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Milan, 31 March 2010
Prot. 16/10

CESR
11-13 avenue de Friedland
75008 – Paris
France

Re: Consultation paper on the extension of major shareholding notifications to instruments of similar economic effect to holding shares and entitlements to acquire shares.

ASSOSIM[1] is grateful for the opportunity to express its view on the consultation hereof.

As a general remark, we would like to highlight from the outset that we are really concerned about the opportunity to extend major shareholdings notifications to instruments of similar economic effect to holding shares and entitlements to acquire shares including cash-settled derivatives. The use of such instruments in order to acquire shares and/or hide positions on the underlying assets is an unusual practice, limited to very few and pathological cases related to take-over bids; these improper and pathological use should be properly addressed through the enforcement tools already embedded in the current takeover bid regulation rather than through the extension of the scope of transparency regulation. In the event that CESR will eventually implement a specific disclosure duty on cash-settled derivatives, despite any contrary view, we would like to suggest, as an alternative to the proposal set out in the consultation paper, the following regulatory options:

Option no. 1: the duty to disclose cash-settled derivatives should apply only if all the following conditions are met:

- the sum of shares and physical-settled derivatives (*global economic interest*) reaches a specific threshold, representing the minimum percentage to wield a relevant influence over the governance of an issuer (*e.g.*10%);
- the shareholding is equal to or higher than the first relevant threshold; and

[1] ASSOSIM (*Associazione Italiana Intermediari Mobiliari*) is the Italian Association of Financial Intermediaries, which represents the majority of financial intermediaries acting in the Italian Markets. ASSOSIM has nearly 80 members represented by banks, investment firms, branches of foreign brokerage houses, active in the Investment Services Industry, mostly in primary and secondary markets of equities, bonds and derivatives, for some 82% of the total trading volume.

- the underlying shares of physical–settled derivatives are equal to or higher than the first relevant threshold.

Option no. 2: the duty to disclose cash-settled derivatives should apply only if the sum of the shares and the underlying shares to physical and cash settled derivatives reaches a specific threshold triggering the duty to launch a take-over bid offer, despite of the amount of shares held and underlying of physical-settled derivatives.

As to the specific questions raised in the consultation paper, please find here below our comments.

Q.1: 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?

The use of such instruments in order to acquire shares and/or hide positions on the underlying assets is an unusual practice, limited to very few and pathological cases related to take-over bids. In our opinion, these improper and pathological use of those instruments should be properly addressed through the enforcement tools already embedded in the current takeover bid regulation.

The introduction of an extended shareholdings transparency regime could jeopardize the efficiency of the market disclosure process. As highlighted in paragraph 17, points 2 and 3 of the CESR's consultation paper, instruments having a similar economic effect to holding shares or entitlements to acquire shares, including cash-settled derivatives, are normally entered into for speculative or hedging purposes. A generalized disclosure regime would be misleading and devoid of the capacity to distinguish transactions entered into for acquiring and/or hiding positions on the underlying assets from those which are entered into for speculative or hedging purposes only.

While not being able to reach the described regulatory objective, as a side effect the implementation of an extended disclosure obligation could negatively impact on the liquidity of the relevant market, in that it could lead to the reduction of the volumes of cash-settled derivatives and other instruments mentioned above.

Q.2: Do you agree that the scope of the Transparency Directive needs to be broadened to address these issues?

According to the above, we do not agree. In our view the duty of disclosure should only apply to: (i) holdings and (ii) underlying shares of physically-settled derivatives.

Q.3: 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?

We do not agree. See answers to Q1 and Q2. We believe that the scope of the TD should not be extended. We are extremely concerned about the possibility that a so broad definition, such as the one proposed by CESR, could be adopted.

In our view this regulatory option could hamper the legal certainty of the scope of the disclosure duties.

When last year the Italian competent authority considered the same issue, having consulted the industry, it eventually decided not to extend the scope of the disclosure regime beyond physical-settled derivatives.

Q.5: Do you think that the share equivalence should be calculated on a nominal or delta-adjusted basis?

We believe it appropriate to calculate the share equivalence on a nominal basis rather than on a delta adjusted basis.

Delta adjusted criterion could entail further calculation costs for intermediaries, which could be requested by their clients (buy-side) to produce the delta adjusted value for each contract embedding a derivative component.

Furthermore, it should be noted that the delta pointer tends to change continually because of the different economic variables which influence the derivative component. The adoption of a delta hedging criterion would therefore trigger the duty of carrying out disclosure communications irrespective of a real trading activity.

Q.6: How should the share equivalence be calculated in instruments where the exact number of the shares is not determined?

Indeed, as regards instruments traded on regulated markets, the identification of the number of underlying instruments is always feasible. Still it might be difficult to compute the exact number of underlying shares, with regard to instruments traded OTC. With regards to OTC trades, the use of delta adjusted criterion for the calculation of underlying shares could thus be justified.

Q.7: 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 right (the "safe harbor" approach)?

Without prejudice to the above, we believe that a "selective" disclosure regime, prescribing the notification of the sole instruments that contractually do not preclude the possibility of giving access to voting right, might not be efficient. As a matter of fact, the settlement clause could be modified by the holder close to the expiry date of the relevant contract.

Q.8: Do you consider there is a need to apply existing TD exemptions to instruments of similar economic effect to holding shares and entitlement to acquire shares?

Without prejudice to the above, in the event that the scope of TD is extended, we deem it appropriate to extend the scope of the TD exceptions (*e.g.* trading book exception, market maker exceptions) to instruments of similar economic effect to holding shares and entitlement to acquire shares.

Q.9: Do you consider there is the need of additional exemptions, such as those mentioned above or others?

Yes, we deem it necessary to provide specific exemptions for: (i) positions built in order to hedge cash-settled derivative contracts; and (ii) positions held through baskets.

Q.10: Which kind of costs and benefits do you associate with CESR's proposed approach?

We believe that the extension of the scope of major shareholding notifications would have a significant economic impact for intermediaries. As a matter of fact it will require complex technical implementations in order to ensure compliance with the new regulation.

Intermediaries would be required to bear set-up costs to produce in-house, or acquire, a proper information system for the calculation and communication of shareholdings including instruments different from holdings (*e.g.* cash-settled derivatives), and *on-going costs* for monitoring the correct functioning of the disclosure system.

Furthermore, CESR should take into account the impact of a similar disclosure regime over policies and procedures which would be revised and updated accordingly in order to ensure compliance with the new regulation.

Conversely, we believe that, for the reasons set out above, the cost of such implementation is not compensated by a significant increase of market transparency especially with respect to the notifications that could arise from the implementation of a cash-settled derivatives disclosure regime.

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We remain at your disposal for any further information and clarification.

Yours sincerely,

Gianluigi Gugliotta
Secretary General