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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 2004
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RESPONSE OF EURONEXT

Euronext welcomes the initiative taken by CESR to consult again on the conditions of admission of financial instruments to trading, which is an essential issue for the operators of regulated markets. Therefore, having already brought comments on such topic in response to CESR's consultation paper within its first set of mandates, we have gone through its revised draft advice with the utmost interest, and appreciate the opportunity given to comment again. We indeed still have important concerns about the new draft advice, relatively to both the requirements for instruments to be admitted to trading, and the obligation for regulated markets to verify issuers' compliance with disclosure obligations and to facilitate access to information.

I. Requirements for instruments to be admitted to trading on a regulated market.

Regarding the new provisions drafted by CESR on the requirements for instruments to be admitted to trading, we first would like to welcome the new and further details brought in the provisions as concerns the different types of instruments. We indeed agree that the various categories of financial instruments have their own specificities, that are to be taken into account when considering, among others, their admission to trading on a market. We concur to the view that concerns, hence requirements, will not necessarily be the same for shares and for money market instruments or UCITS, even less for derivatives.

Nevertheless, we cannot agree with some of the developments contained in the new advice drafted by CESR. In particular, we are opposed to the inclusion of certain new concepts, such as the notion of maintaining a "viable market" introduced by CESR as an additional requirement for shares and for UCITS. Such notion is indeed as immaterial as imprecise and unknown from market participants, hence impossible to implement as such; it is also sufficiently vague to allow for inconsistent implementation at a national level, which is of course to be avoided in any case.

Furthermore, the requirement for a regulated market to "assess" the "adequacy of the free float" as concerns the admission of shares to trading, is not acceptable in our view. Indeed, this requirement is going well beyond the level I text's prescriptions, that were only requiring regulated markets to have "clear and transparent rules regarding the admission of financial instruments to trading", and to ensure that instruments "traded are capable of being traded in a fair, orderly and efficient manner". The obligation to do an "assessment" that the free float is "adequate" is creating a new obligation for operators of regulated markets, that goes much further than the one of establishing clear and transparent rules and verifying the objective compliance to such rules. Regulated markets should only have to set up in their rules certain free float requirements that issuers should conform to except in justified circumstances.

As concerns the criteria settled by CESR relatively to the consideration of the free float, i.e. the breadth of the distribution among public shareholders and the number of shares issued, we believe: 1) that the first criterion should be specified; it should indeed be clearer that reference is made here to the percentage of shares held by the public; 2) that the number of shares issued does not seem a relevant criterion since it can be adapted unilaterally.
Moreover, the advice should precise that these criteria should be taken into account by the regulated market "among others". Indeed, other parameters could be considered alternatively or cumulatively to characterize the free float (e.g. thresholds in value or percentage).

Additionally, the requirement for shares, according to which there should be "appropriate level of historical financial information available of the company" should not be a condition for admission to trading foreseen in the context of MIFID since this is required under the Prospectus Directive/Regulation. If it becomes a condition for admission, this could reopen debates on issues that are governed by the Prospectus Directive. The "appropriateness" level of such information would then be subject to a rather subjective interpretation from one situation to another, from one Member Sate/regulator to another, and could thus breach the level playing field aimed at by the level I text. Any overlap between the various EU legislation's provisions should be avoided.

We have noted the modification done by CESR to its initial drafting concerning the "expected trading activity" criterion. Nevertheless, we still do not believe that such information is required by Article 40 of the Directive and that consideration of this criterion is inappropriate as regards admission to trading. Indeed, the "expected trading activity" is very difficult to anticipate and hence cannot be a relevant parameter for a regulated market to consider in order to ensure "fair and orderly trading". Therefore, the reference to the "expected trading activity" should be suppressed from CESR's advice. In the same respect, we endorse the suppression by CESR of the notion of "expected holders" that was inappropriately included in the first draft advice.

As for derivatives, we believe CESR's revised advice is now suitable.

As concerns the admission to trading of UCITS, we consider that the regulated market does not have to verify, even less to "satisfy itself of", the conditions set out in CESR's advice. This responsibility should in any case lie with the competent regulatory authority. It is particularly true as for the consideration of the « value of units». Moreover and again, the concept of « viable market » introduced by CESR has neither regulatory existence nor precise practical significance.

II. Regulated markets' obligation to verify issuers' compliance with disclosure obligations and to facilitate flow of information.

The new drafting of the advice concerning the obligation, for a regulated market, to verify the issuers' compliance with their disclosure obligations, remains in our opinion problematic, as it still implies for regulated markets obligations that are irrelevant and go beyond the level I provisions.

First, as regards initial disclosure obligations, we agree, as mentioned in our comments to CESR's first consultation, that the primary responsibility for monitoring and enforcing such compliance of the issuer with its disclosure obligations lies with the competent authorities. It is indeed the role of those authorities to monitor and enforce that issuers do not offer securities to the public or apply for admission to trading on a regulated market without an approved prospectus save when an exemption applies. Moreover, in order to allow regulated markets to be in a position to verify that issuers comply with their initial disclosure obligations, and issuers to be able to bring forward such proof, it is necessary that such information be previously made public. Hence the competent authorities should have a clear obligation to publish the said information (i.e. prospectuses' approvals, exemptions as well as notifications in accordance with art. 18 of the Prospectus Directive), for example on their websites. In any case, the market operators should be able to verify that the issuers' obligations have been met on the basis of information provided by the issuers themselves (except in case of admission to trading of a financial instrument without the consent of the issuer).

Furthermore, in relation to the obligation to verify the issuers' ongoing and ad hoc obligations, the principle that the regulated markets shall "satisfy themselves" of such compliance is not acceptable. It implies a subjective consideration of the level/fairness of the said information by the market operator. It is not in line with the level I Directive, that only requires the "regulated market to establish and maintain effective arrangements to *verify* that issuers" comply with such obligations. Therefore, the level II measures should only foresee for the regulated markets the obligation to set up clear and efficient procedures in that perspective, that will allow an objective verification of the issuers' obligations, but in any case no statement on any subjective intervention of the market operator in deciding whether or not the issuers' obligations are met.

Finally, concerning the regulated markets' obligation to facilitate the flow of information, we would like to highlight that reference to a "flow of information" is not relevant as the Directive only calls for facilitating the "access" to information which has been made public under the EU law. Furthermore, we do not agree with the drafting of CESR' advice as regards information published on the basis of the Prospectus Directive. Indeed, this information is made public at the time of the admission to trading; hence access to such information is provided and we consider unnecessary the provisions stating that the regulated market should "inform members and participants whenever a new prospectus related to an admission is published". It seems also irrelevant to assist those professionals to get such information on prospectuses, whereas it is already provided to the general public. In our view, regulated markets could only be required to identify, on request, where information can be found.

Moreover, the Prospectus and Transparency Directives already include provisions for the publication and storage of such information; hence the level II measures for MiFiD do not have to precise such provisions.
