



Milan 16th June 2003
File 202/03/FG/mco

To: Committee of European Securities Regulators
11-13 avenue de Friedland
75008 Paris
France

attn. Mr Fabrice Demarigny

RE: ASSOSIM's remarks on CESR's Consultation Paper regarding Additional Level 2 Implementing Measures (Ref. CESR/03-102b).

The Italian Association of Financial Intermediaries (ASSOSIM) represents the major Italian financial intermediaries, i.e. investment firms and banks, and the Italian branches of European based financial intermediaries.

Introduction

Before going deeply into the disciplinary content of the consultation document, which is the aforementioned subject, we thought it is fitting to make some brief remarks of a procedural nature.

It is appropriate to point out that a first consultation had already taken place as regards technical implementing measures regarding the Market Abuse Directive in July 2002, carried out at the same time as the work on Level 1 legislation (CESR/02.089b).

In fact, the Commission had given a mandate to CESR to define Level 2 measures, when the Council and the European Parliament were occupied with the adoption of the directive.

At present, we are called to a second consultation, due to the addition of further elements in the legislative text which are to be defined at Level 2 legislation.

We are aware of the fact that the aforementioned situation, with the possible related negative implications on the effectiveness of the procedures and loss of time, does not depend on CESR, but on the busy programme contained in FSAP, by the requests of the European Council in order that it is respected and by the deadlines set by the European Commission.

In spite of this, aware of contributing to procedures that are in a "learning by doing" phase, we take the opportunity to reaffirm our availability to support CESR in representing to the other European Institutions the necessities of the utmost consistency and organization

when carrying out proceedings. Particularly, having noted the impossibility of waiting for the definition of Level 1 legislation in order to proceed to Level 2, we agree with CESR that the Commission's mandate for technical measures must only contain those points of the legislative proposal on which there is agreement, upon conclusion of the first reading by the European Council and Parliament.

1) Accepted Market Practices

The directive in article 1.2 provides that when an operation seems to entail the supposition of market manipulation, it is not considered as such if the person concerned has legitimate reasons for doing so and the transactions that he carries out are in conformity with accepted market practices. The following article 1.5 defines market practices as "practices that are reasonably expected in one or more financial markets and are accepted by the competent authority in accordance with the guidelines adopted by the Commission in accordance with the procedure laid down in Article 17 (2).

It must be stated that such an approach is far from our legal tradition, where behaviour is accepted as it is not forbidden by a rule of the code. Thus a list of accepted practices becomes unnecessary. Since the concept of accepted market practices is provided for in Level 1 legislation, it is not the subject matter of the present consultation. Nonetheless, it is important for us to point out the difficulty of managing specific legal concepts of a certain tradition for jurisdictions which do not belong to it.

CESR requests to identify the factors (i.e. key elements) which must guide the regulatory authorities of the European Union countries when assessing the acceptance of a market practice.

With the aim of harmonisation, the fact that the implementation of factors which will guide the authorities in assessing accepted practices is provided for in Level 2, does not exclude, in our opinion, the possibility of regulatory arbitrage, with an ensuing discriminatory treatment of intermediaries and possible difficulties in cross-border operations.

In the first place, factors, understood as evaluation criteria, can be open to interpretation. Furthermore, if Level 2 legislation is represented by a directive and not by a regulation, there would be further freedom of movement for each state during the transposition phase of such factors in national law.

That being stated, this makes it necessary, as far as possible, to choose factors whose interpretation by the domestic authorities is **immediate and unequivocal**, in order to guarantee that the accepted behaviour is the same in all countries.

Moreover, the requirements of the market microstructures should not become an expedient for legitimising practices in some countries which are absolutely forbidden in others. So the authorities point of view during the evaluation process must open up beyond domestic borders.

Concerning this matter, we take this opportunity to say a few words about CESR's future commitment in coping with the discussion of specific accepted market practices in Level 3 legislation, with the prospect of increasing harmonisation.

In our point of view, before arriving to the Level 3 list, which, as we will mention later, should not create impediments to the operations of intermediaries, the opportunity given by point 36 of the document should be fully taken advantage of. Point 36 concerns procedures which the authorities will follow in order to assess practices in the light of factors provided for in Level 2, including consultations of competent authorities in other jurisdictions, "where comparable markets exist".

Otherwise, if harmonisation is not be ensured, even with coordination among the authorities in interpreting Level 2 factors, it certainly will not be recovered by the listing of accepted market practices, as provided for in Level 3.

For example, in the domestic jurisdiction, Level 2 legislation, be it a directive or regulation, has principal legislation status; a possible CONSOB regulation, which acknowledges the list of practices (given in Level 3), cannot accept practices in violation of principal regulations. **Thus, if harmonisation is not ensured in Level 2, the efforts made in Level 3 could be fruitless.**

In our opinion, consultation with the authorities of other jurisdictions, as per point 36, is of such importance that it is suggested that a greater incisiveness in this phase should be imparted, foreseeing that it leads to the adoption of guidelines to be followed by the authorities when assessing the practices.

It is requested to add the following to point 36, first bullet: "Such consultation should result in agreements among the Authorities which contain guidelines for the Authorities to assess the market practices in order to accept them.

In case the result of the assessment of a specific practice is not consistent with the guidelines the Authority should motivate its choice".

In view of a true harmonisation, as already mentioned and as we shall reiterate, the requirements of specific market microstructures must not be represented in Level 2. Therefore, it is not considered fitting to subordinate coordination among authorities to the fact that the markets that they watch over are "comparable". As such, the cancellation of the following expression from said point 36, first bullet is requested: ~~"where comparable markets exist"~~.

Question number 5 asks to offer examples of practices which could be classified as accepted.

Some traders working at our associated intermediaries mentioned: pre-arranged trades (consists in combining a purchase and a sale that will be executed during the same trading session), V-WAP; arbitration; warehouse (instead of placing a big order on the market, the intermediary will execute it in many tranches even overnight, in order not to influence the price); hedging.

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As for the list of factors presented by CESR in points 34/35, it provided us with excellent starting points for reflection in the preliminary phase. We also agree with many of the proposed points. **(Question number 2).**

We wholeheartedly agree that the factor which assess the impact of the practice on domestic discipline regarding manipulation (number 5) expressly foresees that such an assessment is made, even regarding regulations of other countries.

We also agree that the factors regarding transparency (number 1) of the practice and the impact of the practice on integrity (number 4) should be assessed as regards the wider market, especially concerning OTC trading.

It follows that in certain cases it could be fitting to make a distinction between factors depending if they concern practices in regulated markets or OTC practices. **(Question number 3).**

In view of the aforementioned statements, we would eliminate every element from Level 2 factors which refer to specificity and to the microstructures of national markets. It is thus suggested to eliminate the reference to the trading mechanism as per the first part of factor number 2.

~~(“The extent to which the practice in question takes into account the trading mechanism of the market concerned...”).~~

In conclusion, where it mentions assessing the prevalence of practice use among intermediaries, it is suggested to add “in Europe”, in order to avoid that this factor be interpreted in a restrictive manner and that the practice be linked to domestic operations.

A further element to be held in due consideration when choosing factors is market evolution and related practices, as well as the relevant difficulty of constraining permitted activity, i.e. operations of intermediaries, to a list.

In consideration of this, the factors must be flexible in order to allow for the swift acknowledgement of emerging practices.

It follows that our answer to **question number 4** is negative, as one cannot subordinate the implementation of a practice to the fact that it has already been explicitly accepted by the authority.

2) Insiders’ list

CESR is called to express itself on the methods of drawing up and updating the insiders’ list as per article 6.3 and 6.10 of the directive.

As regards the specification of the subjective element of the matter at hand ASSOSIM agrees with the opportunity of offering examples of persons in Level 2 legislation who, as they are acting on behalf or for account of the issuer, are required to comply with the duty

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of drawing up the list. (The answer to **question 12** is affirmative and the list of persons identified in point 62 is satisfactory in our opinion).

However, ASSOSIM does not agree with the formulation chosen by CESR to create a list for each matter or event when it becomes inside information within the context of the person's activity. (The answer to **question 10** is negative).

The problem with such a list is, in fact, related to the moment the duty for drawing it up begins. This moment coincides with the instant in which the news becomes inside information and, according to articles 6.1 and 6.2, the person decides not to make it public; thus the privacy obligation is triggered.

We are well aware how complex the determination of such a moment is by the work carried out on the technical implementing measures regarding the definition of inside information (CESR02.089b).

It does not seem fitting to us to have responsibility, even though it is administrative, lying with the intermediary in case he does not comply with the duty of drawing up the list in the exact moment in which the information becomes inside information.

As well, there is the consideration of the considerable number of operations that an intermediary carries out within the context of his own activity which could bring about inside information and imply the establishment of a specific list for each information.

The difficulty of starting up and managing such a list is also acknowledged by CESR who asks for dedicated resources inside the company (the compliance office, for example) that could govern these activities. This involves following the flow of the information from the moment it becomes inside information until it is disclosed.

The consultation document provides for, in addition to the list for each matter, a permanent list which catalogues those persons who, within the context of a company and based on their responsibilities, have regular access to inside information (point 61).

It is considered fitting that a permanent list be provided for in alternative to the specific information list and that it be left to the discretion of each company to choose one or the other. If this approach is chosen, the duty to draw up the list would be less of a burden on company structure. Moreover, it is appropriate to note that a permanent list of functions, the so-called watch list, already makes up a part of the experience of some intermediaries who have not pointed out any problems in managing said list.

It is fitting to make clear that if a person is in the permanent list this does not imply that he is aware of all inside information, as he is only potentially but not necessarily involved in all operations. Looking at the hypothesis of the corporate finance and research sectors, within the intermediary's company structure, not all persons who are a part of it work on all the projects under way. Each person's real involvement in an activity, on the other hand, can be easily verified by the authority.

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It is clear that the permanent list as well as the specific inside information list are starting points for the authority in case it carries out inspections and it is not an instrument which proves penal responsibility, since it derives not from the person's knowledge of information (which would be easily gathered from both lists) but from the use of this knowledge for illegal aims.

That having been said, the list for specific information would encumber the person who prepares this with costs that are not justifiable with greater benefits compared to the permanent list, in terms of supporting the authority in its supervisory function. Instead, this would impose an extra duty for the intermediary from which, as illustrated above, an administrative responsibility would ensue.

In the light of the aforementioned matter, it is suggested to modify point 61 in the following way: "The issuers and persons acting in their behalf or for their account could decide to draw up a "permanent list" of subjects who have regular access to inside information within the company instead of a list relating to each inside information".

Now, going on to the methods for drawing up the list, we agree that Level 2 must specify the minimum content of the list, which, in our opinion, should be represented by the functions and by the persons who hold these functions. (The answer to **question 11** is affirmative).

ASSOSIM, in view of harmonisation, agrees with the necessity to identify the jobs which provide access to inside information in Level 2. (The answer to **question 13** is affirmative).

The answers to **questions 14 and 15** are affirmative.

Such a change of formulation related to the methods for drawing up the list implies that the criteria for updating said list proposed by CESR in point 69 cannot be shared. Alternatively, it is proposed that the updating of the list be provided for each time the physical person who carries out the function foreseen in the list is changed. (The answer to **question 16** is negative).

3) Suspicious transactions

Article 6.9 of the Directive states that the: "Member States impose upon persons professionally arranging transactions in financial instruments the obligation to notify without delay to the competent authority those transactions which they have reasons to suspect might constitute insider dealing or market manipulation".

Article 6.10 provides that the Commission adopt implementation measures regarding the “technical methods on the basis of which persons, as per paragraph 9, must notify the competent authority”.

The vagueness of the objective element in the rule

The Commission’s mandate to CESR and the consultation document which is the subject matter at hand clear up the vague meaning of article 6.10, **as Level 2 must define the moment for proceeding to the notification of the suspicious transaction to the authority and the methods by which the notification must be carried out.**

The fact that the consultation and the consequent advice that CESR will provide to the Commission concern the determination of the moment in which the duty is triggered and thus, on the content of said duty, despite of the difficulty of the requested contribution, is welcomed in a very positive way by intermediaries, whose worry for the current vagueness of the matter at hand is serious.

In accordance with article 6.9 of the directive, the intermediary must notify the transaction to the authority if he has reasonable motives for suspecting that the transaction constitutes market abuse.

The contribution provided by CESR for determining the obligation is not, in our opinion, satisfactory. In fact, the consultation document, in attempting to make the phrase “any person... who reasonably suspects” clear, only affirms that the intermediary must not have any evidence but “sufficient indications”.

The consequences which may derive from the vagueness of the element which is the subject matter at hand, in terms of civil responsibility, are varied. Most of all, we cannot exactly identify the importance of this at the moment.

Let us consider the hypothesis that the authority, following the intermediary’s notification, believes that there are not grounds for proceeding to a preliminary investigation. In case it was not able to ensure privacy and that the news of the inquest is leaked, the intermediary’s client may sue for damages to one’s image.

Always referring to responsibility, CESR’s consideration should be pointed out concerning the lack of specification in the directive that the notification in good faith to the competent authority does not constitute a breach of contract, in particular concerning the confidentiality duty.

In agreement on the necessity of setting factors for which one must proceed to notification, one is faced with the difficulty of identifying **factors which can be registered by the addressees of the rule without doubt and which do not give rise to errors in assessment.**

Intermediaries do not affirm the necessity of objective factors in those cases which clearly constitute market abuse. On the other hand, one must acknowledge that situations of

outright abuse are not the rule and that abuse is not usually perpetrated with codified behaviour which is immediately recognisable.

Moreover, intermediaries have pointed out, especially in the case of suspicion of market manipulation, that the assessment requested on the transaction should be carried out with respect to the impact of this on the market, clearly affirming that they do not have the means and the correct perspective for complying with the duty imposed upon them.

The source of this duty is article 6.9 of the directive, which is not the subject of consultation (we must cope with the difficulty of managing the disciplinary content of a directive that, unfortunately, has not benefited since the beginning of the Lamfalussy procedure). Notwithstanding this, one wants to make CESR aware of the necessity of limiting the damaging effects which could derive from this, in the aforementioned terms for intermediaries (increased costs, involvement in disputes with clients) and for the system (confusion on competencies, increased litigation).

As such, it is requested to choose factors exclusively pertaining to single transactions and factors which can be immediately traced; of objective factors, only in their presence and the intermediary shall doubtless proceed to notification. The possibility that the intermediary is in a condition to carry out merit assessment is excluded.

This is the reason for which it would be desirable to set a quantitative threshold above which all transactions should be sent to the authority, the only one with the means to carry out suitable checks.

Some performance or price thresholds could be identified (i.e. orders which have an impact against market trends for a percentage which is 3% higher than the previous day's) and trading volume (higher than 0.5% of capital and 25% of the traded volume in the previous quarter) subdivided by type of financial instrument. If it goes over these levels, the intermediary automatically reports the transaction to the competent authority.

The vagueness of the subjective element in the rule

In our opinion, the matter at hand is not determined in a satisfactory manner, even concerning the subjective element, article 6.9 states "whoever carries out professional transactions on financial instruments".

We believe it is fitting to limit the imposition of such a duty to the intermediary, as he has a direct relationship with the client who originated the order. Thus, in the case of the transmission and reception of an order, the negotiating intermediary will not have any duty to notify.

Consequences of the lack of compliance to the duty

The obligation imposed on the intermediary is not determinate enough even in relation to the consequences of the lack of compliance to this duty.

This omission of notification will probably be assumed as an administrative offence.

It is stated that the matter of insider trading and market manipulation in Italy constitutes penal offences. In this case, it is not excluded that the intermediary who does not notify the suspicious transaction risks to be charged with complicity through omission for the aforementioned offences.

The hypothesis is not far-fetched if one considers that there are cases in Italian law where the intermediary was investigated and put on trial for aiding and abetting in the crime of abusive individual portfolio management, in spite of the norm which concerns this offence, as per art. 166 TUF, which does not provide for a specific control obligation on client operations, subtending to the notification duty in the hypothesis of market abuse instead.

Notification methods

According to our proposal, notifying the authority should take place, practically automatically, on the basis of an objective parameter which the client is aware of and does not include any assessment of the transaction by the intermediary.

As regards the contents of communication to the authority, we do not agree with the duty to indicate the reason for the transaction (which the intermediary is not aware of) and the fact that the operation is on own account or on behalf of a third party.

In the excluded hypothesis that there were requests for the intermediary to provide assessment of subjective elements, it is asked that in Level 2 legislation, a discipline be provided for which ensures anonymity of the intermediary who carries out the notification. As an example, the measure dated 12 January 2001 of the Banca d'Italia is cited. It contains the operating instructions for identifying suspicious transactions in case on money laundering, adopted in compliance with Italian law 197 of 1991 and subsequent additions and modifications.

“To ensure the fulfilment of the duty to notify suspicious transactions, anonymity of the person notifying must be ensured, for the protection of the image of the intermediary and for possible personal reprisals.

This aim is persecuted in Italian legislative decree no. 153/1997. The investigative authorities are obliged to omit, in the report which is delivered to judicial authorities, any indication of persons and of the intermediary who gave notification. In this way, the source where the information of a suspicious transaction comes from should not be disclosed.

Only the judicial authority has the power to ask, with a justified decree, the identity of the person and of the intermediary who gave notification; this measure is deliberately limited to exceptional cases, as the judge must consider the obtaining of this knowledge

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“indispensable to the aims of verifying offences under trial”. Specific caution is provided for even regarding this hypothesis of seizure of acts and documents”.

We hope we gave a useful contribution and we remain at your disposal for any clarifications.

Yours sincerely