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AIBE

A.I.B.E.
ASSOCIAZIONE
FRA LE BANCHE
ESTERE IN
ITALIA

Milan, 30 January 2007
Prot. 06/07/DN/dn

CESR
11-13 Avenue de Friedland
75008 Paris
France

Re: CESR's Consultation on the second set of draft Guidance on the Operation of the Market Abuse Directive

ASSOSIM¹ and AIBE² welcome the opportunity to express their view on the above consultation and appreciate the work that CESR is carrying out to set the ground for convergent implementation and application of the Market Abuse Regime.

We believe that a Guidance on the operation of Market Abuse Regime ("**The Guidance**"), in which the national supervisory authorities agree a common understanding on the day-to-day application of Market Abuse directive's legal requirements, is of crucial importance for the success of the harmonization process in this area. The second set of draft Guidance is viewed by our respective members as an important and creditable effort on this way.

Without prejudice to the above, we would like to express the following comments on the paper under consultation:

- a) The scope of the Guidance should be extended to cover all aspects of the market abuse regime. Such an approach would guarantee a higher level of harmonization in the implementation and application of the relevant directives;

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.

² AIBE (*Associazione Italiana Banche Estere*) is the Italian Association of Foreign Banks, which has been constituted in 1984 and counts 50 members approximately. AIBE is a non-profit association created with the aim to represent the interests of foreign banks in Italy, to analyse and follow the trends related to international finance and to dialog with Authorities and Government Bodies. AIBE has an executive committee composed by 9 members.

- b) Consistently, the Guidance should also consider the obligation to report suspicious transactions. In the light of a cost benefit analysis, intermediaries should not be asked by national authorities to put in place unnecessarily expensive and complex systems and procedures, such as technological systems for the reporting of suspicious transactions. We have the perception that the application of the above notification requirement differs across Europe. We are firmly convinced that this is an issue on which supervisory convergence should be fostered in order to guarantee a level playing field for intermediaries;
- c) There is the risk that the criteria set out in paragraphs 1.13 and 1.15 may be differently interpreted by national supervisory and/or judicial authorities. As a consequence, we strongly recommend that the Guidance provides for (i) a more detailed definition of the factors to be considered to determine the significance of a price movement (see paragraph 1.13) and (ii) (if possible) quantitative thresholds of relevance for the items set out in paragraphs 1.13 and 1.15. In particular, quantitative threshold should be provided with respect to the following events:
- Decision to increase or decrease the share capital;
 - Operating business performance;
 - Purchase or disposal of equity interests or other major assets or branches;
 - Decision concerning buy-back programmes;
 - Relevant changes in asset's value;
 - Reduction of real properties' values;
 - Decrease or increase in value of financial instruments in portfolio;
- d) We disagree with Cesr's proposal to consider *tout court* "the coming publication of rating agencies' reports, research, recommendations or suggestions concerning the value of listed financial instruments" as a typical example of inside information that relates indirectly to issuers of financial instruments. ASSOSIM and AIBE believe that specific guidance should be given by CESR in order to clarify the most significant situations where an upcoming research publication, a recommendation or even a simple suggestion may fall within the definition of privileged information. It is not very simple for an intermediary to understand when such opinions may have an impact on the relevant financial instruments. Such very large definition may risk to freeze the industry of the financial analysis. Which kind of evaluations must be done by the intermediary? What are the key elements indicating the risk that a specific research/recommendation/suggestion may have an impact on the stock price if known by the market? How detailed/precise a recommendation/suggestion must be in order to fall in the definition? Currently a research report can be firstly distributed to the clients before being available to the market, is this rule going to change in light of the risk that a research publication can be deemed privileged information?

- e) It would be helpful to have additional and wider examples of the “legitimate interests” provided for in paragraph 2.3;
- f) For a client order to be considered inside information, we believe that the Guidance should take into proper account the provision in recital 78 of Directive 2006/73/EC, which explicitly recognises as legitimate the possibility for an intermediary executing a client order against its proprietary portfolio, to hedge its risks by previously buying (or selling) the relevant financial instruments on the market. Such a practise should include the possibility for the same intermediary to buy (or sell) on the market the financial instruments which are necessary for the purpose of structuring a complex financial product.
- g) Specific Guidance should be provided by CESR in order to clarify the situation in which a client order is part of a complex transaction/event which by itself may constitute inside information and whose disclosure has been legitimately delayed by an issuer. Pending the completion of the execution of the order (which may actually take days), there is obviously no reason to ban the intermediary in-charge from dealing on own account on the financial instrument(s) which is the object of the above order, where appropriate organisational arrangements have been put in place in order to avoid the risk of misuse of the inside information. Once the order has been completely executed, the intermediary should not be made subject to any trading restriction unless it was made abreast by the issuer of the inside information.
- h) As regards the insider list, we believe that a person acting on behalf, or for the account of, an issuer (the “**Agent**”) should abide by the rules in place in its own country of incorporation or location. We thus disagree with the proposal in paragraph 4.7, which requires an agent acting in multiple jurisdictions to keep insider lists according to the rules in place in each of the member states in which the issuer is located or incorporated. Such an approach would be consistent with what set out by Cesar in paragraph 4.5 with respect to issuers admitted to trading in multiple jurisdictions.

We remain at your disposal for any further clarification you should require.

Yours sincerely,

ASSOSIM

Il Segretario Generale
Gianluigi Gugliotta

AIBE

Guido Rosa
President