

CESR – Committee of European Securities
Regulators
Mr. Fabrice Demarigny
Secretary General
11 – 13 avenue de Friedland
75008 Paris
France

Düsseldorf, 18 June 2003
279/516

Dear Mr. Demarigny,

Re: Draft of Comment on CESR Consultation Paper „Market Abuse
Additional Level 2 Implementing Measures” (CESR/03-102b)

We would like to thank you for the opportunity to comment on the actual consultation paper regarding individual questions concerning implementing measures on the Market Abuse Directive. Our comments focus in particular on the parts directly or indirectly relevant for the profession.

I. Insiders' Lists (Part V, Paragraphs 48 to 69)

According to Article 6 paragraph 3 third indent of the Directive issuers, or persons acting on their behalf or for their account, are required to draw up a list of persons working for them, under a contract of employment or otherwise, who have access to inside information. Issuers and persons acting on their behalf or for their account shall regularly update this list and transmit it to the competent authority.

1. Criteria for drawing up insiders' lists (Part V, Paragraphs 51 to 63)

a) Paragraph 62 “persons acting on behalf or for account of the issuer”

CESR also includes the issuers' auditors in the term “persons acting on behalf or for account of the issuer”. This general classification appears incorrect. In contrast to the

other groups mentioned, e.g. lawyers or consultants, statutory auditors act neither on behalf nor for account of the issuer; rather, they act independently of the issuer. In view of current initiatives to strengthen and secure auditor independence, the measures should not leave the impression that auditors act on behalf or for account of the issuer.

CESR's interpretation would also lead to auditors becoming the direct object of the measures. However, auditor responsibilities should not be addressed in connection with implementing measures in the Market Abuse Directive: They are subject to regulation by the 8th EU-Directive, the national legislator and the profession. An auditors' responsibility to draw up insiders' lists, exercise surveillance of information flows and establish a "compliance office" should be addressed in those regulations, if necessary. As a rule, appropriate surveillance mechanisms to demonstrate independence have already been established in practice.

Hence, issuers' auditors should be deleted from the list in paragraph 62, since they do not belong to the group of persons who act on behalf or for account of issuers.

On the other hand, as part of their audit activities auditors regularly gain access to inside information of the issuer. The conduct of an audit could be considered as "working otherwise for the issuer" under the requirements in Article 6 paragraph 3 third indent of the Directive. Consequently, auditors should be included in the group of persons that should be named on the insiders' list of the relevant issuer.

In this connection the question arises whether all natural persons involved in the audit in an auditing firm should be included, e.g. administrative employees or employees at the printers, or only members of the auditing team (professional employees).

Since this may lead to the need to name all employees as insiders – especially in small firms – we suggest that only professional employees are listed in the first instance. On the other hand, a firm's professional employees other than those acting in a managerial capacity may be subject to considerable change, so that the group of persons named on the insiders' lists should be limited to those managers.

To avoid disproportionately high administrative work for the issuer in updating the insiders' lists, permanent insiders' list should generally have priority to lists for individual matters or events (question 10), which has proven useful in the financial industry and its requirements on employee transactions (definition of employee with special responsibilities). Furthermore, lists for individual matters or events may be required for special cases (e.g., ad-hoc relevant matters).

II. Notification of Suspicious Transactions

Article 6 paragraph 9 of the Market Abuse Directive states that any person professionally arranging transactions in financial instruments who reasonably suspects that a transaction might constitute insider dealing or market manipulation shall notify the competent authority without delay.

In our opinion this regulation is not directed towards auditors, since these do not deal in financial instruments. Furthermore, we would like to point out that German auditors are subject to strict confidentiality requirements that forbid the disclosure of information.

Yours sincerely,

Dr. Gross

A handwritten signature in black ink, consisting of a vertical line with a horizontal stroke and a small loop at the end.