the same three types included in article 13.4 of the Directive above mentioned.

ESMA shall establish and periodically update an **indicative list of financial instruments** that are subject to notification requirements pursuant to article 13.1 taking into account technical developments on financial markets. (Art. 13.1b of Directive 2004/109 as amended by Directive 2013/50).

Article 13.1 b) says that the notification obligation applies to other financial instruments (other than those that give the right or the discretion to acquire shares to which voting rights are attached) referenced to shares and with an economic effect similar whether or not they confer a right to a physical settlement.

ESMA states that Article 13.1b already considers the following to be financial instruments, provided they satisfy any of the conditions set out in points a) or b) of article 13.1: transferable securities, options, futures, swaps, forward rate agreements, contracts for differences, and any other contracts or agreements with similar economic effects which may be settled physically or in cash.

ESMA adds that, taking into account current technical developments on financial markets, the following to be financial instruments, provided they satisfy any of the conditions set out in points a) or b) of article 13.1 and reference shares to which voting rights are attached: irrevocable convertible and exchangeable bonds referring to already issued shares, financial instruments referenced to a basket of shares or an index and which comply with the criteria laid down in the regulatory technical standards above explained, warrants, repurchase agreements, rights to recall lent shares, contractual buying pre-emption rights, other conditional contracts or agreements than options and futures, hybrid financial instruments, combinations of financial instruments, and shareholders' agreements having financial instruments defined in article 13.1 a) and b) as an underlying.

ESMA acknowledges that, depending on the characteristics and typology of such financial instruments, there can be overlaps within the categories referred above. In such cases notification is required under one of the categories.

If you want to read the final report from ESMA on draft regulatory technical standards for significant stakes and an indicative list of financial subjects financial instruments subject to notification in the revised Transparency Directive, please, click: http://www.esma.europa.eu/system/files/2014-1187_final_report_on_draft_rts_under_the_transparency_directive.pdf

If you want to read the directive 2013/50/EU amending Directive 2004/109/EC on the harmonization of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market, please, click on: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013L0050&rid=1

If you want to read the directive 2007/14/EC laying down detailed rules for implementing of certain provisions of Directive 2004/109/EC, please, click on: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32007L0014&rid=1

If you want to read the directive 2004/109/EC on the harmonization of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market, please, click on:
Directiva 2004/109/CE: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32004L0109&rid=1