31 March 2010

Mr Hans Hoogervorst
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Dear Mr Hans Hoogervorst

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

The IMA represents the asset management industry operating in the UK. Our Members include independent fund managers, the investment arms of retail banks, life insurers and investment banks, and the managers of occupational pension schemes. They are responsible for the management of £3 trillion of assets, which are invested on behalf of clients globally. These include authorised investment funds, institutional funds (e.g. pensions and life funds), private client accounts and a wide range of pooled investment vehicles. In particular, our Members represent 99% of funds under management in UK-authorised investment funds (i.e. unit trusts and open-ended investment companies). The IMA's authoritative Asset Management Survey 2008 recorded that IMA member firms were managing 43% of the UK domestic equity market for clients.

We welcome the opportunity to comment on the proposals made in the paper. Please find our detailed comments attached.

We look forward to hearing from you if there is any clarification that you would find useful on the points we have raised. We would be happy to meet to discuss the thinking behind the market disclosure requirements.

Yours sincerely

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

We provide below answers only to those questions from the consultation that fall within IMA's remit

VI. Reporting 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?

While we agree with many of the issues raised by CESR in their paper we would be opposed to a further extension of reporting burdens on firms without a proper analysis of the situation.

We agree that the scope of any disclosure should be limited to instruments referenced to shares to which voting rights are attached, are already issued and are of an issuer whose shares are admitted to trading on a regulated market in the EU.

In paragraph 8 you state that "instruments that create similar economic effect to holding shares and entitlements to acquire shares are generally entered into to give economic exposure without wishing to gain access to voting rights". Paragraph 15 supports this when it states that "not all such instruments are used to acquire or influence the exercise of voting rights. Rather, the majority are used simply to gain an economic exposure to the issuer." However, at paragraph 41 you state that "it is likely that an investor with a significant economic long interest will seek to influence the issuer."

Where CESR refers, in paragraph 16, to Article 10(g) of TD we consider that the buyer of an instrument, the writer of whom has hedged his position by buying and holding shares, should only be deemed to have a reportable exposure under Article 10(g) where he actually knows that the position has been so hedged. This would be very difficult to implement at a firm or contractual level. We disagree with CESR's view that such instruments should thus be reported in general.

In paragraph 17 CESR states that instruments outside the scope of Article 13 of TD may create problems for the objectives of the TD, if the buyer knows that the seller has hedged their position. We would be interested to know if CESR has any evidence of the extent to which buyers:

- are aware that they seller has hedged their position;
- of such instruments actually do "exercise a significant degree of de facto control (via the writer) over the voting rights attaching to the shares held as hedge"
- are able to gain an information advantage regarding the free float;
- ever actually buy the shares which formed the hedge from the seller, and if so, to what extent this is done at a price other than the current market price, and thus grants them an actual advantage.

While we recognise the possibility of what CESR is suggesting in paragraph 17, we consider that any advantages to the buyer are rare and minimal, and thus would not justify the costs of imposing these extra restrictions on firms, without more evidence and analysis.

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

We consider that the ideal solution to the issues raised would be to introduce one consistent and proportionate regime of disclosure throughout the EEA. This would best be done through an amendment to the TD.

In order to ensure a consistent and level playing field we would recommend that the changes be on the basis of maximum, rather than minimum, harmonisation. CESR may wish to consider whether a Regulation would be the ideal vehicle for ensuring the greatest degree of consistency across states.

VII. Broad definition

Q3: 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?

A broad definition, which catches all relevant instruments, while excluding any specifically not to be included, would be best. Taking a broad definition will help to minimise the risk of tailored instruments being devised purely to avoid the reporting requirements.

It is most important that the requirements *are* implemented consistently across the EU, and this is an aspect that CESR may wish to consider further.

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.

We consider that the legal definition used in MiFID is generally understood and represents a good approach to setting the necessary scope. An example of how this may need to be framed can be found in the UK's FSA rules at DTR 5.3.1 and their FAQ.

This may be a good opportunity for CESR to ensure that all countries have transposed the TD and MiFID definitions in an appropriate and consistent manner.

We would suggest that, with regard to baskets and indices, there ought to be a *de minimis*, such that firms are not required to take account of such positions where the position in the instrument concerned is likely to be very small.

VIII. Calculation of thresholds

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

While we recognise that the delta adjusted is the superior basis for the calculation we also understand that the calculations can be complex, time consuming and resource intensive. The delta of some instruments may vary over time, depending on movements in the underlying share price or interest rates, and even corporate events. Not all firms will have real-time data feeds for all the above information. All of this results in delays in firms being able to finalise their delta adjusted position.

Consequently we consider that firms should be encouraged to report on a delta adjusted basis, but allowed to report on a nominal basis if reporting on a delta adjusted basis would lead to delayed reporting.

A firm, once it has reported once, should not be required to report again where a threshold has been passed passively, purely because of a change of the delta to be applied to the instrument held. Only where a firm subsequently deals should the reporting requirement re-arise.

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

This is a very difficult question, to which we do not have a complete answer.

If the situation under consideration is a rights issue, where the number of shares in issue is to change, then the pre-issue number of shares should be used as the denominator until the new shares are issued.

We would be happy to discuss other specific scenarios further with CESR, should they have different situations in mind.

IX. Scope of disclosure

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)?

The 'safe harbour' approach was considered, but rejected by the UK, when the FSA implemented its equivalent rules in 2009. It would prove difficult to implement, and very difficult to enforce.

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?

The more consistently the rules are applied, and the fewer exemptions are available, the more effective and useful the directive requirements will prove.

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

Some of our members firms have suggested that underwriting exemptions should remain. We see no need for any other exemptions.

X. Costs and benefits

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

As long as a fully consistent approach across the EU is achieved, then our member firms do not anticipate significant implementation costs.

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

No comment.

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

No comment.