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CESR REF: CESR/05-023B

RESPONSE TO CESR'S DRAFT TECHNICAL ADVICE ON POSSIBLE IMPLEMENTING MEASURES OF THE DIRECTIVE 2004/39/EC ON MARKETS IN FINANCIAL INSTRUMENTS - ADMISSION OF FINANCIAL INSTRUMENTS TO TRADING ON REGULATED MARKETS - SECOND CONSULTATION PAPER - FEBRUARY 2005

On 3 February 2005, CESR launched a consultation on:

- requirements for financial instruments to be admitted to trading on Regulated Markets ("RMs"); and

- obligations for RMs to verify issuers´ compliance with disclosure requirements and to facilitate the flow of disclosed information to their members and participants.

virt-x welcomes the opportunity to submit views and would be pleased to expand on any of the following comments where that would be helpful to CESR.

By way of introductory comment, we wholly endorse CESR's view that the focus for securities trading on an RM should be on supporting optimum trading on that RM, ensuring that any financial instruments admitted to trading on an RM are capable of being traded in a fair, orderly and efficient manner.

Q1: Do consultees support the revised structure of admission requirements? If not, what would be the preferred alternative?

On initial disclosure obligations, we welcome the modification of the proposal so that the RM should no longer have an obligation to verify that the information is correct by assessing whether the conditions for exemption have been duly met.

However, the proposal (in paragraph 8 of the Explanatory text) that an RM should "require that the issuer provides" a copy of the certificate is problematic under some business models (such as virt-x's), in which an RM admits to trading securities which have been listed by a Competent Authority for Listing ("CAL") without the RM having a direct relationship with the issuer. Where an RM does not have a direct relationship with the issuer, the RM cannot "require" any action from the issuer and this is indeed recognised in Article 40(5) of the MiFID which provides that "The issuer shall not be subject to any obligation to provide information required under paragraph 3 directly to an regulated market which has admitted the issuer's securities to trading without its consent". The proposal would therefore not be practicable under a business model which is nevertheless recognised within the MiFID and other relevant EU legislation (e.g. the Prospectus Directive).

We suggest that the way to address this is to extend the existing practice in some Member States whereby the competent authority issues a certificate or no-action letter: the competent authorities in all Member States should be required to provide the necessary confirmation on request. This would have the additional advantage for market participants of unifying the procedure across the EU.

We also welcome CESR's decision to concentrate on characteristics and trading with financial instruments and not matters relating to issuers. The new proposal addresses the point in our previous submission that there would be scope for differing requirements and potential variations in interpretations given by the RM and the CAL in respect of an issuer's obligation. Notwithstanding this, the current proposal still encroaches into the jurisdiction of the CAL, for example in relation to the requirement to ensure that an issuer has an adequate financial history; we see this as a matter for the CAL rather than for the RM.

Similarly, the draft Level 2 advice proposes that an RM should take into account both the breadth of the distribution among public shareholders and the number of shares issued, and also that there should be an appropriate level of historical information about the company. We consider that these are criteria which should properly be taken into account when first assessing the suitability of a company for listing (rather than for trading). We agree that the distribution among public shareholders may also be relevant for trading purposes but this is because it may influence the choice of market model for those securities – in other words, it is for the commercial judgement of the market because it relates to the attractiveness of the market offering; but it should not be a regulatory prerequisite for admission to trading.

Paragraph 21 of the Draft Level 2 advice states that, in respect of information published on the basis of the Prospectus Directive, the RM should without undue delay inform members and participants whenever a new prospectus related to the admission on that market is published and where it can be obtained. Again we suggest that this should be a responsibility of the CAL. Otherwise, RMs will have additional costs and furthermore participants of several markets will receive duplicate information if the security is offered for trading on more than one market. The most cost-effective solution would therefore be for the CAL to publish the information.

The Level 1 text requires Member States to ensure that an RM establishes arrangements which facilitate its members in obtaining access to information which has been made public under Community law. We remain unconvinced that the proposal that an RM should provide links to prospectuses on its web-site (or carry out other procedures if the information is not available electronically), would be of value to investors. We are sure that the investor will be best served if this information is available from a single central source; this will also avoid additional infrastructure cost which will ultimately be borne by the investor.

Q8: Do consultees agree with the content of proposals? If no, what specific changes or alternatives do you suggest?

The Level 1 text requires RMs "to establish and maintain effective arrangements to verify that issuers of transferable securities that are admitted to trading on the regulated market comply with their obligations under Community law in respect of initial, ongoing and ad hoc disclosure obligations". As mentioned above, we agree with CESR's decision that the RM should not have to verify the correctness of information. We consider that CESR should go further than this for listed securities and simply require the RM to have arrangements to ensure that the securities have indeed been listed and that the listing has not been suspended or withdrawn.

28 February 2005
