

Rome, June 18, 2003

Prot. n. 946/03

Mr. Fabrice Demarigny
Secretary General CESR
11/13 Avenue de Friedland
75008 Paris

Dear Mr. Demarigny,

Re: Market Abuse – Additional Level 2 Implementing Measures

Assogestioni welcomes the opportunity to comment on the consultation paper “Additional level 2 Implementing measures”. Our association represents Italian mutual fund and asset management companies and its members, who manage assets of more than euro 700 billion, have a direct interest in the regulation which is being proposed.

The additional mandate from the European Commission focuses on five substantive areas: *i)* guidelines for competent authorities to follow when considering whether practices should be regarded as accepted market practices; *ii)* inside information in the commodity derivatives markets; *iii)* maintenance of insider list of persons with managerial responsibility; *iv)* disclosure of transaction conducted on their own account by persons discharging managerial responsibilities within an issuer; *v)* notification of suspicious transactions by any person arranging transactions in financial instruments to the competent authority.

Referring to the implementing measures as indicated in the consultative paper, we hope that the following comments may provide viable solutions for the mandate you have received.

1) Accepted market practices

The directive states that when a market practice is legitimate and accepted by the competent authority, then the practice may not amount to market abuse. This notion refers to two different contexts. On one hand it refers to the Article 1, paragraph 1, subparagraph 2, to the point of inside information for commodity derivatives and, on the other hand, it is mentioned in Article 1, paragraph 2, subparagraph (a) in the contexts of defence for market manipulation.

The guidelines for determining accepted market practices have to take account of developments on financial market and they should ensure uniform application of the directive. To this end, is very important promote harmonisation throughout Member States and promote sufficient transparency of accepted market practices for all market users. In this context we support the your choice of trying to establish a level playing field in the UE for admitted market practices by means of permanent cooperation among national Authorities.

2) Inside information in the commodity derivatives markets

According to art. 1.1 inside information shall mean information: 1) which is not been made public; 2) of a precise nature, 3) relating to one or more issuers of financial instruments or to one or more instruments. In addition Article 1, paragraph 1, subparagraph 2 of the Directive, states that inside information for derivatives on commodities shall mean information which users of markets on which such derivatives are traded would expect to receive in accordance with accepted market practices on those markets.

In this context it is necessary to take in account of: *i)* the markets on which the underlying commodities are traded and their characteristics; *ii)* the generally accepted function of commodity derivatives markets of enabling users of those markets to transfer risk fairly and *iii)* the characteristics and rules of these markets.

In our opinion CESR has correctly identified the relevant market and product factors.

3) Maintenance of insider list

According to article 6 of the directive, if inside information is not disclosed it immediately gives rise to the need to ensure the confidentiality of the inside information and to control access to it. In that case, issuers and persons acting on their behalf or for their account should immediately establish a list of persons who have access to that specific inside information.

As indicated in the consultative paper, CESR holds the view that an issuer should establish a list for each matter or event when it becomes inside information that is not yet disclosed. The list furthermore should be updated with any new person who gets to know the information during the period when disclosure is delayed. In our opinion this approach is excessively burdensome and is likely to be unrealistic. In particular is burdensome because is very difficult to update each list drew up for each matter or event. The risk is that this approach frustrates the aim illustrated by the provision of article 6, that should allow each competent authority to investigate into suspicious transactions.

Any confidential transaction produces on a continuous basis inside information which is not possible to disclose. This information is likely to change rapidly and suddenly according to business decisions. Thus a large and always varying range of representatives of the issuer would be involved and should be encompassed by those lists by accident or because of their institutional position.

Providing such a great amount of lists could easily jeopardize any effective control by the competent authorities, also considering that insider's lists should be closed when the inside information becomes public but they should not be destroyed because they might be needed for future investigations.

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In our opinion the issuer should draw up a “permanent” list of those persons that work in the relevant offices and could be deemed to be always in possession of the inside information. Level 2 should identify the jobs which typically provide access to inside information. As we have indicated in our previous submission on 6 March 2003 (Re: Market Abuse Mandates – Second Call for evidence) with regard to the conditions under which issuers are to draw up and update a list of those persons working for them and having access to inside information, the criteria for identifying persons discharging managerial responsibilities within an issuer should be referred to directors, members of the board of auditors and general managers of the company and any other persons who have access by virtue of their duties in the company or its main subsidiaries. Depending on the nature of inside information, furthermore, persons acting on behalf or for account of the issuer may include: *i)* the issuer’s financial, economic and legal advisors; *ii)* the issuer’s auditors; *iii)* persons belonging to the same issuer’s group; *iv)* rating agencies; *v)* the issuer’s banks.

4) Disclosure of transaction conducted on their own account by persons discharging managerial responsibilities within an issuer

According to Article 6 (4) of the Directive, persons discharging managerial responsibilities within an issuer shall notify to the competent Authority the existence of transactions conducted on their own account relating to shares of the issuer.

We reckon that the criteria indicated in the consultative paper are sufficient for level 2 legislation. This disclosure obligation not only for management body but also for persons closely associated to them appears appropriate for the directive’s purposes.

In our opinion, for the purpose of identify the significant transactions, should be adopted criteria in term of size and considers to be disclose every transaction whose value, summed with that of any other transactions carried out in the reference period, and not previously notified, exceeds a fixed value for a single declarer. Then again, the notional value of derivatives, covered warrants and warrants should be calculated as the product of the number of shares controlled by the instrument and the official price of the underlying asset, observed on the day the transaction is concluded.

With regard to the technical arrangements for disclosure to the competent authority (article 6 paragraph 10 fifth indent of the directive) a time limit to communicate the transaction carried out by significant persons should be defined. This time limit should be harmonized with the recent proposal for a transparency directive (COM/2003/138final).

With regard to the technical arrangements governing notification of suspicious transactions to the competent authority by any person professionally arranging transactions in financial instruments (article 6 paragraph 10 last indent of the directive), the criteria for determining how to notify them should be indicated on specific model forms, where it could be reported changes in current/previous and the number of securities converted/exercised.

5) Notification of suspicious transactions

According to Article 6.9 of the directive and to the measures taken at European level to prevent and combat money laundering, persons professionally arranging transactions in financial instruments have to notify without delay to the competent authority those

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transactions which they have reason to suspect might constitute insider dealing or market manipulation.

As a result, such transactions must be assessed with reference to the elements constituting insider dealing and market manipulation as defined in Articles 1 to 5 of the directive itself. In particular, persons subjected to this obligation shall decide on a case by case basis whether a transaction is suspicious with no need of any evidence of the abuse.

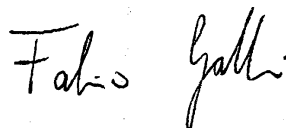
It is not clear whether the duty of notification envisaged by the Commission could work. First of all we deem that the suspicion should be at least “reasonable”. Second, such obligation can envisage a risk of conflict of interest because the professional would probably fear to lose their clients. In addition the prevision that this type of duty doesn’t need any evidence of abuse, but a suspicion only, entails that these persons could be afraid of doing a mistake. This duty appears to be beyond these person’s competence and, furthermore, could be used to hamper competition.

In this context, competent authorities should, at least, ensure the confidentiality of such notifications and inform the person about the result of their investigation for the sole purpose of permitting him/her to use this result as a benchmark for future notifications. With regard to the details which should be included in the notification to the competent authority (as indicated in your consultative paper), we deem them sufficient.

We are available for any clarification you might need on the above.

Best regards.

Fabio Galli
Secretary General
Assogestioni

A handwritten signature in black ink, reading "Fabio Galli". The signature is written in a cursive, flowing style.