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CONFORMITE BNP PARIBAS CIB

CESR Public Consultation
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Proposal to extend major shareholding notifications to instruments of similar economic effect to holding shares and entitlements to acquire shares

Please find herein after the answers of the BNP PARIBAS Group. BNP PARIBAS strongly supports the answers provided by the French association "AMAFI", and you will find many answers similar to those provided by this association. You will also find in addition, our own position concerning specific topics. BNPP globally supports the recommendations provided by the ESME report and highly encourage CESR to use this useful material.

REPLY TO SPECIFIC QUESTIONS RAISED BY CESR

➢ REPORTING INSTRUMENTS OF SIMILAR ECONOMIC EFFECT TO HOLDING SHARES AND ENTITLEMENTS TO ACQUIRE SHARES

⇨ **Question 1: 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**

No, BNPP does not agree with CESR's analysis of the issue even if, as mentioned above, it does not deny the fact that SEE Instruments may be used to acquire and/or exercise potential influence in a listed company or allow for creeping control.

First of all, there have only been a very small number of situations in which such use has been evidenced.

For instance, the CESR analysis does not deal with the FSA commissioned study by PwC which found that nine of the largest UK CFD writers have policies in place which disallow the acceptance of voting instructions from the holders of such financial instruments. AFME members have indicated that a sale of shares held as a hedge for cash settled financial instruments to the holder **of the instruments is the exception** and not the rule. Also hedges may take the form of an offsetting CFD which eliminates any question of control of voting rights

Secondly, in the situations described by CESR in paragraph 17 of the CP, the control is supposedly gained *via* the shares held by the writer of the SEE Instrument as hedge. But such writer if often a bank or an investment firm which holds such shares **in its trading book.** As such, it is not allowed to exercise the voting rights attached to such shares and such prohibition is often confirmed by the firm's internal rules. **Therefore, to**

assume as a general situation that "*the buyer* (of a SEE Instrument) *has the ability to exercise a significant degree of de facto control (via the writer) over the voting rights attaching to the shares held as hedge"* does not correspond to the reality.

What is true, on the other hand, is the fact that the buyer (of a SEE Instrument) has an information advantage over the rest of the market concerning the free float since he can assume the volume of the writer's shares held as hedge which is not available to the other market participants.

Therefore, he knows that the shares held as hedge will be available in the market when the contract is closed out. Should he then wish to acquire them, he will be in a better position than the other participants to do so although this advantage is only meaningful if the size of the transaction is significant, as compared to the daily trading volume of the shares in question. Naturally, should he then acquire such shares when they become available in the market, he will have to disclose their acquisition but the fact that he has had an information advantage beforehand is not satisfactory.

A legal response - harmonized throughout the EU - should be found to deal with this issue. But such response should be proportionate and, as mentioned above, BNPP believes that such proportionate response **should be an obligation, for the holder of significant positions in SEE Instruments only, to disclose such significant positions by way of a separate notification**. For that reason, BNPP disagrees with what is proposed by CESR which appears to be completely disproportionate to the issue which is to be cured. Furthermore BNPP regrets that:

(i) No alternative is proposed to the only solution put forward by CESR – i.e. aggregation of SEE Instruments with shares[1] - whereas **an obvious alternative** (discussed heavily in France and chosen in the end by the French authorities and recommended also by ESME) would be to impose a **separate notification requirement** of such Instruments. In fact it is quite remarkable that the CP does not contain a single question relating to whether or not the participants agree with CESR's proposal and whether they think any alternative proposal should be considered;

(ii) CESR's proposal is asserted in a forceful way but without valid arguments to support it. Paragraph 40 of the CP - like previously § 28 to 37 - give the impression that several member States have adopted a regime identical to that put forward by CESR. This presentation is totally misleading. Only one country in the European Union - the UK - has adopted rules providing for full aggregation of SEE Instruments with shares. With the same objective of improving the transparency regarding SEE Instruments, France, as explained above has adopted a regime close to what is proposed by ESME in which SEE Instruments are to be reported separately.

⇨ **Question 2: Do you agree that the scope of the Transparency Directive needs to be broadened to address these issues?**

BNPP thinks that this issue should be addressed by way of a harmonized solution imposed throughout the EEA. In that sense it agrees that the TD should be modified to include such solution and such amended directive should impose maximum harmonization. Therefore, if this is the exact meaning of CESR's question, then the answer is positive. If on the other hand, "*broadening the scope of the Transparency Directive"* means, for CESR, including all SEE Instruments in the scope of major shareholding disclosure, i.e. proceeding by way of aggregation of these Instruments with shares, then BNPP, as explained above**, disagrees with that solution.**

Incidentally, harmonization should also be sought throughout the EU with reference to the subject matter of the disclosure obligation regarding shares, i.e. the voting rights attached thereto. The member States which provide for a double calculation with reference to both shares and voting rights should be required to refer strictly to voting rights in compliance with article 9 of the TD.

➢ BROAD DEFINITION

⇨ **Question 3: Do you agree that disclosure should be based on a broad definition of instruments of similar economic effect to holding shares and entitlements to acquire shares without giving direct access to voting rights?**

BNPP understands and agrees that disclosure of SEE Instruments – **by way of a separate notification rather than aggregation** – should be based on a broad definition of such Instruments. It agrees that such scope should only extend to instruments referenced to shares that **have already been issued** but wonders then why, after having made that statement, CESR includes in the list of such instruments convertibles which, most of the time, are converted into new shares. This issue has also been discussed in depth in France and the AMF agreed in its conclusions with the idea that only instruments referenced to shares already issued were concerned. Another interpretation, including not shares already issued, would raise very serious practical issues.

⇨ **Question 4: With regard to the legal definition of the scope (paragraph 50-52 of the CP), 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 instruments.**

BNPP acknowledges that the definition of financial instruments under MiFID may not indeed be sufficient to encompass now or in the future all such Instruments.

➢ CALCULATION OF THRESHOLDS

⇨ **Question 5: Do you think that the share equivalence should be calculated on a nominal or delta-adjusted basis?**

- **delta - adjusted basis**. It may be a rational way to measure such equivalence as it is representative the number of shares the person writing the instrument would need to hold in order to perfectly hedge its exposure. As explained by CESR, if any influence on the issuer can be gained by the buyer of a SEE Instrument, it is *via* the shares held by the writer of such instrument as hedge. Furthermore, if, as mentioned by CESR, the suggested short-selling rules currently being consulted under the CESR Task Force, provide for a calculation on a delta-adjusted basis, this is an additional argument in favour of such method of calculation. Nevertheless, CESR must be aware that such a method requires to re - calculate the delta adjusted holdings on a daily basis, and in case of high volatility of the markets, this can become technically difficult and may raise uncertainty.

- **Calculating in nominal:** a nominal reporting rubric will overstate the size of positions, and is likely to give a misleading image of the real situation. On the opposite, it is an easier way to monitor the situation in case of high volatility.

Whatever the solution will be, BNPP requests a full harmonization of the rule concerning this particular point between all the EEA Member States. This issue is the key for us and the current situation where we have to manage the two systems is the worst one (technically and also because of risks on uncertainty).

⇨ **Question 6: How should the share equivalence be calculated in instruments where the exact number of reference shares is not determined**

Such exotic instruments should be exempted from the disclosure regime unless they can only be hedged with a defined number of referenced shares.

➢ SCOPE OF DISCLOSURE

⇨ **Question 7: 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)?**

BNPP understands the concerns expressed by CESR (§ 69 to 73 of the CP) in relation to the "safe harbour" approach. Therefore BNPP does not disagree with the general disclosure approach **for as long as all such SEE Instruments to be disclosed are disclosed by way of a separate notification and not by way of aggregation**. Once more, BNPP regrets that the alternative option of separate notification is not clearly mentioned and proposed and that under the term of "general disclosure", a confusion is entertained between two different possibilities, that of separate notification achieving equally the objective of improved transparency but in a more proportionate way.

⇨ **Question 8: 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, the TD exemptions should apply to the SEE Instruments. For instance a CFD or equity swap held by a firm **in its trading portfolio** should not have to be disclosed – by way of a separate notification – unless it reaches a certain level. **It should be recalled that ESME recommends that cash settled derivatives be reported separately only when they reach a significant level (estimated to be at least equal to 5 % or higher in the range of 5 to 10%).**

⇨ **Question 9: Do you consider there is a need for additional exemptions, such as those mentioned above or others?**

Yes (3 examples)

(i) The additional exemptions mentioned by CESR, notably the exemption **for client-serving transactions or for accounting purposes**, seem justified for as long as they apply in a harmonized way throughout the EEA.

(ii) **Intra-group transactions** (lending-borrowing, OTC transactions between separate entities within the same group) should be excluded ei. taking into account **once only** in the calculation. In the current situation, the way certain intra group transactions are taken into account in the calculation method is not clear enough and CESR could provide some guidelines.

(iii) We also suggest that cash settled financial instruments referenced to **shares which are held by underwriters and sub-underwriters** as bona fide hedges of their underwriting commitments (primary market) should be exempted from disclosure.

➢ COSTS AND BENEFITS

⇨ **Question 10: Which kinds of costs and benefits do you associate with CESR's proposed approach?**

As mentioned above, most European countries have just achieved the transposition of the Implementing Transparency Directive of March 2007 and the firms have adapted their systems accordingly.

Therefore, any new change to be made to the TD in the future will inevitably generate new costs for the parties concerned. Such additional costs are only acceptable **if the result of such changes favours a better convergence between the way the different Member States implement the Directive and particularly, concerning the calculation method for derivative instruments.**

The first benefit which is to be sought is to have a full harmonization of the European legislation on "Major Shareholding Notification", which requires either a European regulation or a maximum harmonization directive. The current situation - where there is a diversity of regime throughout Europe - is very difficult to manage and therefore very costly for the parties concerned. The European authorities should therefore seek to propose a system that can be imposed upon all member States.

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The second benefit which is to be sought is to provide the market with relevant information which is going to be meaningful and truly useful. For that purpose, a disclosure obligation of significant positions in SEE Instruments only seems far more appropriate – notably in terms of balance between costs and benefits – than the full aggregation approach proposed by CESR which is inevitably going be costly with doubtful benefits.

⇨ **Question 11: How high do you expect these costs and benefits to be?**

BNPP made several IT developments to capture the positions in derivatives instruments adequately and can confirm that the costs of implementing CESR's approach has been significant, particularly due to the lack of consistency in the way the different regulators implemented the EU. Directive. (ex: AMF - FSA and BAFIN : 3 different ways of calculating the positions concerning the "other instruments") In addition, these inconsistencies are also source of legal and regulatory uncertainty.

⇨ **Question 12: If you have proposed any exemptions or have presented other options, kindly also provide an estimate of the associated costs and benefits.**

There is no doubt that the option supported by BNPP i.e:

(i) **the disclosure of SEE Instruments by way of a separate notification of only significant positions,**

(ii) **(ii) the calculation of derivatives instruments fully harmonized between the MS,**

(iii) **ii) concerning instruments referred to only already issued shares)**

is likely to be less costly because, it will give rise to a less important number of declarations and a better accuracy of these declarations.

At the same time, it will necessarily be more beneficial to the market as it will avoid **an overload of declarations mixing instruments giving access or likely to give access to voting rights with instruments which, conversely, are, for their vast majority, unlikely to ever give access to voting rights**. The need for disclosure of the latter category (the SEE Instruments) is fully understood and supported but in order for such disclosure to be relevant, it must be effected b**y way of a separate notification for significant positions only.**

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