

February 2007 / Issue 3

A legal update from Dechert's Financial Services Group

## Implementation of the Transparency Directive Changes Shareholder Notification Requirements across Europe

The European Union Transparency Directive is slowly becoming implemented throughout the EU Member States. The aim of this directive is to enhance transparency in EU capital markets by establishing harmonised rules for the disclosure of periodic financial reports and major shareholdings of companies whose securities are admitted to trading on a regulated market in the EU.

This update focuses on the different ways in which the shareholder disclosure requirements have been implemented in the United Kingdom, France, and Germany. Belgium and Luxembourg have not yet implemented the Directive.

### United Kingdom

On 20 January 2007 the Financial Services Authority (FSA) implemented part of the EU Transparency Directive and introduced a new regime for the notification of major shareholdings. The shareholder notification requirements which were previously in Part VI of the Companies Act 1985 (1985 Act) have been repealed and are now replaced by the new FSA Disclosure Rules and Transparency Rules (DTR) in the FSA Handbook.

### Applicability of New Shareholder Disclosure Rules

The new rules broaden the categories of entities which have to comply with reporting requirements compared to the position under the 1985 Act. The new disclosure regime applies to anyone who holds shares in UK public companies registered under the 1985 Act or **any** entity (non-UK entities included) whose shares are admitted to trading on a regulated market (such as the London Stock

Exchange) or a prescribed market (such as AIM), where the UK is their home state for the purposes of the Prospectus Directive.

### Disclosure Thresholds

Where a person holds, either directly or indirectly, shares or financial instruments of listed UK or non-UK issuers conferring voting rights which reach or exceed the thresholds, as listed below, such person must notify the issuer and (if the shares are traded on a regulated market) at the same time file a copy with the FSA. The issuer then has an obligation to make public the information contained in the notification. Generally, financial instruments are interpreted to mean (i) transferable securities; (ii) money-market instruments; (iii) units in collective investment undertakings; and (iv) options, futures, swaps, forward rate agreements and any other derivative contracts.

The new regime sets out two separate thresholds depending on whether the shares are issued by UK or non-UK issuers. In the case of UK issuers, direct or indirect shareholders will be required to disclose shareholdings which reach or exceed 3% of the total voting rights and each 1% threshold thereafter. For non-UK issuers, direct or indirect shareholders will be required to disclose shareholdings at 5%, 10%, 15%, 20%, 25%, 30%, 50% and 75%, in accordance with the Transparency Directive.

Certain voting rights (such as the holdings of EEA qualifying investment managers, asset managers, registered US investment managers and shares belonging to open-ended investment companies) can be disregarded for the purpose of notification below the 5% threshold, but have to be disclosed at 5% and 10% and every whole percentage figure above 10%.

## **Shareholder Disclosure Calculation**

In order to determine whether a shareholder has reached or exceeded the relevant disclosure threshold, the calculation is made in respect of all voting shares. Therefore, a shareholder must calculate all shares to which voting rights are attached, even if the exercise of such rights is suspended.

## **Indirect Holdings for Shareholder Disclosure Purposes**

The DTR lists situations in which a person will be considered an indirect holder of shares for purposes of the shareholder disclosure requirements. Indirect shareholders are those who are entitled to acquire, dispose of, or exercise, voting rights on behalf of a third party, and who may be able to control the manner in which voting rights are exercised. This may be through shares or financial instruments. In such cases, where the holdings reach or exceed the thresholds listed above, a notification to the issuer and/or the FSA should be made. All indirect holdings of a shareholder must be aggregated, but must also be separately identified in the notification to the issuer.

Where shareholders have both direct and indirect holdings of the same UK listed entity, they may also be required to notify the issuer and the FSA if there is a change in the aggregate level of the combined holding. A notification may also be required in this case if there is a notifiable change in one or more categories of voting rights (i.e., voting rights held via financial instruments) even if their overall percentage level of voting rights remains the same.

## **Method of Notification**

Notification by the shareholder has to be made within two trading days in the case of shares of UK issuers and four trading days in the case of non-UK issuers. The time period runs from the time when the shareholder became aware, or should have become aware, of the acquisition or disposal. Notification must also be made using the standard form, TR1, available from the FSA's website. Where the issuer's securities are admitted to trading on a regulated market, a copy of the notification must also be filed with the FSA. UK issuers whose shares are admitted to trading on a regulated market must make the notification public as soon as possible and in any event by the end of the next trading day. Other issuers must do so as soon as possible and in any event by the end of the third following trading day.

## **France**

On 28 September 2006, the French Autorité des marchés financiers (AMF) implemented portions of the EU Transparency Directive by amending the AMF's General Regulation. The AMF completed the implementation process by amending its General Regulation again in January 2007. The amendments were published and became effective on 20 January 2007.

## **Applicability of New Shareholder Disclosure Rules**

The securities covered by the disclosure requirements in France are any shares of companies having their registered office in France (i.e., non-French entities are excluded) and whose shares are listed (i) on a French regulated market; (ii) on a French non-regulated market (organized multilateral trading facility pursuant to AMF regulation); or (iii) on the OTC market.

It follows that the securities currently within the ambit of the new rules are any shares of a French company whose shares are listed on *Eurolist* by Euronext, *Alternext Paris* (currently the only French organized multilateral trading facility) or the *Marché Libre* (OTC Market).

## **Disclosure Thresholds**

Because the French disclosure rules concern only companies whose registered office is in France, the thresholds are more straightforward: 5%, 10%, 15%, 20%, 25%, 33 $\frac{1}{3}$ %, 50%, 66 $\frac{2}{3}$ %, 90% and 95% (legal threshold notification). In addition, a French publicly traded company may also impose more stringent threshold notification requirements in its by-laws for holdings of less than the 5% statutory notification threshold, in increments as small as 0.5% (by-laws notification threshold), which are independent of the legal thresholds.

There are no exemptions similar to those under the UK rules enabling certain voting rights to be disregarded for purposes of notification below the 5% threshold.

## **Shareholder Disclosure Calculation**

Like the rules in the UK, and in compliance with the EU Transparency Directive, the new French rules provide that the total number of voting rights is calculated on the basis of all the shares to which voting rights are attached, including shares whose voting rights have been suspended.

## Indirect Holdings for Shareholder Disclosure Purposes

A shareholder must now aggregate the shares and voting rights it holds with:

- shares or voting rights held by a third party in its own name on behalf of that investor
- shares or voting rights such investor (or any other entity with whom aggregation is required) is entitled to acquire at such investor's sole discretion pursuant to an agreement
- shares in which the investor has a usufruct or beneficial interest
- shares or voting rights held by a third party under an agreement entered into with the investor providing for the temporary transfer of the shares or voting rights in question
- shares deposited with the investor, if the investor can exercise voting rights attached to such shares at its discretion in the absence of specific instructions from the relevant shareholder
- voting rights that the investor may exercise as a proxy where the investor can exercise the voting rights at its discretion in the absence of specific instructions from the relevant shareholder

As with the UK rules, indirect holdings must be aggregated and separately identified in the notification to the AMF.

## Method of Notification

The filing may either be submitted in French or in English. The AMF has provided a model notification form but the General Regulations of the AMF do not require that the model be followed so long as the relevant information is included.

The timeline for filing varies depending on whether the thresholds in question are imposed by law or under by-laws. As regards by-laws thresholds, the timeline varies depending on the each issuer's by-laws. Market practice generally seems to require that notification be made by way of a letter with acknowledgement of receipt within a period of between five and 15 days as of the date on which

the threshold is crossed. As regards the legal thresholds, the notification must be filed within five trading days of crossing the relevant threshold.

## Germany

On 20 January 2007 the changes to the German Securities Trading Act (WpHG), as described below, became effective. These changes amended the existing reporting regime directed at holders of shares and certain types of options. It is important to note that the German Federal Financial Supervisory Authority (BaFin) introduced, in addition to the thresholds provided for by the directive, an additional reporting threshold of 3% and also introduced a new reporting regime directed at holders of financial instruments other than shares. The changes to the existing reporting regime as well as the requirements of the new reporting regime are detailed below.

## Scope of Notification Obligations

Notification obligations will no longer apply only in respect of voting rights resulting from the holding of shares in listed companies residing in Germany. The existing reporting regime as well as the newly introduced reporting regime will also apply to securities of "issuers for which the Federal Republic of Germany is the home state". These are defined as issuers of shares or securities that have a denomination of less than 1000 Euro or the equivalent amount in another currency if the issuer:

- resides in Germany and the securities are admitted to trading on a regulated market in Germany, in an EU Member State or in a state that is a party to the EEA, or
- resides in a state that is neither in a EU Member State nor a state that is a party to the EEA and the securities are admitted to trading on a regulated market in Germany, another EU Member State or a state that is a party to the EEA, and if the issuer's home state for the purposes of the EU Prospectus Directive is the Federal Republic of Germany.

The notification obligations do not apply to German issuers whose securities are not admitted to trading on a regulated market in Germany or elsewhere.

## **Introduction of New Thresholds for Holders of Shares and Certain Types of Options**

Under section 21 of the WpHG new thresholds will be introduced (3%, 15%, 20% and 30%) resulting in notification obligations being triggered if thresholds of 3%, 5%, 10%, 15%, 20%, 25%, 30%, 50% or 75% are reached, exceeded or fallen short of. Moreover, notification will have to be effected immediately, or at the latest within four business days upon the threshold being crossed, reducing the former period of seven days. The relevant date of crossing the threshold is considered the date the shares are, in fact, booked into the account of the acquiring company.

Similarly to the UK, the introduction of the 3% threshold is not a consequence of the implementation of the Directive into German law but a deliberate decision of the German legislature. Unlike the UK, however, the 3% threshold applies to non-German issuers as well as German issuers, if Germany is their home state.

## **Attribution of Voting Rights for Holders of Shares**

To implement BaFin's current practice into the applicable law, the attribution of voting rights has been broadened to include voting rights that are entrusted to an investment adviser or may be exercised by an investment adviser in its function as representative provided that it may exercise these voting rights at its own discretion and in the absence of special instructions from the shareholder. In the case of certificates representing shares, notification obligations will only be triggered for the holders of the certificates.

## **Notification Obligations Resulting from The Holding of Financial Instruments Excluding Shares**

Under section 25 of the WpHG, a new and separate reporting regime has been introduced which imposes notification obligations on holders of financial instruments other than shares. These notification obligations are triggered if:

- the financial instruments are held directly or indirectly
- the financial instruments confer on the holder the right unilaterally to acquire shares of an issuer for which Germany is the home state, and

- the thresholds set out above are reached, exceeded or fallen short of, with the exception of the 3% threshold

BaFin has confirmed orally that voting rights resulting from financial instruments other than shares held by funds will not be attributed to investment advisers. Therefore, in this instance and in contrast to the reporting regime for holders of shares, investment advisers will have no obligation to disclose these financial instrument interests to BaFin.

However, where interests in various financial instruments of the same issuer meet the requirements of section 25 of the WpHG as set out above, then the proportions of voting rights resulting from the different financial instruments will need to be aggregated for the purposes of disclosure requirements.

## **Special Treatment of Options**

Voting rights resulting from particular options might result in a notification obligation under both the reporting regime for holders of shares (section 21 of the WpHG) and the new reporting regime for holders of other financial instruments (section 25 of the WpHG). Certain options that have an underlying agreement which provides for the option to be exercised in the sole discretion of the purchaser and where such exercise results in transfer of title at the time of purchase may trigger notification obligations under both regimes. However, if options are held that might be exercised unilaterally but where transfer of ownership would require further steps (i.e. transfer would not be effected by exercising the option), then voting rights resulting from such options will fall within the scope of the new reporting regime under section 25 of the WpHG, but not under the reporting regime under section 21 of the WpHG.

Where notification obligations are triggered under both reporting regimes, BaFin has confirmed orally that it is advisable to file two separate notifications.

## **Belgium**

Despite the fact that, pursuant to Article 31 of the EU Transparency Directive, the deadline for implementation of the Directive was 20 January 2007, the Directive has not yet been implemented in Belgium.

The Belgian Council of Ministers of 21 December 2006 has approved two preliminary draft laws with respect to the Transparency Directive. However, the text of these draft laws has not yet been submitted to the Belgian Parliament nor has it been publicly released.

It is currently understood that these laws will be enacted in mid 2007.

## Luxembourg

Currently, Luxembourg has not implemented the Transparency Directive, nor has the Commission de

Surveillance du Secteur Financier (CSSF) stated when implementation might take place.



This update was authored by Andrew Hougé (+44 20 7184 7373; [andrew.hougé@dechert.com](mailto:andrew.hougé@dechert.com)), Jessica Brescia (+44 20 7184 7584; [jessica.brescia@dechert.com](mailto:jessica.brescia@dechert.com)), Alexandre Marion (+33 1 53 65 05 19; [alexandre.marion@dechert.com](mailto:alexandre.marion@dechert.com)), Katharina Ebelt (+49 89 21 21 63 41; [katharina.ebelt@dechert.com](mailto:katharina.ebelt@dechert.com)), Thierry Hudsyn (+32 2 535 5465; [thierry.hudsyn@dechert.com](mailto:thierry.hudsyn@dechert.com)) and Pascal Bouvy (+352 45 62 62 30; [pascal.bouvy@dechert.com](mailto:pascal.bouvy@dechert.com)).

## Practice group contacts

For more information, please contact one of the lawyers listed, or the Dechert lawyer with whom you regularly work. Visit us at [www.dechert.com/financial services](http://www.dechert.com/financial services).

**Jessica Brescia**  
London  
+44 20 7184 7584  
[jessica.brescia@dechert.com](mailto:jessica.brescia@dechert.com)

**Richard Frase**  
London  
+44 20 7184 7692  
[richard.frase@dechert.com](mailto:richard.frase@dechert.com)

**Andrew Hougé**  
London  
+44 20 7184 7373  
[andrew.hougé@dechert.com](mailto:andrew.hougé@dechert.com)

**Alexandre Marion**  
Paris  
+33 1 53 65 05 19  
[alexandre.marion@dechert.com](mailto:alexandre.marion@dechert.com)

**Joseph Smallhoover**  
Paris  
+33 1 53 65 05 17  
[joseph.smallhoover@dechert.com](mailto:joseph.smallhoover@dechert.com)

**Katharina Ebelt**  
Munich  
+49 89 21 21 63 41  
[katharina.ebelt@dechert.com](mailto:katharina.ebelt@dechert.com)

**Angelo Lercara**  
Munich  
+49 89 21 21 63 22  
[angelo.lercara@dechert.com](mailto:angelo.lercara@dechert.com)

**Thierry Hudsyn**  
Brussels  
+32 2 535 5465  
[thierry.hudsyn@dechert.com](mailto:thierry.hudsyn@dechert.com)

**Richard Temko**  
Brussels  
+32 2 535 5430  
[richard.temko@dechert.com](mailto:richard.temko@dechert.com)

**Pascal Bouvy**  
Luxembourg  
+352 45 62 62 30  
[pascal.bouvy@dechert.com](mailto:pascal.bouvy@dechert.com)

**Marc Seimetz**  
Luxembourg  
+352 45 62 62 23  
[marc.seimetz@dechert.com](mailto:marc.seimetz@dechert.com)

A list of names of the members of Dechert LLP (who are referred to as "partners") is available for inspection at the above office. The partners are solicitors or registered foreign lawyers. The use of the term "partner" should not be construed as indicating that the member of Dechert LLP are carrying on business in partnership for the purpose of the Partnership Act 1890.

This document is a basic summary of legal issues. It should not be relied upon as an authoritative statement of the law. You should obtain detailed legal advice before taking action.

© 2007 Dechert LLP. Reproduction of items from this document is permitted provided you clearly acknowledge Dechert LLP as the source.