SOCIETE GENERALE

CESR

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Paris La Défense, 25th March 2010

CESR Public Consultation :

Proposal to extend major shareholding notifications to instruments of similar economic effects to holding shares and entitlements to acquire shares

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Société Générale Group (SG) has participated in different working groups dealing with threshold crossing disclosures of cash settled derivatives either organized by the AMAFI or by the AMF since 2008.
SG completely shares views and conclusions expressed by the professional association AMAFI on CESR Public Consultation.

Before answering the specific questions raised by CESR, SG wishes to underline that:

- **The context and purpose of this consultation need to be clarified to understand how it is fits in with CESR's role and the work undertaken by the EU Commission on the subject :**
  In your CP,it is stated that "*CESR intends to widen this scope* (i.e. the scope of the TD) *to include all instruments referenced to shares that allow the holder to benefit from an upward movement of the price of these shares".* From a legal standpoint, such a statement is most surprising as it is not within CESR's powers to modify the scope of European directives. Moreover, CESR's role is limited to the implementation of existing EU legislation. It is not, at least not for the time being, to propose new legislation when such new legislation is not a way of achieving coordinated interpretation of an existing European legislation.

- **The CP is very partial and fails to examine alternative solutions** :
  This is particularly surprising after all the discussions that have recently taken place, *inter alia*, in the UK, in France, and for the preparation of ESME report in November 2009 "*Views on the issue of transparency of holdings of cash settled derivative"*. SG would like to stress out that the way the French position is presented in the CP is quite misleading as it could be construed as confirming the position that CESR is trying to promote whereas in fact, the position adopted in France is the opposite of what CESR would like to see adopted.

- **Harmonisation throughout European is definitely a goal that should be pursued by CESR and the EU Commission when work on the Transparency Directive (TD) starts:**
  On this particular subject and generally in respect of disclosure of major shareholdings, SG is strongly in favour of the adoption of European legislation imposing full harmonisation. The diversity of regimes currently in place throughout Europe is very hard and costly to manage and clearly lacks clarity for the investors and in fact, for all parties concerned. But one can seriously question the fact that the proposed harmonization is based on a regime which has been adopted in one single European member State - the UK - particularly since, as mentioned above, no other alternative is proposed as part of this consultation.

With this in mind, SG Group wishes to provide the following responses to the CESR Public Consultation questions :

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 ?

SG does not agree with CESR's analysis of the issue even if 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, the control is supposedly gained *via* the shares held by the writer of the SEE Instrument as hedge. But such writer is 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.

What is true, on the other hand, is the fact that the buyer (of a SEE Instrument) has an information advantage over the rest of the market concerning the free float, since he can assume the volume of the writer's shares held as hedge which is not available to the other market participants.

A legal response – harmonized throughout the EU - should be found to deal with this issue. But such response should be proportionate. Furthermore SG regrets that no alternative is proposed to the only solution put forward by CESR – i.e. aggregation of SEE Instruments with shares - whereas an obvious alternative (discussed heavily in France and chosen in the end by the French authorities and recommended also by ESME) would be to impose a separate notification requirement of such Instruments.

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

SG agrees that the TD should be modified in order to create greater cohesion and thinks that this issue should be addressed by way of a global solution imposed throughout the EU.

In that sense SG agrees that the TD should be modified to include such a solution and such amended directive should impose maximum cohesion regarding major shareholding notifications. 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 SG disagrees with that solution.

Q3 : 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 ?

SG agrees that disclosure of SEE instruments - by way of separate notification rather than aggregation - should be based on a broad definition of SEE instruments. It agrees that such scope should only extend to instruments referenced to shares that have already been issued (which excludes notably some convertible bonds when shares are not issued).

Q4 : With regard to the legal definition of the scope (paragraph 50-52 of the CP), what kind of issues do 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.

SG believes that the 2nd option allows for less ambiguity than the 1st one. However, SG acknowledges that the definition of financial instruments under MiFID may not indeed be sufficient to encompass now or in the future all such Instruments.

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

SG thinks that the share equivalence of SEE Instruments should be calculated on a delta-adjusted basis. Should nominal be used, it will lead to numerous unjustified disclosures.

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.

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

SG does not understand the type of situation that CESR has in mind. Clarification is needed for this question. If you are referring to basket and indexes, SG would like to emphasize the difficulty, and in some situations the impossibility, in breaking down the underlying shares.

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) ?

SG understands the concerns expressed by CESR in relation to the "safe harbour" approach. Therefore SG 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.

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 ?

Yes, the TD exemptions should apply to the SEE instruments (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%).

Q9 : 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 the apply in a harmonized way throughout the EEA.

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

SG believes that any change of regulation would need new monitoring tools and additional costs would be generated as results. Recently, new tools have been implemented to take into account the implementation of the TD and any new change will drive up costs.

The first benefit will lie in a completed consistency of the European regulations. The current situation - where there is a diversity of regime throughout Europe - is very difficult to manage and therefore very costly for the parties concerned. The European authorities should therefore seek to propose a system that can be imposed upon all member States. Realistically, as mentioned in the ESME report, it is more reasonable to seek full cohesion on the basis of a regime which is already, give or take, quite widely spread out throughout Europe, rather than trying to impose a regime which is in place in one single member State.

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 – than the full aggregation approach.

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

SG anticipates that the costs of the full aggregation approach will be unjustifiably high with doubtful benefits.

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

There is no doubt that the option supported by SG (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.