

**EMISORES ESPAÑOLES' contribution to the consultation paper "CESR proposal to extend major shareholding notifications to instruments of similar economic effect to holding shares and entitlements to acquire shares" (Ref.: CESR/09-1215b)**

**Introduction.**

EMISORES ESPAÑOLES is a Spanish Association created in November 2009, which main objectives include, among others, the following:

- The analysis and promotion of measures addressed to enhance the legal certainty with respect to the issue, negotiation, settlement, custody and register of quoted securities.
- Contribution to the development of high-level standards of corporate governance in listed companies.
- Promote the adoption of any kind of measures aimed at improving the communication between listed companies and their shareholders.

Notwithstanding its recent creation, EMISORES ESPAÑOLES has already brought together more than thirty Spanish listed companies representing a wide range of economic industries (construction, finance, energy, IT, media, etc...). In spite of our members coming from such different industries, our common interest lays in achieving both a smoother running of the markets and an improvement of the regulation applicable to listed companies.

On these grounds, EMISORES ESPAÑOLES welcomes CESR's proposal to extend major shareholding notifications to instruments of similar economic effect to holding shares and entitlements to acquire shares (hereinafter, "**the Instruments**") as it will contribute to market transparency.

Thus we are very pleased to submit to CSER our approach on the issues addressed in this consultation paper and we offer you our future cooperation in any matter which falls within our activities.

Please, find below our answers to the questions posed by CESR.

**Questionnaire.**

**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.

EMISORES ESPAÑOLES considers that CESR's proposal will enhance the markets transparency and that disclosing the Instruments may be relevant for all the market participants (listed companies, shareholders, investors, etc...) and regulators.

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

Yes.

The legal regime set out in Article 13 of the Transparency Directive do not cover the Instruments, as defined on CESR's paper ("instruments of similar economic effect to holding shares and entitlements to acquire shares").

Therefore, we agree that the scope of the Transparency Directive would need to be broadened in order to include the Instruments.

**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?**

EMISORES ESPAÑOLES considers that this is a key issue to be addressed.

In our opinion, any prospective legislation to derive from CESR's proposal (if that were to be the case), should be extremely accurate in terms of legal certainty. Therefore, wide definitions of Instruments should be avoided so that market participants can deal with the future legal regime with confidence and with little risk of being fined or punished because of a misinterpretation of indeterminate concepts.

On the other hand, we agree that there are significant risks in trying to deliver an exhaustive list of Instruments as it would increase the risk of avoidance through the creation of new Instruments that are not on the list

All things considered, we are of the view that, notwithstanding the existence of a broad definition as mentioned in paragraph 47 of CESR's paper, it would be advisable to have a list of Instruments that the European legislator could update from time to time.

As a consequence of that, the holder of any Instruments included on the list would be sure of its duties under the regulation.

**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 think that, in terms of legal certainty, the best option to construct the definition of Instruments would be to start from the definition of financial instrument in MiFID as it would avoid including a new definition of financial instruments in European regulation.

However, there are some types of financial instruments included in MiFID that, in our opinion, should be excluded when constructing the definition of "Instruments". They are as follow:

- a) Money-market instruments.
- b) Units in collective investment undertakings.



- c) Options, futures, swaps, forward rate agreements and any other derivative contracts relating to commodities that must be settled in cash or may be settled in cash at the option of one of the parties (otherwise than by reason of a default or other termination event).
- d) Options, futures, swaps, and any other derivative contract relating to commodities that can be physically settled provided that they are traded on a regulated market and/or an MTF.
- e) Options, futures, swaps, forwards and any other derivative contracts relating to commodities, that can be physically settled not otherwise mentioned in c) above and not being for commercial purposes, which have the characteristics of other derivative financial instruments, having regard to whether, inter alia, they are cleared and settled through recognised clearing houses or are subject to regular margin calls.
- f) Derivative instruments for the transfer of credit risk.

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

Once again we strongly recommend the application of legal certainty principles to any future legislation regarding this matter.

Therefore, our opinion is that the share equivalence should be calculated on a nominal basis as the delta-adjusted method mentioned in CESR's paper can bring about involuntary failure of the notifications duties. Additionally, the acceptance of the nominal criterion for Instruments would be consistent with Article 13 of the Transparency Directive.

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

In some of the Instruments included on the list mentioned in our reply to Q4, the calculation of the share equivalence will not arise any special difficulty (for instance, Contracts for Differences) as they normally replicate a specific number of shares.

In some other cases, we think that the calculation of the share equivalence could be determined as the quotient resulting from dividing the nominal amount of the relevant Instrument into the share nominal amount, this quotient being rounded up.

**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)?**

A "safe harbour" approach could be helpful as it can avoid the disclosure of Instruments that simply create similar economic effect to holding shares and entitlements to acquire shares but that are not addressed to gain access to voting rights. In other words, Instruments held with only economic purposes could be exempt from the notification regime.

However, we agree with CESR that creating such a "safe harbour" for certain types of contractual agreements can be unworkable.

**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?**

In the event that the "safe harbour" approach was not adopted, we consider that it would be consistent to apply to the Instruments the same exemptions included in the Transparency Directive for 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?**

In our opinion there is no need for additional exemptions.

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

In our opinion, the costs and benefits associated with CESR's proposal are clearly set out in paragraphs 75 to 80 of CESR's paper.


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

Although we cannot foresee how high these costs and benefits would be, it seems that financial entities and regulators would be significantly affected in terms of costs, as they will have to change their systems in order to capture Instruments information.

For this reason, we suggest that any new regulation regarding this matter includes transitory provisions to allow some time for financial entities and regulators to make the relevant changes.

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

Not applicable.

A handwritten signature in blue ink, consisting of a large, stylized 'D' followed by a checkmark-like flourish.

D. Salvador Montejo  
Presidente