

CESR'S CALL FOR EVIDENCE

**EVALUATION OF THE SUPERVISORY FUNCTION
OF THE MARKET ABUSE REGIME**

Borsa Italiana thanks the CESR for its evaluation work on the implementation of the Market Abuse Directive (MAD) throughout the EU and appreciates the opportunity to contribute. Borsa Italiana strongly believes that convergent implementation and application of the new regime are of great importance and that CESR guidance plays a key role in reaching these objectives.

In particular, we identify two main areas that in our opinion need further assessment and clarification, i.e. (i) the scope of the directive and (ii) the relationship between Accepted Market Practices (AMPs) and the rules of a regulated market. In addition, we would like to address a third topic on which CESR is seeking for industry's views, i.e. (iii) inside information. Finally, we suggest (iv) changes to level 2 implementing measures on managers' transactions in order to ensure real transparency.

i. SCOPE OF THE DIRECTIVE

Article 9 of the MAD states that the provisions of this directive apply not only to listed financial instruments, but also to financial instruments "for which a request for admission to trading [on a regulated market in at least one Member State] has been made".

This article could be interpreted in the sense that even companies that are not listed should be subject to the obligations coming from the MAD, in particular with reference to price sensitive information and market abuse. Should this be the case, it becomes relevant the moment from which such obligations start, which is – in the Commission wording – the request for admission to trading. To this regard it must be noted that the concept of "a request for admission" widely varies across the different Member States.

In the Italian case the procedures for admission to listing and admission to trading are merged and between the request submission and the effective admission to trading could elapse a time period of even two months or more.

If the request for *admission to listing/trading* is considered as the reference point, this could lead to the fact that all information duties for a company would start from this preliminary phase of the admission procedure, even independently from its final outcome. Therefore, such obligations could apply even in the case of a company that in the end is not listed.

Should such an interpretation be allowed, an additional element of concern would then be given by the fact that – in those cases where there is a merge of the request for admission to listing and to trading – price sensitive information would be distributed to the public also in the absence of an official prospectus. This could provide for a set of information available to the investors that is incomplete and therefore could be misleading.

Moreover, Borsa Italiana observes that a narrow interpretation of the directive's provisions could oblige companies to communicate to the public their request for admission to listing on a regulated market. The communication to the public of such a request could then be considered as the first application of the duty of communicating price sensitive information.

If the request for admission to listing has to be made public, this could discourage IPOs, due to the potential negative effects deriving from a possible refusal by the regulator and/or by the market.

Finally, from the point of view of the time period, the link with the implementation of the Prospectus Directive must also be taken into account. In particular in Italy the request to the regulated market for admission to listing/trading is contextual to the request for the authorisation by the competent authority to publish the draft prospectus of a company. The regulated market has 60 days of time to take its decision; the 20 days foreseen for the review by the national authority of the draft prospectus start then from the date of the decision taken by the regulated market concerning the admission to listing/trading. Therefore, in practice, the period of time elapsing between the presentation of the request for admission to listing/trading – which coincides with the request for the authorisation to publish the draft prospectus – and the actual admission to trading would then add up to 80 days.

On the other side, in several European countries the processes of admission to listing and of admission to trading are clearly separated and of competence respectively of the national regulator and of the exchange. As a result, in the majority of EU Member States the formal submission of a request for admission to trading is made (and disclosed to the public) only when the outcome of the admission procedure is nearly certain (e.g. LSE 1 day before the admission, Euronext 2 days before the admission and Deutsche Boerse 3 days before the admission).

In brief, when at national level the procedures for admission to listing and for admission to trading are not merged the scope of the directive becomes extremely narrower; on the contrary, in those States where the procedures are merged, the scope becomes very wide.

Borsa Italiana would welcome further clarification on this issue, with the view of reaching effective harmonisation throughout the EU.

ii. AMPs AND RULES OF A REGULATED MARKET

In its “Level 3 - first set of guidance and information on the common operation of the Market Abuse Directive”, CESR has acknowledged that “in most of the cases considered, conduct of the practice in conformity with the rules of the relevant regulated market would be sufficient in itself to promote market integrity and therefore the question of giving the practice accepted market practice (AMP) status would not arise”.

However Consob, the Italian competent authority, has stated that conducts coherent with the provisions set in the market rules approved by Consob have a relevance (only) close to that of the AMPs. Therefore, in the Italian context, the legal status of AMP has not been extended to the regulated market rules, as – according to Consob – the former provide for more stringent and more transparent rules than the latter.

On this topic, we observe that the Italian national legislation clearly states that the regulated market rules are subject to the approval of the Italian competent authority, which, among other things, should verify that such rules are compliant with the European legislation and are appropriate to ensure the transparency of the market, the orderly conduct of trading and the protection of investors.

As a consequence, Borsa Italiana believes that CESR – in its future work of guidance for the correct implementation of the MAD – should go further and clearly state the substantial equivalence between rules that have been defined by a regulated market

and therefore have (already) been approved by the relevant competent authority and those practices that have been recognised by the same competent authority as AMPs. Should this statement not be clear, there could be paradoxical situations in which, for example, an action undertaken privately by an operator is covered and safeguarded by an AMP, while when undertaken in the context and in compliance with the regulated market rules could be seen as a market abuse, even though it has already been approved by the same competent authority as a rule of the regulated market.

iii. INSIDE INFORMATION

In its call for evidence CESR draws the attention of respondents on four main issues related to inside information, and in particular on when does information become “inside information”.

On this topic, Borsa Italiana observes that the Italian legislator has acknowledged the fact that in the European legal framework the notion of “inside information” is substantially twofold. The same definition indicates the information that can be the object of an abuse of insider trading as well as the information that becomes relevant for the communication to the public. However, the Italian legislator has also pointed out that – in order to obtain an effective application of the directive dispositions – it is helpful to make a distinction between these two categories.

In particular, to the end of *market abuses*, information has to be considered “inside information” expressly from the moment when a set of circumstances or an event exists or may reasonably be expected to come into existence/occur. This is because the potential insider could take advantage of this information *even in the case that the event has not yet occurred*.

On the other side, *disclosure obligations* – as stated by the Commission in its level 2 Directive 2003/124/EC – are deemed to be complied with “where, upon the coming into existence of a set of circumstances or the occurrence of an event, albeit not yet formalised, the issuers have promptly informed the public thereof”. In this case the Italian legislator has considered that *the coming into effect of the event* is the necessary and sufficient condition for such disclosure obligations. Therefore – in this second case – the company does not have to communicate to the public a price sensitive information concerning an event that has not yet taken place.

Borsa Italiana believes that such an approach should be taken into account by CESR in its assessment on “when does information become inside information”, also in order to reach a common understanding throughout the EU.

IV. CHANGES TO LEVEL 2

As CESR suggested in its call for evidence, we would like to take this opportunity to suggest a change to the MAD implementing measures, as a result of the evaluation of the effective operation of the new legislation at national level.

With reference to the notification of managers' transactions, Commission Directive 2004/72 sets in 5.000 euro the total amount relevant for disclosure requirements.

We believe that such an amount is not meaningful and could undermine the real rationale of the directive.

In accordance with the directive, the notification of managers' transactions is a valuable information for the public.

In Italy, after 6 months from the entry into force of the directive, more than 1 thousand managers' transactions have been notified to the public. This huge amount of information risks to be useless for the public – that is not able to read all the notifications.

Therefore, the threshold relevant for the notification to the public should be raised so that the public is informed only about significant transactions in order to take conscious investment decisions.

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We hope that CESR will find our comments useful and we remain at disposal for further clarification.

Milan, 30 October 2006

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