

M. Fabrice DEMARIGNY
Secrétaire Général
CESR
11 avenue de Friedland
75008 PARIS

Paris, 13 May 2003

Dear M. Demarigny,

Mis en forme : Anglais
(Royaume-Uni)

Please find herein after the response of BNP PARIBAS to the consultation paper, ref. CESR/03-12b.

III: GUIDELINES FOR DETERMINING ACCEPTED MARKET PRACTICES:

SECTION 34, 35, 36 :

Question 1: BNP PARIBAS would have preferred a different approach consisting in directly harmonising so called “accepted market practices” on level 2. We understand that the mandate of CESR does not go so far. In addition, we regret that CESR did not include in its scope credit derivatives which also may raise very sensitive issues regarding inside information and market abuse. There is a lack of a minimal framework concerning the use of these financial instruments within the EEA industry.

Question 1: section 36 provides that “*conclusions regarding the acceptability of market practices should be published to aid transparency for all market users*”. It is not clear whether or not such conclusions should include the description of accepted market practices identified in accordance with the procedures described. The following is some suggested wording to ensure that procedures provide for accepted practices to be identified:

Section 36: “conclusions regarding the acceptability of market practices, including appropriate descriptions of such practices, should be published to aid transparency for all market users (see below).

Question 2: suggested principles seem appropriate; concerning procedure to be followed by the competent authority when considering whether to accept a market practice, we strongly support the commitment of CESR in the process of recognising a practice as an “accepted market practice” and would like to see included in § 36 that:

36: “ *the competent authority, prior to any market practice recognition, consults the other EEA competent authorities, (as mentioned) but also do its best effort to obtain a minimal consensus within the group. CESR reports the result of these debates and the list of accepted*

market practices to the EU Commission on a yearly basis. In addition, CESR discloses in this report the dissident opinions (if any) and/or the reasons why a practice has not been considered as a accepted market practice. This report is publicly disclosed by the EU Commission. Any investment firm member of a regulated market (in free establishment or as a remote member) is notified the list of accepted market practices applicable according to the market. (See the notification procedure applicable for rules of conduct and rules of general good, in accordance with section 11 of the ISD.) It is the responsibility of the competent authority to notify and to update this list on a regular basis to all members of the market".

Question 2: The addition to the list of factors of the degree to which a practice has a significant effect on prices is indeed desirable, particularly where market professionals intervene significantly in a prominently retail market.

Question 3: If CESR suggests to distinguish market practices which may exist in the Equity world (financial instruments mainly negotiated in regulated markets) and in the Fixed income or monetary market world (financial instruments mainly negotiated in the OTC market, wholesale market of professional investors), we believe it is necessary to make distinction between "regulated market" and OTC markets in order to obtain adequate accepted market practices.

If CESR means that the same rules (insider dealing and market abuse) must apply to a transaction on a listed financial instrument, wherever the instrument has been negotiated for that transaction (on a regulated market or on the OTC market), we believe that there is no reason to introduce any distinction.

In other words, the distinction between standards of acceptable market practices on regulated markets and OTC practices does not appear necessary where an OTC derivative has as its underlying a financial instrument listed on a regulated market.

On the opposite, accepted market practices for OTC instruments whose underlying is not a listed financial instrument should take into consideration the extent to which such practices comply with applicable national or international codes of conduct (e.g. the Model Code for the foreign exchange markets). However, if this suggestion is accepted it follows that codes of conduct should be placed on with national rules and regulations and not be deemed "less persuasive" (section 35, § 5).

We do not believe that it would be fair and appropriate to make any distinction between "regulated markets" as defined in the ISD, and "Multilateral Trading Facilities". In addition, it could be inconsistent with the spirit of the ISD II. For that reason, we support the "pre trade" and "post trade" transparency discussed in the ISD II for both, in order to ensure a level playing field within the EEA and an adequate protection of investors.

Question 4 : Yes

Question 5 :

Please find below a few examples of transactions which could be classified as accepted market practices :

-the use of VWAP,
sells/backs of securities in the regulated market for the sole purpose of evidencing an official market price for illiquid securities, and for the valuation of these assets in the collective investment schemes,
the use of sells - backs for liquidity providers or designated sponsors

- « pre arranged post trading » for options and its hedging,
- « marking the close » practice in case of orders executed on behalf of certain clients such as employees funds or UCITs,
 - « Trading at last » practice , when requested by the client.

V : INSIDER 'S LIST

Question 10: as an investment firm, BNPP agrees with the principle of having watch lists; It is a regulatory requirement in many jurisdictions. As an issuer, BNPP agrees too.

However, we consider that the Market Abuse Directive is more focused on the production of permanent insider list, and we believe that CESR should make a better distinction between the list of permanent insiders, who obtain inside information on a regular basis for their professional duties, which should be a short list of senior managers, and a list of employees who receive inside information on a case by case basis for their professional duties (so called ad hoc list).

The purpose of the permanent insiders list is different from the ad hoc list: its purpose is to aid preventive measures such as quiet periods and to identify people subject to obligation to disclose share transactions.

Ad hoc lists are an aid to investigate inside dealing “after the fact” and is a track record for the investment firm and the regulator.

Pertaining to the communication of the lists to regulators, section 6-3 of the directive states: *“issuers..... shall regularly update this list and transmit it to the competent authorities whenever the latter requests it”*. We understand that there is no obligation to send the list to the competent authority but only on the request. Ad hoc list contains very sensitive information and its dissemination even within the investment firm (watch list) is very confidential. Should such a list enter the public domain, this would itself be potentially very damaging for the transaction involved. Requesting a systematic reporting through papers, electronic means etc....., regulators would considerably increase the risk of dissemination of insider information.

Question 11: Yes

Question 12: Yes but we contest the third bullet in section 60, and we expect CESR to propose a harmonised criteria for the safekeeping of lists within the EEA, at least concerning administrative investigations: 5 years?

Question 13: it is necessary to have a list of permanent insiders for very senior managers: members of the board of directors and the top management of the investment firm or the Corporate have inside information on a very regular basis for their professional duties. It would be inefficient to believe that they could just be insider on a case by case basis (in the ad hoc list only). Again, we believe that the permanent insiders list must be a short list of selected people and must be different from the ad hoc list (see question 10).

Question 14: No

Question 15: Yes, we need clarification about people who are not employees and who could be considered as “insiders”. We do not believe that the list in section 62 is appropriate. We believe that CESR must make a distinction between “inside information” as defined in the Market Abuse Directive and « sensitive » information. The inside information referred to in the directive is “privileged” information. There are also degrees in the notion of

“confidential” or “classified” information which is legally recognised in a number of jurisdictions and may apply to persons other than “insiders”, such as auditors, rating agencies, consulting, when they obtain sensitive information for their professional duties. CESR does not take these different degrees into consideration in its proposal..

These lists must be manageable and if CESR enlarges the scope of who is an insider, it would be very difficult for firms to manage this list. In addition, the status of “insider” may involve restrictions (staff dealing policies and specific prohibitions which affect the privacy and the ability of insider people to hold stocks). This list can only be a “short list” conducted by a restrictive approach.

Question 16: regarding § 69: We understand that it is the responsibility of the issuer to update a list of employees of the firm qualified as “insiders” and it is the responsibility of external entities acting on behalf of the firm (lawyers, external auditors, advisers etc...) to update their own list of employees involved in a deal and considered as insiders. In other terms, it cannot be the responsibility of an issuer (or to an investment firm) to update a list including people who are not employees of the firm.

We suggest to modify section 69 as follow:

69/ “Issuers should maintain and updated permanent insiders’ list on a regularly basis i.e when a new natural or legal person is informed of the relevant inside information or obtains access to information. This insiders lists concerns people who, due to their responsibilities within the firm (see section 73), receive inside information on a permanent or a very regular basis. This list is provided to the Competent authority on the request. The information contained in the reporting is mentioned section 60”.

“In addition, issuers and persons acting on their behalf or for their own account should take adequate procedures in order to be able to provide with the Competent Authority an updated list of people involved in a specific transaction and considered as insider for that transaction. Issuer and person acting in the deal provide this list to the Competent authority on the request. Issuers and persons acting on their behalf or for their own account must be in situation to provide on the request all the information mentioned in section 60”.

VI: disclosure of transactions:

Question 17: Again, The inclusion of “senior managers” with decision-making functions in the list of persons required to disclose their personal dealings in shares of their company significantly extends the scope of disclosure requirements and may lead to excessive and meaningless notifications to market supervisors. A more detailed description of management functions having access to inside information should be provided. Again, the permanent insiders list must only concern real permanent insiders.

Question 18: we do not support the definition of “people closely associated” as “people sharing the same household” because this definition is not consistent with our legal framework. In addition, from a practical point of view, nobody could be in a situation, within an investment firm or an issuer, to control after the fact, that external people did not use any inside information. It would constitute a violation of privacy in many jurisdictions. CESR must refocus the definition on employees only, possessing inside information for their professional duties. In addition, there is no need to create a specific category of “people closely associated”: whether these people did not receive any inside information and there is no need to classify them as sensitive people and to put their name on a list, whether they

received for their professional duties an inside information and they fall within the scope of the ad hoc list. This category is inaccurate and misleading.

Question 19: Yes; no thresholds

Question 20: 2 days is too short. We suggest 5 working days. We understand that these provision do not apply to issuers as legal entity but only to natural persons.

VI: SUSPICIOUS TRANSACTIONS

Section 94

Question 21:

“Transaction” must be understood as follow: *“the execution of an order concerning a financial instrument negotiated on a regulated market, carried out on or outside a regulated market”*; We expect CESR to include this definition in order to clarify what “arranging a transaction” means.

We cannot support the third bullet point (*“certain transaction etc.....”*). We believe that this proposal goes far beyond the Market Abuse Directive which requests to detect “ex ante”, transaction that might be suspicious. CESR is proposing now to enlarge the diligence not only “ex ante” but also “ex post” and not only transaction per transaction but, to put in perspectives several different transactions, without any time frame . This proposal is simply unrealistic, from a practical point of view, and inconsistent with the principle of Chinese walls. How to connect a transaction on the Equity world with another transaction or structured product, launched later in another department of the bank. Who can be in the position to have (i) a global overview of every transaction carried on behalf of an issuer and who can be in the position to (ii) have a perfect knowledge of an issuer’s strategy ? Investment banks apply the Chinese Walls and “need to know” principles required by the Market Abuse Directive itself and by the ISD II. Nobody is totally above the Chinese Walls and have an overview of “a whole group of transactions” within the investment firms, and nobody is in the situation to detect that this whole group of transaction might be suspicious. To a certain extend, this provision denies existence of Chinese Walls and this is not acceptable. As a consequence, we believe that this bullet point must be deleted.

From a legal point of view, there is also a need for protection of persons making suspicious transaction reports. A person making a suspicious transaction report in good faith should be protected from civil claims, including in circumstances where such report were ultimately to prove unfounded. The articulation with Banking Secrecy Laws need to be set out clearly. The Anti Money Laundering Directive offers this protection and guarantee whereas unfortunately, the Market Abuse Directive did not include the same provision.

This issue whether a person making a suspicious transaction report is required not to disclose to the client that such a report has been filed is also at stake, because of its practical and serious legal consequences. It is obviously too late to modify a directive that has just been voted but it is urgent that the EU. Commission mandates CESR for opening discussion and proposing a “safety clause”, necessarily at level 2.

Question 22: see above

Question 23: No. We suggest to replace in section 99 “ the following details shall be included etc...” by “the following elements should be, if reasonably available, included etc....”Nobody can ensure that “immediately after the suspicious transaction has been carried out”, all these information will be available.

Question 24: Yes

Should you need further information please contact Etienne Valence (33 1 40 14 97 46) or Hubert de Vauplane (33 1 429 98 61 08)

regards

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