NATIXIS

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

First, Natixis wants to thank CESR for providing it with the opportunity to discuss the proposal of extending major shareholding notifications to "*instruments of similar economic effect to holding shares entitlements to acquire shares*".

As CESR knows, Natixis is a listed subsidiary of one of the largest banking groups in France, focused on three complementary divisions: Corporate and Investment Banking (including brokerage), Investment Solutions and Specialized Financial Services.

Before answering the specific questions raised by CESR, Natixis would like to clearly support the point of view of the French association AMAFI.

As general remark, we agree with the AMAFI which considers that the CESR's CP appears to be one sided. From the start, it announces its objective to propose to *"extend major holdings notifications to include all instruments that give a similar economic effect to holding shares and entitlements to acquire shares in the broadest sense"* (§4) adding that "*CESR considers the scope of major shareholding disclosure should include all instruments that give similar economic effect to holding shares or entitlements to acquire shares*" (§38). On two occasions, CESR admits that these instruments "*are generally entered into to give economic exposure without wishing to gain access to voting rights and are an important source of liquidity to the market*" (§8) and that "*not all such instruments are used to acquire or influence the exercise of voting rights. Rather the majority are used simply to gain economic exposure to the issuer*" (§15).

On one hand, since the vast majority of these Instruments will never give access to voting rights and be used to gain influence, aggregating them with shares and other instruments which are physically settled is bound to create total confusion and an overload of different types of information of different nature all mixed together which is likely to be detrimental to the relevant information needed by the market and the investors.

On the other hand, the possible use of SEE Instruments to acquire or influence the exercise of voting rights, is an issue which should be addressed. But first of all, those cases remain very limited in number and secondly they are legal means – and notably the notion of "concerted action" - which can be used to sanction such behaviour.

➢ ***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, Natixis 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 has only been a very small number of situations in which such use has been evidenced.

- 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.

Natixis disagrees with what is proposed by CESR which appears to be disproportionate to the issue which is to be cured. Furthermore Natixis regrets that no alternative is proposed to the only solution put forward by CESR, clearly inspired from the UK regime.

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

Natixis thinks that this issue should be addressed by way of a harmonized solution imposed throughout the EEA. In that sense it agrees that the Transparency Directive 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 Natixis, as explained above, disagrees with that solution.

➢ ***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?

Natixis 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.

⇨ 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.

The second option would certainly allow more legal certainty and it should include the vast majority of SEE Instruments.

➢ ***CALCULATION OF THRESHOLDS***

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

The share equivalence of SEE Instruments should be calculated on a delta-adjusted basis.

It is the only relevant way to measure such equivalence as it is representative of 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.

CESR should however be aware of the cost of such method which requires that the instrument holder recalculates on a daily basis the delta-adjusted holding.

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

Natixis does not understand the type of situation that CESR has in mind. Clarification is required in this connection.

➢ ***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)?**

Natixis 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, Natixis regrets that the alternative option of separate notification is not clearly mentioned and proposed and that under the term of "general disclosure".

⇨ **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?

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.

➢ ***COSTS AND BENEFITS***

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

The transposition of the Implementing Transparency Directive of March 2007 is been achieved recently and Natixis, like the other firms, has adapted its systems accordingly. Therefore, any new changes 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 is beneficial for the market participants and the market itself.

- As the AMAFI said, 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.

- 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.

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

Unfortunately, Natixis expects the costs of implementing CESR's approach to be very high with doubtful benefits.

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

Natixis considers that the option supported by the French Association AMAFI (i.e. the disclosure of SEE Instruments by way of a separate notification of only significant positions) is likely to be less costly because, it will give rise to a less important number of 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 by way of a separate notification for significant positions only.

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