Comments by NYSE Euronext on CESR's Proposal for a Pan-European Short Selling Disclosure Regime

1. Introduction and Executive Summary

1.1 NYSE Euronext is a leading global operator of financial markets and a provider of innovative trading technologies. NYSE Euronext's exchanges in Europe (Amsterdam, Brussels, Lisbon, London and Paris) and the United States provide for the trading of cash equities, bonds, futures, options, and other exchange-traded products. NYSE Liffe is the name of NYSE Euronext's European derivatives business and is the world's second largest derivatives business by value of trading.

1.2 NYSE Euronext is grateful for having the opportunity to provide comments in response to CESR's proposal for a Pan-European short selling disclosure regime.

1.3 NYSE Euronext believes that it is crucial to ensure that short selling per se is not seen as constituting an abuse and that, on the contrary, it is recognized that in the normal course of events short selling is a key component of an efficient price discovery process. Having said that, NYSE Euronext appreciates that in extreme market conditions, the level of short selling may prompt Government intervention in the interests of broader economic objectives, such as the financial stability of a particular institution or sector.

1.4 NYSE Euronext remains unconvinced about the rationale for operating a short selling disclosure regime on a continual basis – as opposed to agreeing it in advance, but only using it as part of a package of emergency measures, when justified by extreme market conditions.

1.5 NYSE Euronext agrees with CESR that the current approach to the disclosure of short positions - whereby CESR members have implemented similar but different regimes - is unsatisfactory and that, if short selling disclosure is to continue to be required by CESR members, a more coherent approach is necessary. NYSE Euronext agrees that, in order to be meaningful, any such regime would need to apply to transactions regardless of trading venue (i.e. Regulated Market, MTF, Internalisation, crossing networks, OTC). Moreover, individual CESR members should refrain from imposing additional measures at national level.

1.6 In relation to the treatment of derivatives within any Pan-European disclosure regime, they should be accounted for on a delta adjusted basis. Moreover, as a practical matter NYSE Euronext does not believe it would be sensible to regard a short position in a broad based equity index derivative or an Exchange Traded Fund ("ETF") as constituting short selling in relation to each component stock within the index or fund. As such, NYSE Euronext believes that broad based index derivatives and ETFs should be exempt from the disclosure regime.

1.7 Finally, NYSE Euronext believes that any disclosure regime should be based upon short position reporting. NYSE Euronext considers that the alternative approach of flagging orders pre-execution would be costly, difficult to implement, and less effective in terms of identifying the level of short sales.

2. Answers to Consultation Questions

Q1 Do you agree that enhanced transparency of short selling should be pursued?

NYSE Euronext is not convinced that a public dissemination of individual short selling positions would improve the functioning of the market. In the normal course of events short selling is a key component of an efficient price discovery process and there would seem little need for more transparency about going short than there is in respect of going long.

For public dissemination to be useful, it would have to be made through one means and all the data for a specific instrument would have to be available on only one tool/channel. NYSE Euronext suggests any publicly disseminated information should be in aggregate form since disseminating individual positions may prejudice the anonymity of trading.

Q2 Do you agree with CESR's analysis of the pros and cons of flagging short sales versus short position reporting?

NYSE Euronext regards the flagging of orders as wholly impractical. It would be costly, difficult to implement, and less effective in terms of identifying the level of short sales compared with short position reporting or in providing any useful information to regulators or the market generally.

Flagging orders (if it were feasible) and short selling position reporting would give two different type of information.

Flagging orders would provide fragmentary pre-trade information about "potential" short selling positions, or elements of such positions. The only potential advantages of this approach would be to have information on attempted short selling (given that some orders may not be executed) and on intraday short selling. However, it is questionable whether such data would be of practical use. On the negative side, it would have significant IT costs for trading venues, investment firms and as a consequence for investors. Moreover, the data would not exhaustive: MiFID allows pre-trade transparency waivers for Regulated Markets and MTFs; and the OTC market, Dark Pools and crossing networks have no pre trade transparency obligations. As a result, it would not be possible to identify all short selling orders.

Reporting short selling positions, on the other hand, is (subject to NYSE Euronext's response to Question 11) a much more feasible proposition. It would provide a daily snap shot of actual short positions in a manner which would be more comprehensive and which would avoid the fragmentation that would come with the order flagging approach.

Q3 Do you agree that, on balance, transparency is better achieved through a short position disclosure regime rather than through a 'flagging' requirement?

Reporting would be easier to implement and the daily snap shot data easier to collect.

Q4 Do you have any comments on CESR's proposals as regards the scope of the disclosure regime?

CESR has proposed that the regime should encompass short positions which create an economic exposure to shares admitted to trading on Regulated Markets and MTFs, and that the regime should only apply to EEA issuers and to those issuers whose shares are solely and primary admitted to trading on EEA markets. In order to avoid misunderstanding, NYSE Euronext suggests a list of the relevant instruments should be made available on the CESR web site.

Q5 Do you agree with the two tier disclosure model CESR is proposing? If you do not support this model, please explain why you do not and what alternative(s) you would suggest. For example, should regulators be required to make some form of anonymised public disclosure based on the information they receive as a result of the first trigger threshold (these disclosures would be in addition to public disclosures of individual short positions at the higher threshold)?

NYSE Euronext remains unconvinced about the rationale for operating a short selling disclosure regime on a continual basis – as opposed to agreeing it in advance, but only using it as part of a package of emergency measures, when justified by extreme market conditions.

NYSE Euronext is not convinced that a public dissemination of individual short selling positions would improve the functioning of the market. Public dissemination of short positions can lead to other participants having an undue advantage.

In the interests of cost and functional efficiency, the procedures and means used to report to regulators and publicly have to be the same. For example, when a threshold requires both a regulatory and a public dissemination, it would be preferable to have only one report for both.

Q6 Do you agree that uniform pan-European disclosure thresholds should be set for both public and private disclosure? If not, what alternatives would you suggest and why?

The criteria for determining the thresholds should be simple and harmonized. Once established, individual Member States should not modify the thresholds or add further requirements as this would merely serve to undermine the harmonization effort.

Concerning the data to be taken into account, CESR should ensure that all Member States have the same definition (i.e Free float. Furthermore, in relation to turnover, OTC trades must be taken into account as well as those transacted in other venues.

Q7 Do you agree with the thresholds for public and private disclosure proposed by CESR? If not, what alternatives would you suggest and why?

NYSE Euronext agrees with the thresholds for private and public disclosure.

Q8 Do you agree that more stringent public disclosure requirements should be applied in cases where companies are undertaking significant capital raisings through share issues?

No comment.

Q9 If so, do you agree that the trigger threshold for public disclosures in such circumstances should be 0.25%?

No comment.

Q10 Do you believe that there are other circumstances in which more stringent standards should apply and, if so, what standards and in what other circumstances?

No comment.

Q11 Do you have any comments on CESR's proposals concerning how short positions should be calculated? Should CESR consider any alternative method of calculation?

NYSE Euronext agrees with CESR's suggestion that the aggregate delta adjusted position should be disclosed.

For the avoidance of doubt, NYSE Euronext agrees that only aggregated net positions should be disclosed, i.e. a position holder would need to deduct any long positions against its short positions and only disclose the net short position on a delta adjusted basis.

However, NYSE Euronext believes that short positions based on a broad based index or "basket" financial instruments (e.g. index options and, ETFs) should be excluded from the short position disclosure regime because short positions in these instruments represent short positions in relation to the equity market generally rather than short positions in individual stocks.

Q12 Do you have any comments on CESR's proposals for the mechanics of the private and public disclosure?

NYSE Euronext defers to the operational analysis of firms and regulators in relation to this question.

Q13 Do you consider that the content of the disclosures should include more details? If yes, please indicate what details (e.g. a breakdown between the physical and synthetic elements of a position).

NYSE Euronext does not consider the content of the disclosure should include more details.

Q14 Do you have any comments on CESR's proposals concerning the timeframe for disclosures?

NYSE Euronext defers to the operational analysis of firms and regulators in relation to this question.

Q15 Do you agree, as a matter of principle, that market makers should be exempt from public disclosure obligations in respect of their market making activities?

NYSE Euronext agrees that in view of their role as providers of liquidity to the market – which will involve them at times being short (and, indeed, long) on a short term basis, depending on the interaction of their resting two-way quotes with incoming buy and sell orders - market makers/liquidity providers should be exempt from the public disclosure obligations in respect of the business they conduct as a market maker/liquidity provider.

In order to avoid any misunderstanding, NYSE Euronext recommends that CESR should publish a clear definition, approved by all of its members, of what is meant by a market maker/liquidity provider. In practice, a significant number of market makers/liquidity providers are non-MiFID firms. As such, the definition should not exclude a non-MiFID firm from being classified as a market maker/liquidity provider for the purposes of the short selling disclosure regime.

Q16 If so, should they be exempt from disclosure to the regulator?

No. The regulator is likely to need a comprehensive view of overall short selling in times of financial crisis.

Q17 Should CESR consider any other exemptions?

No comment.

Q18 Do you agree that EEA securities regulators should be given explicit, stand-alone powers to require disclosure in respect of short selling? If so, do you agree that these powers should stem from European legislation, in the form of a new Directive or Regulation?

This is principally a question for the national regulators themselves. NYSE Euronext will support all measures facilitating harmonization in an effective and cost efficient way.

3. Next Steps

3.1 NYSE Euronext is grateful to CESR for seeking to harmonise the current arrangements for short position disclosure across Europe and would welcome the opportunity to discuss its views further with CESR and its members.