Response to the CESR proposal to extend major shareholding notifications to instruments of similar economic effect to holding shares and entitlements to acquire shares

As a member of the European Banking Federation (EBF), the AEB has participated in the preparation of this Federation´s response to the CESR´s consultation, a response that the AEB broadly supports.

The AEB, however, would like to highlight certain matters that are particularly important for Spanish banks. Thus, the AEB has decided to participate individually in the CESR´s consultation and draw up this reply document.

The AEB agrees with CESR in recognising that certain instruments might create a similar economic effect to holding shares, even if cash settled, and therefore, should be subject to some kind of disclosure in the context of major shareholding notifications, as far as these instruments might potentially be used to exercise influence in companies whose shares are admitted to trading on a regulated market.

The analysis, anyway, should be faced splitting from the very beginning two different kind of entities and activities that could be involved: on the one side, specific consideration should be paid to the activity of credit entities and investment firms as service providers or market makers, and, on the other side, a different approach should be taken to the investor activity (or the proprietary trading activity of the credit entities and investment firms).

As explained later, regarding market makers we believe that any professional activity as counterparty of any investor (or when hedging such activity) should be excluded from the new requirements. A distinction should be made when the market maker is acting as investor itself, in proprietary holding activity, in which case, the applicable regime should be the same that would apply to any investor.

Regarding investors, we support communications of nominal (not delta) long positions through instruments when they confer a right (not otherwise), either cash or physical settled. Furthermore, we believe that communication should not net long and short positions and should be splitted in three different kind of notices (cash, instruments with nominal known and instruments with nominal unknown) without uncertain safe harbours.

ANSWERS TO CONSULTATION QUESTIONS.

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

The AEB agrees with CERS in considering that the scope of the Transparency Directive has become too narrow and should be widened.

Regarding the new extended scope for major shareholding notifications, the AEB considers that only instruments that confer a right, not an obligation should be included.

Only instruments that grant a right should be taken into account in order to consider if the threshold to give notice has been reached or not. The proposal to include writing of put options seems to be beyond the scope of the definition of *"instruments that give similar economic effect to holding shares or entitlements to acquire shares"* because put options are not instruments whose features permit a high degree of influence in the buyer (as nothing assures that buyer will hedge its position and how would it be hedged) and there is a high degree of uncertainty in the future holding of the shares by the writer.

The AEB agrees with CESR in considering that netting of long and short positions does not prevent access to voting rights so netting should therefore not be allowed.

Holders of instruments that create a long economic exposure in shares should disclose this position without netting it with its short position and without limiting this general approach with any kind of exception based on contractual terms.

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? Q4. With regards to the legal definitions 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.

The AEB agrees with the broad definition based on the concept of similar economic effect to holding shares and entitlements to acquire shares.

On the other hand, significant concerns would arise if the range of covered instruments was not spelt out in an exhaustive way. The resulting legal uncertainty could lead to very burdensome consequences for banks.

The AEB would therefore propose that any possible initiative foresee a combination of Level 1 and Level 2 measures, with the latter including two non-exhaustive lists of instruments to serve as guidance to the market: One for instruments included and one of instruments excluded. In the last one the writing of put options should be included due to the reasons established above.

Q5. Do you think that the share equivalence should be calculated on a nominal or delta-adjusted basis? Q6. How should the share equivalence be calculated in instruments where the exact number of reference shares is not determined?

The AEB considers that share equivalence should be calculated on *nominal basis, not on delta.*

Potential voting rights should be calculated on a nominal basis due to the fact that the delta moves daily and may result in thresholds being crossed passively. Another difficulty would result if the market maker hedges its different positions on a global basis and not trade by trade, as it may cause a distortion between the information given to the market by the investor and the real delta maintained by its market maker (who might not be prepared to provide individual information to its investors). In addition, specifically in sophisticated instruments, the delta may be determined using different calculation methods which may result in different figures to be considered in the notices. Finally, the costs associated to control the positions on a delta basis could be huge. This approach should be extended to the instruments where the exact number of reference shares is not determined to reach the simplicity in the determination needed to make viable the positions control

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

The AEB considers that there should be a general disclosure of these instruments when reference to shares due to the reasons explained above.

The exception of adding certain instruments based on contractual terms, the "safe harbour" approach, should be disregarded due to: (i) the legal uncertainty that creates, (ii) it makes unreasonably difficult for holders to evidence a legitimate change of mind in investors, (iii) it is quite easy to circumvent the purposes of the disclosure obligation, and (iv) it creates operational risk, compliance and legal issues to the writers of the instruments.

The obligation to notice should be triggered when thresholds are reached but dividing the notices and threshold in three different kinds of notices: (i) One related with the direct or indirect holding of the voting rights (ii) another one related to the instruments that create a long economic

exposure in a share notwithstanding if such instruments are physically or cash settled when the nominal exposure to the relevant share is known and (iii) when nominal exposure to the relevant share is unknown. Aggregation of the three different communications into one would confuse the market unless more detailed information is provided, in which case the burden of communicating would be triggered probably too soon.

Regarding exemptions, we believe that any professional activity as counterparty of any investor (or when hedging such activity) should be excluded from the new requirements. When shares are hold on the interest of any third party, such third party will have the obligation to report, and if the market maker is also obliged to communicate there would be an inflation of shareholding communications (from the market maker and from the investor, and then from the second market maker which whom the former one is hedging its position, and so on) that would make useless the information available in the market.

Regarding exemptions, the AEB wants to remark, the need for exemptions to be defined with great clarity to provide legal certainty, and with a view to achieving full harmonisation across the EU. This is especially clear for client serving transactions where they are effectively acting as intermediaries and exemptions for accounting purposes.

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