

MARKET ABUSE ADDITIONAL LEVEL 2 IMPLEMENTING MEASURES**RESPONSE BY AFEP****III GUIDELINES FOR DETERMINING ACCEPTED MARKET PRACTICES****Questions 1 to 5.**

It is important, at level 2, to invite national regulators to consult with each other before accepting any practice in a given market. It is advisable to prepare at that level for convergence in order to prevent completely isolated accepted practices. Moreover, each regulator should be obligated to submit an annual report to the European Commission regarding accepted practices in such regulator's market.

IV DEFINITION OF INSIDE INFORMATION FOR DERIVATIVES ON COMMODITIES**Questions 6 to 9.**

No comment.

V INSIDERS' LISTS:**Question 10: Do you agree on the relevance of establishing a list for each matter or event when it becomes inside information?**

It is useful to draw up a list for each event in order to achieve the following two purposes:

- to take preventive action by alerting the relevant persons to the fact that they are in the position of an insider; and
- to facilitate the identification of insiders who have engaged in criminal conduct.

However, a large variety of events occur in the life of a company, such as financial, industrial or other events. Consequently, it is appropriate to limit the notion of "event" to major events, that is:

- large financial transactions; and
- events outside the ordinary course of business, or events that have a material effect on the revenues or profits of a company. (see §60 below).

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Question 11: Should the minimum content of the list be specified at level 2?

Yes. Subject to the comments below, it is useful, at level 2, to have an indication of the contents of the lists.

It would be appropriate to:

- eliminate the obligation to specify the function and responsibilities of persons listed. It is not always easy to know the exact title of a person, especially if trying to act in strict confidentiality. That specification should remain optional. (see §60 below)
- eliminate the obligation to specify the time at which the person no longer has access to the information. The lists will be all the better prepared as their management will not be too burdensome. The employee himself or herself will be responsible for requesting his or her removal from the list. (see §60 below)

Certain companies have set up other systems, such as the execution by the employee of a document under which the employee agrees to keep confidential any information of which he or she may have knowledge as a result of his or her involvement in the transaction. Such systems should be accepted as constituting the equivalent of drawing up a list for each event.

Question 12: Should level 2 give examples of those persons acting on behalf of or for the account of the issuer who should be required to draw up lists?

The examples set forth in §62 appear to be sufficient.

Question 13: To what extent is drawing up a list of "permanent insiders" useful? Should Level 2 identify the jobs which typically provide access to inside information?

It would be appropriate to specify that the persons who are required to be included in the permanent list are those who have a **general and permanent** knowledge of the conduct of the business, that is, practically speaking, those listed in §73 (*members of the administrative, management or supervisory bodies of the issuer and senior managers who are not necessarily members of these bodies but perform similar decision making functions*).

Furthermore, it is necessary first to consider the consequences that are intended to be attached to the notion of "permanent insider". Is the intent to create a presumption of insider information? In any event, it must be made clear that being included in a permanent list must not result in the prohibition of any transaction on the market, whereas managers now have that possibility outside of those periods defined by the regulator during which they are prohibited from entering into transactions in the company's securities.

Consequently, it is advisable to clarify that issue and to provide criteria that would make possible the identification of those persons who are required to be listed on a permanent list.

Question 14: Would it be useful to further develop at level 3 the "illustrative system" outlined?

No.

Question 15: Would it be useful to describe the meaning of the expression "working for them" (article 6 §3) for example, to give clarification regarding people who are not employees of the issuer?

What must be clarified is the fact that the issuer is required to include in the list the name of legal entities working for the issuer, for example the name of the law firm. However, each outside participant must be responsible for drawing up such participant's own list of employees or associates who worked on a given matter.

Level 2 advice

58. No comment

59. No Comment

60. Each list should indicate at least:

- the related matter or event : the concept of matter or event is limited to major events, ie in addition to major financial transaction, events outside the ordinary course of business or which have a material effect on the revenues or profits of the issuer.
- if and when the person had no more access to subsequent information relating to the event or matter.

Supprimé : the person's functions and responsibilities

Supprimé : <#> when the person had access to it for the first time, ¶

61. No comment

62. Depending on the nature of the inside information, persons acting on behalf or for account of the issuer may include the name of the entity involved.

- the issuer's financial, economic advisors
- the issuer's auditors, rating agencies....

63. No comment

Level 2 advice

69. Issuers and persons... information. Those persons must be informed that they are mentioned in the list".

Question 16: Do you agree with the approach adopted regarding the criteria which trigger the duty to update insiders' lists?

Yes. The list should be continuously updated. It should be possible to add a person to the list at any time. In order for the list to perform the preventive function mentioned above, it is important that each person be advised (preferably verbally) that he or she is included in the list. This could be stated at §69.

VI DISCLOSURE OF TRANSACTIONS

Level 2 advice

73. *Persons discharging managerial responsibilities... This is the case for:*
 - *members of the administrative, management or supervisory bodies of the issuer,*

Supprimé : *senior*

Supprimé : *managers who are not necessarily members of these bodies but perform similar decision-making functions within the issuer. ¶*

Question 17: Is the above description for "persons discharging managerial responsibilities within an issuer" sufficient for level 2 legislation? Are there other persons that should be considered as belonging to the management of the issuer or should there be a specific restriction to persons who can assess the economic and financial situation of the company?

The term "senior managers who perform similar decision-making functions" is not precise enough and does not adequately define the scope of the group of persons in question. In reality, the relevant information is that which concerns directors and senior officers such as, chairmen of the board, chief executive officers, members of the board of management, directors and members of the supervisory board as well as the individual representatives of legal entities holding such positions.

Level 2 advice

75. *Persons closely associated are spouses, minor children or step children or children or stepchildren sharing the same household as the person discharging managerial responsibilities. Furthermore...*

Supprimé : *are all persons*

Question 18: is the above description sufficient for level 2 legislation? Are there other persons that should be considered as belonging to this category?

The first sentence of §75 is particularly imprecise and is unacceptable in respect of the right to privacy. It is suggested that the scope of the duty be limited to spouses and minor children or adult children living in the same household, as it is impossible to cover all situations involving personal ties.

Level 2 advice

77. *The disclosure obligation to the competent authority should cover all transactions in shares of the said issuer or in derivatives or other financial instruments linked to them above a cumulative threshold of 15,000 euros over a period of six months.*

Supprimé : *regardless of the size of the transaction.*

Supprimé :

Inséré : *000 euros*

Question 19: is the above description, sufficient for level 2 legislation? Should there be a threshold concerning the disclosure obligation to the competent authority?

Yes. There should be a **cumulative** threshold over a period of 6 months, which could be 15,000 euros. Thus, the disclosure obligation would be triggered as soon as the aggregate amount of transactions exceeds such threshold.

79. The disclosure to the competent authority should be made as soon as possible, in any case within 5 working days. the notification must contain :

- name, address, nature of notification duty of the person/relation to the company
- name of the relevant issuer
- name, class/description of the financial instrument
- nature of transaction (acquisition/disposal/other
- date (trading day) and market of the transaction
- price and amount/number of financial instruments.

Are not concerned, the exercise of stock options, transfer of securities by means of inheritance or donation

Supprimé : 2

Question 20: Is the above description sufficient for level 2 legislation? Are there any other details that should be covered on this level, for example the number of the relevant securities that the person holds after the transaction?

The two trading day deadline is too short; it should be extended to 5 days. Deadlines that are too short would entail additional costs for the company, as it will be forced to set up an accelerated reporting system.

It is necessary to have a precise list of all transactions covered, i.e. subscriptions, grants, and sale or purchase transactions. **However, transfers by inheritance or donation should be excluded, as they are not market transactions, but rather constitute private transactions, and the exercise of options should be excluded as well.**

VI SUSPICIOUS TRANSACTION

Level 2 advice

94. As regards the criteria for determining the notifiable transactions, CESR proposes the following:

- In order to determine whether a transaction in financial might constitute...Directive.
- Persons... abusive.

Supprimé : Certain transactions can seem completely void of anything suspicious when considered separately, but can take on a more suspicious aspect when seen in perspective with other transactions, a certain conduct or other information (e.g information to the effect that the third party for whose account the transaction is executed could be an insider). In such case, the whole group of transactions should be notified.

Question 21: Do you agree with the proposed approach?

The third item in §94 provides for the obligation to notify the competent authority of the group of transactions. The provision raises a real concern because it is not possible to discern the limits of the obligation for intermediaries, or what systems and procedures such an obligation would entail considering that they do not have the power to conduct investigations. On the one hand, intermediaries are required to set up Chinese walls; on the other hand they are asked to have a lateral vision of the transactions.

Level 2 advice

96. As regards the time of notification, CESR proposes the following:

In relation to a transaction notification without delay shall mean:

- *promptly after the suspicious transaction has been carried out ;*
- *after completing a transaction, immediately after a party under obligation to notifies becomes aware of any fact, as a result of which the transaction seems to be suspicious.*

Supprimé : *or a group of transactions,*

Supprimé : *immediately*

Question 22: Do you think that other possibilities should be taken into account?

No.

We propose to replace the term "immediately" with "promptly", which would leave time to refer the matter to the compliance officer and to make an informed decision.

Question 23: Do you think that other elements should be mentioned?

No. AFEP only wishes to stress the importance of the grounds for notification. It is necessary that the intermediary indicate the reasons for which a transaction is considered suspect. Such a provision protects the principal.

Level 2 advice

103. Notification to the competent authority can be done in writing or by e-mail, provides in the latter case that the confirmation is sent as soon as possible by any written form if the competent authority requests it.

Supprimé :

Supprimé : *or by telephone*

Question 24: Do you think that the proposed advice is appropriate?

It is important in all cases to opt for a written document, which will constitute a better safeguard as it will contain the grounds for notification, and to eliminate the possibility of referral by simple telephone call.