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RE: CESR Consultation Paper on CESR proposal to extend major shareholding notifications to instruments of similar economic effect to holding shares and entitlements to acquire shares.

Luxembourg, 15 March 2010

Dear Mr Comporti,

I am submitting this letter in response to the solicitation by CESR for comments on « CESR proposal to extend major shareholding notifications to instruments of similar economic effect to holding shares and entitlements to acquire shares ».

Q1. Do you agree with CESR's analysis of the issues raised by the use of instruments of similar economic effect to shares and entitlements to acquire shares?

Yes, I strongly agree with CESR view that the scope of the regime of major shareholding disclosure should be extended to include all instruments that give similar economic effect to holding shares or entitlements to acquire shares, irrespective of whether such an instrument is settled in cash or physically. I have argued for this in a paper recently published in France¹.

The last five years (2005-2010) provide many examples of the use of cash settled instruments that give similar economic effect to holding shares or entitlements to acquire shares, especially Contracts for Difference (CfD), in order to reach significant undisclosed participations in listed companies in Europe and outside Europe (United States, New Zealand...).

The fact that CfDs and similar instruments are not currently taken into account by the Transparency directive (TD) creates a major loophole which threatens to make the Transparency directive meaningless. The Porsche/Volkswagen case is an extreme example of the possible dramatic impact on the market and on certain market participants such as hedge funds and private investors of such a loophole. Since these instruments are used to acquire secretly large participations, defeating the purpose of the Transparency directive, it is all the more necessary to include them within the scope of the directive. A swift legislative action is needed to close this loophole before the principle of transparency becomes the exception in the very case (building large participations before a takeover) where it is the most needed.

Q2. Do you agree that the scope of the Transparency Directive needs to be broadened to address these issues?

Yes, I agree. The purpose of the Transparency directive, and before it of the Council Directive 88/627/EEC of 12 December 1988 on the information to be published when a major holding in a listed company is acquired or disposed of (OJ L 348, 17.12.1988, p. 62.) was to determine the potential influence of a shareholder in the general shareholders' meeting of a company whose shares are admitted to trading on an EU regulated market. Since, some financial instruments were settled in cash, they were excluded from the scope of the Transparency directive. However, experience shows

¹ P.-H. Conac, *Le nouveau régime des franchissements de seuils issu de l'ordonnance n°2009-105 du 30 janvier 2009 et du Règlement général de l'AMF*, *Revue des sociétés*, Dalloz ed., 2009, p. 477.

that these cash settled financial instruments have been used to build secretly large stakes in companies, since it is easy at the end of the contract to purchase directly the shares from the financial institution which issued the CfDs. Even if the goal of the TD was not to provide information on the freefloat, it should still be included in this case because the shares held by banks for the purpose of hedging their risks on CfDs are in substance, although not legally, held for the benefit of an investor. In addition, nothing prevents the EU legislator from expanding the reasons for in order to take into account market developments.

The concept of fraud, known in Member States, in case CfDs are used to build secretly a large participation in a company is too difficult and subject to unpredictable judicial analysis to be considered a reliable and effective alternative to a legislative solution. In addition, courts can take years to solve the issue, creating more uncertainties for all parties involved.

In addition, despite the fact that some Member States have decided to include CfDs in the numerator in order to assess whether a threshold has been crossed, which means that the issue is starting to be tackled at national level, it is much better to have an EU regime in order to prevent geographical loopholes and also to provide consistency across Europe. Otherwise, investors and banks will be subject to various legal regimes. Such situations will create unnecessary costs and legal risks as investors might have to manage very different technical rules.

Because of the costs and the legal risk associated with various regimes in a highly technical area, and also for the sake of uniformity across Europe, it would be preferable that this regime be of maximum harmonisation and not minimum harmonisation like the rest of the Transparency directive.

I agree that netting should not be allowed, since it can be used to hide a large position, until a sudden unnetting takes place.

Q3. Do you agree that disclosure should be based on a broad definition of financial instruments of similar economic effect to holding shares and entitlements to acquire shares without giving direct access to voting rights?

Yes, I agree. In order to prevent circumventing the transparency obligations, an exhaustive list of financial instruments is not the best legislative choice but instead there should be a broad definition based on the concept of similar economic effect to holding shares and entitlement to acquire shares.

Q4. With regard to the legal definition of the scope (paragraphs 50-52 above), what kind of issues you anticipate arising from either of the two options? Please give examples on transactions or agreements that should in your view be excluded from the first option and/or on instruments that in your view are not adequately caught by the MiFID definition of financial instrument.

I do not have specific views on this point.

Q5. Do you think that the share equivalence should be calculated on a nominal or delta-adjusted basis?

The share equivalence should be calculated on a nominal basis and not on a delta-adjusted basis. The presentation of delta-adjusted position will lead to underestimate the potential position that the holder of CfDs or similar instruments might hold in the future.

In addition, the position would be subject to constant modifications, reflecting changes in the price of the underlying security, which will trigger new disclosures which will then create excess and volatile information on the market. The purpose of transparency would be defeated by too much and frequent information. The transparency should be on the large picture not on minute changes.

Q6. How should the share equivalence be calculated in instruments where the exact number of reference shares is not determined?

I do not have specific views on this point.

Q7. Should there be a general disclosure of these instruments when referenced to shares, or should disclosure be limited to instruments that contractually do not preclude the possibility of giving access to voting rights (the 'safe harbour' approach)?

There should be a general disclosure rather than a disclosure limited to instruments that contractually do not preclude the possibility of giving access to voting rights (the 'safe harbour' approach). As CESR mentioned, this second approach will create a new loophole since it will be easy to circumvent the « safe harbour ».

Q8. Do you consider there is a need to apply existing TD exemptions to instruments of similar economic effect to holding shares and entitlements to acquire shares?

Yes, I agree. Existing Transparency Directive disclosure exemptions should also be applied to instruments of similar economic effect to holding shares.

Q9. Do you consider there is need for additional exemptions, such as those mentioned above or others?

I do not have specific views on this point.

Q10. Which kinds of costs and benefits do you associate with CESR's proposed approach?

The benefit of CESR's proposed approach would be to close a major loophole which threatens to significantly undermine the goal of transparency of participation that is aimed at by the Transparency directive.

I do not have specific views on the issue of cost.

Q11. How high do you expect these costs and benefits to be?

The benefits in terms of transparency should be high.

I do not have specific views on the issue of cost.

Q12. If you have proposed any exemptions or have presented other options, kindly also provide an estimate of the associated costs and benefits.

I do not have specific views on this issue.

The views expressed here are personal. I appreciate the opportunity to participate in this consultation.

Yours sincerely,

