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13 June 2003

Mr Fabrice Demarigny
CESR (Committee of European Securities Regulators)
11-13 Avenue de Friedland
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Dear Mr Demarigny

Market Abuse Directive Additional Level 2 Implementing Measures Consultation

The International Primary Market Association (IPMA) welcomes the opportunity to respond to CESR's consultation on additional Level 2 implementing measures for the Market Abuse Directive. Our response addresses CESR's proposals on 'accepted market practices' in the context of a defence for market manipulation, and 'insiders' lists'. IPMA represents international banks and financial institutions in their capacity as arrangers and underwriters of debt and equity securities in the international primary market. A list of IPMA members is available on our website www.ipma.org.uk.

Implementing measures relating to the definition of 'accepted market practices'

We agree with CESR's approach in focusing on the characteristics of particular market practices, and the procedures that Competent Authorities should follow when considering particular practices. We welcome in particular CESR's advice that new and emerging practices should not be assumed unacceptable because they have not been previously described as acceptable, and that the structural characteristics of the relevant market, including the type of its participants, must be considered. It is essential that a practice need not be identifiable as already having been explicitly accepted by a Competent Authority before it can be undertaken and CESR's advice should address this. We also particularly support CESR's proposal for broad consultation with relevant market participants. We are concerned that bullet points 4 and 5 of paragraph 35 appear to suggest that market participants have to comply with the rules of markets other than the one in which they are participating, and be aware

of the consequences of their actions on those other markets. As market participants are already subject to the specific regulations of the market on which they are operating, we consider this is neither practical nor serves a useful purpose. We also suggest that compliance with a code of conduct should be considered as a positive indication that a practice is acceptable.

As the prohibitions of the Directive may also apply to OTC trading, it is important that the defence against a charge of market abuse should also be available for transactions which are not on a regulated market. OTC markets are likely to have different characteristics to organised exchanges. We suggest that CESR's advice should acknowledge the possibility of different relevant factors, and should expressly state that practices which conform to market practices in a relevant OTC market are capable of being regarded as 'accepted market practice'. For example, debt issuance in the international capital market in 2002 was approximately Euro 1.8 trillion. These securities are typically admitted to trading on a regulated market, but in practice most of the trading activity is OTC. A number of these issues are placed and traded inside and outside the EU and may also be subject to the rules of non-EU markets. We therefore also suggest that an additional factor which should be taken into account is whether the particular practice is accepted practice and/or is in accordance with the rules and regulations on the market where the conduct takes place.

Implementing measures relating to insiders' lists

We suggest that CESR's advice should clarify that inside information for the purposes of insider lists relates only to information which would have an effect on the securities of the issuer concerned which are admitted to trading on a regulated market. A majority of issuance in the international markets is by issuers who have debt, but not equity, admitted to trading on a regulated market. For many such issuers the proportion of their debt outstanding which is admitted to trading on a regulated market in Europe is small compared with the total level of their securities outstanding. It would be administratively burdensome and costly for such issuers if they were required to maintain lists pertaining to information about securities which are not admitted to trading in the EU, and such lists would be of no benefit to any Competent Authority. Issuers who have only debt admitted to trading in the EU would produce lists in respect of information which affected the price of such debt, but not equity, or debt not admitted to trading in the EU.

More generally, we are particularly concerned that CESR's proposed implementing measures are too detailed and exceed the requirements of the Directive and the Commission's mandate. Implementing measures must be practical to comply with. The costs of compliance must also be proportionate to any benefit which will result. We strongly suggest that CESR's proposals are impractical, will result in substantial additional costs for issuers and their advisers, and will lead many issuers, particularly non-EU issuers, who represent more than 50% of the international debt market, to consider de-listing their securities from European exchanges, and to look instead to markets outside the EU to raise capital. This will adversely affect all participants in EU markets, including investors and financial intermediaries.

We strongly suggest that any insider list should not be 'information specific' and should be limited to those individuals who have regular access to inside information

because of their position within a company. Issuers are capable of drawing up ‘information specific’ insider lists *post hoc* if asked by a Competent Authority, for example, to assist an investigation. In practice it is often very difficult for an issuer to determine what is inside information and when a discussion or event becomes inside information. A requirement to maintain and constantly update ‘information specific’ lists will be almost impossible to comply with, leading to a proliferation of lists which will be of little use to a Competent Authority, and significant additional administrative and advisory costs for issuers and those working with them.

If CESR continues to support ‘ad hoc’ lists, we strongly urge CESR to consider ‘transaction’ specific lists. Such ‘transaction specific’ lists would include people working on a particular transaction which involves inside information. They would not be ‘information specific’, and would be sent to the Competent Authority at the Competent Authority’s request. This approach would mitigate some of the concerns of complexity and administrative burden of ‘information specific’ lists, but would still lead to increased costs for issuers, their advisers and market participants, and we would urge CESR to consider in detail the costs and benefits of any ad hoc list requirements.

We note that the mandate from the Commission addresses ‘criteria which trigger the duty to draw up and update insiders’ lists’. CESR’s proposed measures are too detailed. Level 2 should not specify contents of lists (paragraph 60), nor should it include lists of persons acting for the issuer (paragraph 62), which are in any event too broad (for example, neither rating agencies nor an issuer’s banks act on behalf of the issuer). We also note that regulated financial intermediaries involved in executing transactions already have detailed procedures to address management of inside information. There is a significant increase in cost and administrative burden in imposing detailed lists on financial intermediaries, given the nature of a financial intermediary’s business, and no added value.

We therefore urge CESR to reconsider its proposals on insiders’ lists with a view to implementing a more practical, simpler system.

We would be pleased to discuss any aspect of our submission with you further.

Yours sincerely

Mary Hustings