ASSOGESTIONI
associazione del risparmio gestito

Rome, January 31 2005

Mr Fabrice Demarigny
Secretary General
CESR – The Committee of
European Securities
Regulators

Re. N. 63/05

Dear Mr. Demarigny,

Re: Market Abuse Directive Level 3 – preliminary CESR guidance and information on the common operation of the Directive.

In replying to the invitation contained in your consultation document to produce observations and comments, the undersigned Association wishes first of all to thank you for the opportunity you have granted us.

Assogestioni is the Italian Association of the Investment Management Industry and our members, who manage assets to a countervalue of over 900 billion euro, are directly concerned by the regulations subject to consultation.

In view of the activities of our members, who manage assets both individually and collectively, our attention is drawn to the part of the document dealing with the identification of manipulative practices and the obligation to report suspicious transactions to the Supervisory Body pursuant to Article 6, paragraph 9 of the Directive.

An analysis of the two issues mentioned leads to two main lines of reasoning which can be summarized in the following points:

- with regard to the identification of manipulative practices, it seems important to establish whether the examples available to market operators are sufficient or whether it is necessary to provide more examples or specify them in greater detail;

00186 Roma Via in Lucina,17 Tel. 06 6840591 Fax 06 6893262 info.roma@assogestioni.it 20121 Milano Via Andegari,18 Tel. 02 8052168 Fax 02 8052483 info.milano@assogestioni.it www.assogestioni.it

- with regard to the obligation to report suspicious transactions, it would be useful to assess the opportunity of the CESR providing those under the obligation with indications on how to build detection systems capable of detecting suspicious signs.

In relation to the first question, our opinion is that it is not necessary either to provide further specification, or to add to the list of examples of manipulative transactions. We believe that the following provisions are sufficiently precise for this purpose:

- the definition of manipulation set out in the Directive (Art. 1, paragraph 1, n. 2) together with the examples indicated at the foot of the definition;
- the signs of manipulation drafted at level 2 by the CESR and set down in Directive 2003/124/EC (Art. 4);
- the further examples of manipulation provided at level 3 and disclosed in today's consultation document.

It is unrealistic to think that an exhaustive description of all possible cases can be provided, and in any case we do not believe it appropriate that any such list be intended or perceived/used as a replacement for a qualitative analysis of each individual operation.

On the matter of notification of suspicious activities, our view is that priority should be given to achieving an appropriate balance between the obligation to report and the danger of missing the purpose of the provision through an excessive number of reports to the competent authority. Our view is that this danger is greater in cases where brokers do not possess objective criteria on which to base their assessment of individual transactions on financial instruments.

While conscious that the activity of identifying and subsequently reporting suspicious transactions runs alongside a parallel plan for investigation drawn up by the Supervisory Authorities, and therefore constitutes the limit of the duty required of such activity, it should be noted that the absolute discretion afforded in the assessment (*ex ante*) of any suspicious aspects of a transaction, in addition to liability arising from failure to report transactions shown (*ex post*) to be manipulative, is an incentive for operators to report a greater number of transactions than required. The regulation in fact provides that:

- assessments must be made case by case;
- the grounds on which an assessment is based must be within reason;
- the obligation to report applies even in cases where the broker merely harbours "suspicions" rather than sound evidence.

In these circumstances, qualitative analysis is the only approach to be followed. This is carried out by means of:

- the test of reasonable suspicion;
- the examples provided of market manipulation (for this purpose the CESR provides a series of examples of transactions showing signs of insider trading and market manipulation);
- the detection systems required of market operators.

In the light of these provisions, we believe that it is necessary to focus on the efficiency of the detection systems, and in this respect it would be appropriate for the CESR to indicate minimum standards for their implementation, for two reasons, the second of which is a consequence of the first.

In the first place it should be noted that, unlike judgements that must be made case by case and which are founded on elements of discretion, the effectiveness of detection systems must be assessed on objective criteria. Market operators must perform the task entrusted to them by the Directive in a professional manner, implementing effective procedures.

The need to provide effective procedures arises from the following consideration: some transactions that do not in themselves give rise to any suspicion may show signs of possible market abuses if examined in combination with other transactions, with other behaviours, or with other information. A single detection system is therefore necessary to "cross-reference" all the available information.

In the second place, it is advisable that a demonstration of having prepared effective mechanisms discharges the market operator from forms of liability in cases where such mechanisms have not actually been able to detect the signs of manipulation related to a particular transaction. It is in fact possible that the falsification and deception of a party that performs a manipulative transaction achieve their purpose despite the safeguards put in place by the market operator.

We remain at your disposal for any further clarification which you may require.

Yours sincerely

The Director General

Fabio Galli