FEDERATION BANCAIRE DE L'UNION EUROPEENNE

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03/07/03

PRELIMINARY COMMENTS ON CESR'S MARKET ABUSE CONSULTATION DOCUMENT CESR/03-119 OF 30 APRIL 2003

1. Accepted Market practices:

We strongly agree with CESR's high-level approach to accepted market practices. Detailed rules would not allow taking into account the characteristics of the different market structures and practices across Europe and keep up to date with the pace of innovations.

We also agree that at Level 2 the focus should be on the characteristics of the practice and the procedure.

We strongly support the notion that it should not be necessary for a practice to be formally accepted before it is undertaken; otherwise this would paralyse the markets and stall all innovation. However, this flexible approach would translate into practice only if there is a presumption of innocence, so that the market participant does not have to prove that the practice s/he engaged in is called into question just because it has not yet been classified as acceptable.

Additionally, the focus in this section should not be on the breach of conduct of business rules, since these are already regulated under the ISD, but on the breach of market integrity.

2. Insiders' Lists

This is an area where our members have very serious concerns with respect to the proportionality and usefulness of CESR's proposals. We strongly recommend that CESR carry out a cost-benefit analysis with respect to its proposal on insiders list before finalising its advice.

Specifically, we have serious reservations about the usefulness of CESR's proposal on "information specific" lists, which will lead to excessive (in some cases, millions of) pieces of data being prepared, updated and sent to the regulator. Requiring both permanent and ad hoc lists does not seem to be actually required by the Directive, so CESR could modify its proposal by requiring one list (permanent).

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In any event, if ad hoc lists are kept, even as an option, their content and reporting method should be modified. Since permanent lists are generally used for prevention of market abuse, while ad hoc (transaction-based) lists are generally useful for investigation purposes, and since the focus of the Article is rather on prevention, it would be more reasonable to require the issuer only to keep an ad hoc list based on a transaction and make it available to the regulator on a case-by-case basis (which should not be regular, ie should only be required when involving a concrete investigation).

3. Disclosure of transactions

Certain members feel that a *de minimus* rule would be helpful in ensuring that the disclosure of small sales or purchases does not lead to a flood of unnecessary reporting.

4. Suspicious transactions

As was discussed at the public hearing, one of the main problems with this requirement is the legal risk faced by the firm making the report of the suspicious activity. Although CESR's intention with respect to whether evidence should be required or not (i.e., that the firm should not have to do the regulator's police work before coming forward) was clear, and is laudable in principle, the approach will have different practical consequences.

As it stands, there is no protection for the firm from liability (as is provided in the Market Abuse Directive) that might arise from the reporting done in good faith. It should be remembered that any assessment of suspicious activity is above all a subjective exercise, and may turn out to be a false alarm or one that cannot be proven by the regulator. However, the report will always involve a breach of the firm's duty of confidentiality and might lead to concrete losses for the client. It is not reasonable to expect the firm to take on these risks without any protection or limit. If not altered, the proposed regime will not lead to the kind of reporting that can help the regulators detect market abuse but will instead burden investment firms with an unreasonable degree of legal and commercial risk. Therefore, even if CESR believes that it cannot directly address this point, we believe that CESR should bring it to the attention of the Commission as a matter to urgently resolve before the Directive can be implemented fully.

Another, related, point is that reporting of market abuse should not have the effect of ***shifting*** the responsibility of monitoring the market from the regulator to the investment firm. The diagnostic flags/indicators were developed with the primary objective of guiding the regulator in mind, and are not useful for the purpose of bringing certainty to

the firm's duty to report. Furthermore, the individual bank may never see the overall market as a whole and will therefore have a more limited view of the activity surrounding the suspicious transaction. In other words, the benchmark of the duty to report cannot be what the regulator would expect to catch. Without this point being resolved, the firms would find themselves in a situation where, while not being formally expected to do so, they would have to carry out extensive background investigations and surveillance in order to be minimise the risk of being found negligent for not reporting a transaction that, according to the diagnostic flags surveyed from a global angle, should have been considered suspicious.

One way to resolve this problem would be to delete the reference to diagnostic flags/indicators in the context of the duty to report. It would also be useful to clarify that the firm's duty is not defined in absolute terms, i.e., in terms of what should have been deemed or might later be judged to be market abuse by the regulator, but rather in terms of what would reasonably be expected to give rise to a suspicion of market abuse in the particular circumstances of, and with the specific information available to, the firm.

More practically, it should be clarified that the duty to report is imposed on the firm, and not on the individual employee.

The content required to be in the report is far too detailed; in most cases the firm will not have most of this information. Hence it should be clarified that this will serve rather as a checklist for the regulator (for example by specification at Level 3) rather than being used as a list of minimum information expected from the reporting entity.