Ref.: llm-0305-016
Brussels, 28th May 2003

Note to CESR

Subject: Market Abuse Directive; CESR advice on possible Level 2 Implementing Measures for the proposed Market Abuse Directive

Mr. Stavros Thomadakis
Chairman of the CESR Expert Group on Market Abuse

Dear Mr. Chairman,

May I first of all express the appreciation of the Federation and its Members for continued dedication of CESR to an appropriate consultation process. This applies specifically also to the hearing you were kind enough to host and chair on Monday, May 12th in Paris on a number of subjects of importance to regulated markets under the proposed Market Abuse Directive.

As you have invited further comments, confirming or adding to comments made in the meeting on Monday, May 12th, to come in at CESR before June the 15th, I would like to comply in the form of this brief note following the numbering of document CESR/03-104.

III. Accepted Market Practices

Generally speaking, we may concur with CESR's advice on accepted market practices while noting with emphasis that at level 2 you only propose procedural rules whereas you would intend to cover legitimate market practices by competent authorities at level 3. We stress that appropriate consultations should take place then and there as well. On the procedures proposed, may I briefly comment on a few issues?

In paragraph 34 CESR stresses the need to allow innovation and continued dynamic development in the financial markets. This point is of great importance and should not remain a good intention, but should be effectively applied by national regulators and supervisors when actually using the Directive.

On the non-exhaustive list in paragraph 35 we would like to point out that in the fifth indent the statement that "practices which breaches rules and regulations are unlikely to be regarded as acceptable" should be taken with just one grain of salt as the variety in accepted practices throughout the European Union is such that some customs may be perfectible acceptable in one market but illegal in another. It is difficult to say that by

necessity one must be wrong and the other one must be right; both might even be right. Efforts at harmonisation will undoubtedly be made al level 3, but we trust not at an enforced pace. It also brings me to the comment that the paper and the mandate from the Commission, speak of 'national market', whereas we would prefer 'individual market' as it is not always national borders but often market structure that determine the market's scope.

On the same point we would also like to stress that although from a strict constitutional point of view codes of conduct may be of a lower regulatory status than official rules and regulations, that in actual life of financial markets codes of conduct may be of the greatest possible importance for the effectiveness of markets' rules. We would therefore urge CESR and national regulators to provide as much scope as possible to codes of conduct and self-regulatory or contractual arrangements made by market participants. I may remind CESR that the actual text of the Market Abuse Directive thanks to intervention by the European Parliament contains clear references that implementation of anti-abuse policies be not monopolized by official bodies only.

On the difficult issue raised in question 3 relating to Regulated Markets, OTC Trading, and Trading via other mechanisms, we would like to believe that any bias to regulated markets is a good one, but that the Market Abuse Directive is not necessarily the best place to arrange market structure, quite on the contrary. Therefore, the proposed neutrality of the Directive's implementation would meet with our support. At the same time of course, regulators should take into account that OTC Markets and Regulated Markets are often interlinked.

Finally, we respond to question 4 affirmatively; a practice needs not to be identified as having been explicitly accepted by competent authority before such practice can be undertaken. The contrary answer would stifle innovation.

IV. Inside information for Commodity Derivatives

We noted with pleasure that these paragraphs did not give rise to major discussion, thanks among others to careful consultation by CESR of specialized Commodity Markets and Commodity Market Regulators. We should stress here that the management of FESE's Commodity Markets are as dedicated to fair, transparent, and honest markets as anybody else, but that the different structure and function of such markets should be taken into account by CESR when drawing up advice which we feel has been appropriately done. The point has been made in the meeting that only those with sufficient interest in Commodity Markets will be expected to provide themselves with the appropriate information channels about such markets and information emanating from them. We support the point discussed in the meeting that materiality of information should play a role too.

V. Insiders Lists

As CESR has indicated that the insiders' list will, in any case, be of illustrative nature, we do believe that there is ground for a lighter approach than the rather detailed proposals made by CESR in the paper. We believe in the first place it is best to leave the choice of permanent and/or ad-hoc lists to the listed companies (and others under the obligation to keep list) and to find out in practice how such an approach functions. We stress here that the detailedness of the CESR's proposals in the further future may create an unwanted dependency on established lists which may in turn create legal uncertainty or misunderstandings. By way of example, one cannot exclude that courts will allow companies to rely on lists that they have set up and have submitted to regulators and that therefore, persons beyond those lists, notwithstanding legal language to the contrary, will be considered exempt.

VI. Disclosure of Transactions

In the hearing it was supported that to put a smaller number of people under these obligations might actually improve the effectiveness of the arrangements. We note the obligation to report transactions in two days to the competent authority whereas the obligation for such authority to provide public access is phrased in "as soon as possible". We would believe that it is up to the competent authorities to ensure that in-house mechanisms are created for the earliest possible publication. We warn against the possibility of manipulation by false direct reporting.

On Question 20, we do believe that the number of relevant securities that a person holds after a transaction is indeed an important factor that should be added.

VII. Suspicious Transactions

Although it is the Directive itself that imposes the general obligation to inform the competent authority of suspected manipulative transactions, the detailedness of the proposals by CESR will give rise to concern. We do believe that the approach is trying to fish with too large a net.

A legal and political issue arises in combination of paragraphs 83 and 84 which show that an intermediary or other professional with an obligation to report might not be legally protected against the accusation of a breach of duty of confidentiality imposed by whatever means. We noted with pleasure CESR's agreement that this point be brought with force to the

attention of the Commission, even though it falls outside the scope of the mandate. The political/constitutional point here is also that we believe that CESR should not in all cases strictly limit itself to the mandate if an important point has to be made outside the mandate but of relevance to the case. We would assume that a professional that did not report when he should have, is seen as accessory to the crime and therefore risks punishment under the Directive's clauses. This again reinforces the point made just earlier.

As a matter of course we are willing to further elaborate on any point where you would feel that it is required.

Yours sincerely,
Paul Arlman

cc: Mr. Fabrice Demarigny
Secretary General of CESR