



I S M A

INTERNATIONAL SECURITIES MARKET ASSOCIATION

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By e-mail

Mr Fabrice Demarigny
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JLL/zk

Market Abuse Directive Additional Level 2 Implementing Measures Consultation

Dear Mr Demarigny

The International Securities Market Association (ISMA) welcomes the opportunity to respond to CESR's consultation on additional Level 2 implementing measures for the Market Abuse Directive. We are aware of the responses of a number of other associations such as LIBA and IPMA and are broadly in agreement with their comments when supportive of CESR's draft advice and also when critical of it.

We welcome in particular CESR's advice that an overriding principle should be that *'new and emerging practices should not be assumed unacceptable because they have not been previously described as acceptable by the Competent Authority'*. This is of fundamental importance if the EEA is to remain the global centre for the development of innovative financing, trading and risk transfer techniques. We also strongly support CESR's proposal for ongoing consultation with market participants.

On the other hand we fully concur with other respondents who have commented in detail on the impracticality and excessive cost of the draft advice concerning the creation and maintenance of insiders' lists.

As an association which represents the interests of its members before the statutory regulators and also acts as the global self-regulatory body for secondary market trading in international securities, ISMA has always been closely involved in developing and maintaining high standards of conduct between market professionals. Its Market Practices Committee is charged with considering issues posed by new market developments and with promoting solutions for ISMA members and the international securities market as a whole.

This short note therefore concentrates on the issue of accepted market practices and in particular on the implications of the draft advice for investment firms and individuals active in the secondary market for international securities. The key distinguishing feature of this market is that most trading takes place outside regulated markets or indeed MTFs; it is carried on primarily by means of bilateral transactions entered into via the telephone where investment firms act as principal and not as agent.

As the consultation paper observes, the Directive focuses on accepted market practices 'on the regulated market concerned', but the prohibitions of the Directive also apply to OTC trading. It appears self-evident to ISMA that the defence should apply to trading on and off regulated markets, and, in response to Question 3 of the consultation paper, that CESR's advice should make clear that the appropriate distinctions should be made. The alternative would result in a massive increase in legal and regulatory risk in off-exchange markets.

This risk is by no means of minor significance. On a conservative estimate, in 2002, according to data published by Euroclear and FESE, the value of OTC secondary market trading in international securities exceeded 40 trillion Euros; some 50% or more being repo related. By way of comparison, the total annual figure for the turnover in equities on all the exchanges in the EU was just over 10 trillion Euros.

In this context, ISMA's principal concern with the advice as currently drafted is as follows. The 'factors to be taken into account by Competent Authorities when assessing particular practices', (para 35), include the 'structural characteristics of the market in question'. If it is CESR's intent that this includes consideration of whether the market is on- or off-exchange that is helpful. The bullet point does not specifically state that this is so however. If it is the case, clarification would be helpful. If not, major issues arise, since earlier CESR states 'practices which inhibit the interaction of supply and demand by limiting the opportunities for other market participants to respond to transactions are less likely to be acceptable'.

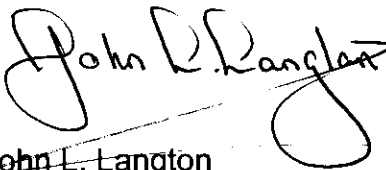
While there is some degree of ambiguity in these words it appears that they are rooted in a concept of a market such as the limit order book of a regulated market in which investors orders (at least to the extent that they have revealed the full extent of their order), interact in the public view. As such, this advice is not best suited to consideration of practices in OTC trading.

Telephone based markets, where transaction prices are arrived at on the basis of bilateral negotiations, do not normally share this characteristic. Opportunities for other market participants to react are, by the very nature of the market, limited. However, trading by investment firms on these markets is subject to rules of conduct and codes of practice promulgated by statutory regulators, self-regulatory bodies such as ISMA and other practitioner-based associations. ISMA suggests that the final advice should therefore also

require Competent Authorities to take into account whether the particular practice is in accordance with the rules or codes of practice on the market where the conduct takes place or is otherwise accepted by persons active on that market. It is on issues such as these that CESR's commitment to ongoing consultation with market participants will assume crucial importance.

I will of course be pleased to discuss these matters further with you and your colleagues at any time.

Yours sincerely


John L. Langton

cc: Mr. Richard Britton, ISMA Consultant on International Regulatory Matters
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