

CESR
11-13 avenue de Friedland
75008 Paris,
France

London, 31 March 2010

Dear Sirs,

Public Response to the Consultation on the CESR proposal to extend major shareholding notifications to instruments of similar economic effect to holding shares and entitlements to acquire shares

We are writing to provide you with Hermes' comments on CESR's Consultation Paper examining whether instruments that create a similar economic effect to holding shares and entitlements to acquire shares should be disclosed as part of major shareholding notifications.

Hermes is one of the largest fund managers in the City of London. We respond to consultations such as this one on behalf of many clients, including among others the Ireland's National Pension Reserve Fund, Pensioenfonds PNO Media of the Netherlands and Denmark's PKA. We have over 60 billion Euros assets under advice*.

Hermes takes a close interest in matters of company law and regulation because they set the context for the exercise of our clients' rights as part-owners of the companies in which they invest. We seek to safeguard our clients' current rights and also to enhance the transparency and accountability of companies and their directors to their long-term owners and of capital market participants more generally. To minimise risk to our clients we believe that the markets in which they invest should be transparent and efficient and that regulators should ensure that their actions encourage these aims.

Hermes welcomes CESR's consultation on transparency in relation to instruments with a similar economic effect to holding shares. We are pleased in particular about the suggested scope and the thorough background analysis of the topic.

We are broadly in agreement with the proposals contained within the discussion paper as we consider, especially in the light of some recent international cases, that increased transparency on instruments which have a similar effect to holding shares enhances market efficiency and is ultimately beneficial for institutional investors. As a result we have not answered all the questions in the discussion paper.

Below we address the consultation questions that involve issues which are of specific interest or, in some instances, of concern from our point of view.

* Figure as at March 31st 2010.

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?

In principle we agree with the CESR's position that the current system does not adequately address the concerns over adequate disclosure and that this lack of transparency can allow holders of financial instruments that create a similar economic effect to holding shares to have significant influence on companies' corporate governance and / or voting rights. We have heard concerns from many companies about the negative effects of the opacity surrounding CfDs and other similar financial instruments, including large shareholders appearing on registers overnight and funds claiming to hold CfD positions and seeking to influence strategy. Other shareholders – and the market as a whole – are also adversely affected by such events.

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

We agree that the scope of the TD needs to be broadened. Leaving the current regime unchanged is not appropriate considering that in many jurisdictions around the world there have been cases where instruments such the ones addressed by this consultation were used in order to influence or acquire control of a company. These situations represent a breach of the efficiency of the market and are potentially detrimental to the ownership interests of institutional investors.

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?

Considering that financial markets and instruments evolve rapidly, and that different local markets have specific contracts in place, we would favour a broader definition like the one proposed by the CESR rather than an explicit list which is very likely to end up being non-exhaustive.

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 fear that restriction to the MiFID – also due to different national transpositions of the TD - and, in particular, the definition of financial instruments offers loopholes which might be exploited. Therefore, we support the first option.

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)?

We are not supportive of the safe harbour approach. While the introduction of a safe harbour may seem attractive, we fear that it will open the door to abuse by investors which wish to avoid disclosure. We can easily imagine circumstances where an investor falls within the safe harbour at one point but then – almost overnight and through its own actions – no longer does so. We do not believe that companies and the market would feel any less ambushed in such circumstances.

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

We foresee additional costs associated with CESR's approach for both market participants and regulators. At the same time, we believe that the benefits, in terms of enhanced transparency and protection of minority shareholders' rights, outweigh the costs.

It should be clear from the above that we welcome the CESR applying attention to the area of instruments of similar economic effect to holding shares. We would note, however, that there is a further area where legal and beneficial ownership of shares becomes separated and voting control can on occasion rest in hands where it is not wholly transparent. This is not in the interests of certainty for companies, transparency nor market integrity. This area is stocklending and we would like to request the CESR to apply its mind to the regulation of this area so that market confidence can be maintained. We would be happy to discuss this specific issue further.

We trust that you will carefully consider our views and hope that they provide some useful input to the consultation process. If you would like to discuss our views in further detail, please do not hesitate to contact us.

Yours sincerely,

A handwritten signature in black ink, appearing to be 'PL' followed by a horizontal line.

Paul Lee, Director