

13 June 2003

M. F Demarigny
Secretary General
CESR
11-13 Avenue de Friedland
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France

Dear M. Demarigny

RESPONSE TO CONSULTATION PAPER ON ADDITIONAL LEVEL 2 IMPLEMENTING MEASURES FOR THE MARKET ABUSE DIRECTIVE

Thank you for the opportunity to comment on CESR's consultation paper of April 2003, regarding possible additional Level 2 implementing measures for the Market Abuse Directive.

We support the overall objective of the Directive and believe its proper implementation is vital to ensure the integrity of Europe's financial markets and to enhance investor confidence. We welcome the majority of CESR's recommendations, however we have some specific comments, which are set out below.

Accepted market practices

We accept that market practices in other jurisdictions should be considered when determining whether market abuse has taken place, but it is important to recognise that practices vary across markets. We are aware that further work will be undertaken at Level 3 on this topic, however at Level 2 we are concerned that the wording should not be all encompassing. For example, the practice of short selling is severely restricted in some jurisdictions, whereas FSA concluded in a recent review that it is a legitimate market activity which can be carried out without restrictions. We therefore suggest the following text for bullet point 5 of paragraph 35:

35. Non-exhaustive list of factors to be taken into account by Competent Authorities when assessing particular practices:

- *the result of any investigation of the practice by any regulatory body, including the extent to which a practice breaches existing rules or regulations designed to prevent market manipulation on the market in question or comparable markets in the EU – ~~it seems unlikely that a practice which breaches such rules or regulations could be regarded as acceptable~~ consideration should be given to whether a practice which breaches such rules could be regarded as acceptable...*

Insider lists

We support the principle behind the requirement to draw up and maintain insider lists, as it is a necessary measure to prevent the misuse of inside information. However we are conscious that the wide scope of those to be included on the lists could encompass those with minimal knowledge of relevant information, such as the staff of advisers or lawyers. Implementation may prove onerous for small and large companies alike. In order to facilitate investigation of market abuse, insider lists need only set out who had knowledge of the information and when they gained that knowledge. CESR's advice should be simplified to reflect this understanding of the lists' intended use.

We believe CESR should distinguish between permanent and ad hoc insider lists. Permanent lists would contain those who habitually have inside information and ad hoc lists would only be drawn up when triggered by a specific transaction or corporate finance project. The permanent list could also serve as the list of people discharging managerial responsibilities for the purpose of disclosure of transactions. Finally, in accordance with the wording of the Directive, we feel the lists should only be sent to the competent authority upon request.

Suspicious transactions

The Directive requires persons who professionally arrange transactions in financial instruments to notify the competent authority of any transactions they believe to be suspicious. However, we believe it is important for CESR to make clear that market abuse investigation remains the clear responsibility of the competent authority. To clarify any uncertainty around this issue, we suggest that the following statement be added at the top of paragraph 94:

94. While the Competent Authority remains responsible for the detection and investigation of market abuse, CESR proposes the following criteria for determining the notifiable transactions...

We also suggest that, since not all the details may be known at the time of notifying a suspicious transaction, paragraph 99 should contain the following caveat:

99. Where known, the following details should be included in the notification to the competent authority:

Definition of persons discharging managerial responsibilities

We believe this definition could be more specific so third country issuers in particular are able to easily identify which persons fall under the definition. We suggest specific roles (such as Chief Executive, Finance Director, Board members etc) be included in the definition and that this list should match any permanent list of insiders. Having one list that serves two functions will simplify implementation for both EU and third country issuers.

I hope our views are helpful to CESR's work. Please do not hesitate to contact me if you wish to discuss any aspect of this letter.

Yours sincerely

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