BORSA ITALIANA

MARKET ABUSE DIRECTIVE

ADDITIONAL LEVEL 2 IMPLEMENTING MEASURES

Following the Lamfalussy Process, the Committee of European Securities Regulators (CESR) published, for a second round of consultation, a Paper (Ref: CESR/03-102b) containing the additional implementing measures for the *Market Abuse Directive*. After the consultation process, CESR advice will be submitted to the European Commission by August, 31st 2003.

The areas covered by this Consultation Paper concern the accepted market practices, the inside information in commodity derivatives markets, the insiders' lists, the disclosure of transactions and the notification of suspicious transactions.

Responses to the questions and comments to the additional level 2 implementing measures are reported below.

Guidelines for determining accepted market practices.

We basically think that the principles to be observed by Competent Authorities to ensure that accepted market practices do not undermine market integrity (par.34) and above all the list of factors to be taken into account when assessing particular practices (par.35) are excessively generic and difficult to be interpreted. We think that they need to be better defined in order to make them more understandable and applicable.

As regards for example the concept of "transparency" stated in the first bullet point of par.35, do we have to interpret it as an obligation for the person to disclose the nature and the scope of a practice (possible cases can be: the issuer who discloses the actions undertaken while trading following a stabilisation procedure, the person that gives explanations of a particular trade executed in order to close an old open position in derivatives, and so on…) or does it have a different meaning?

We disagree on the statement of the third bullet point of par.35, which refers to the consideration of the prevalence of a practice amongst intermediaries. The assumption

that "the more widespread a practice is, the more likely it is that it will be accepted" may encourage the diffusion of potentially abusive behaviours.

Referring to Question 3, we believe that standards of acceptable market practices shall be applicable only to regulated markets. OTC trading is mainly bilateral and that implies a lower level of "public effects".

Going to Question 5, we think that defining accepted market practices may be misleading and of limited usefulness, because a particular activity in itself may be considered as an accepted practice, but if it is carried on as part of a more complex transaction, it may be considered as unacceptable.
However, we can list some practices, that we consider as not acceptable:

- intentional crossing by the same firm acting as principal;
- spoofing (deletion of "anomalous" orders during the final part of auction phases);
- entering transactions which are not aimed at transferring the ownership of the financial instruments or at changing the exposure to market risk.

Definition of "inside information" for derivatives on commodities markets

We agree with the approach proposed by Level 2 Advice, and we underline again the following aspects, which CESR already mentions in the Consultation Paper and which we consider particularly important:

- each market has its own rules which reflect the characteristics of the commodities themselves and the markets on which they are traded. Accordingly, disclosure obligations may vary from market to market for the same commodity and from one country to another for the same type of commodity market. Other disclosure obligations may also be relevant;
- competent authorities and users of commodity derivatives markets may have no control over the disclosure of information relating to the underlying commodities or markets on which they are traded;
- these markets are very different form securities markets, and those differences, in particular the different disclosure rules applying to commodities (and derivatives on

them) and to issuers of securities, mean that it is neither possible nor desirable to import securities market disclosure rules to commodity derivatives markets.

Insiders' lists

As regards *ad hoc* insiders' lists, we suggest their existence in relation to situations which enable the issuer to delay public disclosure of inside information: in this case the issuer shall inform the competent authority about the decision to delay the public disclosure of such information and in the meantime provide the authority with a list of persons who have knowledge of the mentioned information.

Assuming that information regarding "price sensitive" events cannot be disclosed to anyone apart from the persons who are concerned, we think as well that the competent authority can ask for information about persons who have knowledge of inside information on a case-by-case basis, while performing an *ad hoc* investigation on a "suspected" transaction: in that case the authority can directly ask for the names of all the persons involved, independently from the existence of a predetermined *ad hoc* list.

We agree with the drawing up of a permanent list of persons who have regular access to inside information within the issuer, as such list regards persons that have a recurring and higher probability to be involved in events and transactions that can regard inside information. Such list might also be extended on a case-by-case basis to external advisors who are directly involved in the issuer's activities.

Disclosure of transactions

We substantially agree with the approach proposed by Level 2 Advice and have the following remarks.

Question 17: we agree with the description of "persons discharging managerial responsibilities within an issuer" disclosed by par.73 and we underline the importance of considering within such definition all the persons belonging to the issuer's top management.

Question 18: we agree with the definition of "persons closely associated" disclosed by par.75.

Question 19: we agree that the disclosure obligation should cover all transactions in shares of the issuer or in derivatives or other financial instruments linked to them, but we suggest the introduction of quantitative thresholds as regards the size of the transactions.

Question 20: we agree with the list of items that the notification shall contain and also with the timing of such notification (par.79). Nevertheless, we don't think that the disclosure of the number of the relevant securities that the persons holds after the notified transaction might be necessary or useful. Such a disclosure should instead be given periodically.

Suspicious transactions

As regards this specific matter, we think that the level of responsibility referred to the person who "reasonably suspects" that a transaction might constitute insider dealing or market manipulation and is obliged to notify it to the Competent Authority is not adequately defined.

We suggest the introduction of a principle for which the person is obliged to notify to the Competent Authority only the relevant OTC transactions, where the definition of "relevant" is given by fixing a quantitative threshold (as provided for example by the regulations about money laundering).

Milan, June 13th 2003