Cesr bozza in inglese 16 6 market abuse

June, 15th, 2003

To: CESR - Committee of European Securities Regulators
11 – 13 Avenue de Friedland
75008 Paris
France
To the kind attention of Mr Fabrice Demarigny

To: CONSOB Commissione Nazionale per le Società e la Borsa
Via G. B. Martini, 3
00198 Roma

Re: **Directive 2003/6/CE of the European Parliament and Council of the 28th of January 2003 on the insider dealing and the market manipulation (market abuse) – second CESR mandate**

Dear Sirs,
with reference to the subject herein, may we observe as follows.
In April, CESR received, by the European Commission, the second mandate for the definition of the implementing measures relating to:

- Accepted market practices;
- Inside information in commodity derivatives markets;
- Insider's lists;
- Disclosure of transactions;
- Notification of suspicious transactions.

Please, find herinbelow our comments.

1) <u>Accepted Market Practices – Art. 1.5</u>

Article 1.2 of the Directive states that an operation does not constitute a market manipulation, when the subject who carries out the operation has legitimate reasons for doing it and when the relevant transactions is compliant with admitted market practices. The subsequent article 1.5, provides for the definition of "Admitted market practices" as follows : *Practices that are reasonably expected in one ore more financial markets and are accepted by the competent authority in accordance with guidelines adopted by the Commission in accordance with the procedure laid down in Article 17(2).*

Specifically, the European Commission has required CESR's advise on the following items:

1. **to take into consideration the existing practices and to recognise the emerging ones.**

No remarks.

2. **define the factors (i.e. key elements) which the competent Authority needs to consider if and when admitting a practice.**

CESR has provided a non exhaustive indication on the key elements which have to be taken into consideration by the competent Authority for the valuation of the admitted practices:

- transparency;
- opportunity given to other participants to react adequately;
- diffusion of the practice between the intermediaries;
- risk of market integrity;
- risk of regulation violation;
- structural market characteristics – presence of retail investors;
- impact on the market liquidity.

CESR is working to determinate the key elements (the basic notions) to be used as guidelines by the Authorities of the member States in the definition of the acceptable market practices; these defined practices will not exclude new practices still not identified.

We presume that the identification at level 2 of these key elements is necessary, such that the competent Authorities will provide a quick and sole interpretation, in order to assure the admission of the same practices or, at least, of homogeneous practices, in all the Member States.
At level 3 new practices will be defined, updated and admitted on the basis of the above mentioned key elements defined at level 2.

In our advice, the opportunity given by the consultation paper, which deals with the co-ordination of the Authorities of each member State, has to be exploited.

On the basis of the first indications received by other intermediaries the following examples of practices, classified as acceptable at level 3, have been pointed out for the CESR: pre-arranged trades; V-WAP; making the close; arbitrage; warehouse; hedging.

2) <u>Obligation to provide a list of persons having access to "Inside Information" on which an obligation of confidentiality exists- Art. 6.3</u>

Article 6.3 provides for: "*Member States shall require that, whenever an issuer, or a person acting on his behalf or for his account, discloses any inside information to any third party in the normal exercise of his employment, profession or duties, as referred to in Article 3(a), he must make complete and effective public disclosure of that information,* *simultaneously in the case of an international disclosure and promptly in the case of a non-intentional disclosure*."

In particular the European Commission has required CESR's advise on the following items:

1. definition of the criteria for which the obligation to create a list starts
No remarks

2. definition of the criteria for which the obligation to up-date the list starts
In our advice also the contents and the regulation of the lists should be defined at level 2, in order to exclude discordant regulations for the Member States, such as the identification of the functions which give access to the inside information.

CESR proposed to have, further to the permanent list, a list for single inside information (such as for each operation) to be updated when a new information is known by a person. It is necessary to stress the circumstance that the lists prepared by the issuer and the by the intermediary are totally independent one from the other.

3) Disclosure of management transactions – Art. 6.4

Article 6.4 provides for: "*Persons discharging managerial responsibilities within an issuer of financial instruments and, where applicable, persons closely associated with them, shall, at least, notify to the competent authority the existence of transactions conducted on their own account relating to shares of the said issuer, or to derivatives or other financial instruments linked to them. Member States shall ensure that public access to information concerning such transactions, on at least an individual basis, is readily available as soon as possible*."

In particular the European Commission required CESR's advice on the following items:

1. definition of the criteria used to identify the persons exercising the managing responsibility.
No remarks.

2. definition of the criteria used to identify the persons closely related to them
The reference to *persons sharing the same household* is not completely agreeable, being generic and giving an uncertain interpretation. The following wording could be suggested: "Account is taken of the operations carried out by each relevant person, spouse non legally separated, children, or carried out by persons in between, trusts or controlled companies".

3. definition of the criteria to determine when the obligation to disclose such operations starts
No remarks.

4. **definition of the criteria to determine how and when should such operations be disclosed**

The regulation proposed by the CESR seems, in substance, agreeable, nevertheless it would be foreseen a revision of the relevance threshold (i.e. 250,000 euro on the three months period) and a timetable of the disclosures to the competent Authority which should control the effective relevance of the disclosure. It seems reasonable a period of 10 days from the end of the quarterly reference period.

4) <u>Suspicious transactions</u>

Article 6.9 of the Directive provides for: "*Member States shall require 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 particular the European Commission has required CESR's advise on the following items:

1. **definition of the notifiable transaction to the control Authority**

It could be convenient that CESR introduce some definite and objective elements to define the notion of *who reasonably suspects*. Some thresholds of yield or price (orders which impact counter-tends on the market for a percentage over the 3% of the precedent day) and trading volumes (0,5% of the share capital and on this basis volumes which are superior to 25% of the traded volumes of the precedent quarter) divided for types of financial instruments and that when exceeded the intermediary discloses automatically the operation to the competent Authority.
Article 6.9 also states that "*any person arranging transactions in financial instruments shall notify the competent authority without delay*". In this way the legislator defines, but in a non satisfactory manner, the subjective element of the topic.
The imposition of the obligation above only to the intermediary having a direct relationship with the client originating the order would be considered *advantageous*. So in case of transmission or reception of the order, the negotiating intermediary would not have any obligation to notify.

2. **Time of notification and interpretation of the expression "without delay".**

No remarks.

3. **Detail to be included in the notification to the competent Authorities.**

CESR proposes that such obligation is referred to all the operations involving a transfer of financial instrument and that the disclosure to the competent Authority includes at least the following elements:

- Nature of the operations and form of execution
- Reasons
- Data on the customer
- Name of the financial instruments

- Indication if the operation was done for direct interests or for third parties
- Market in which executed
- Type of order executed
- Type of trading market
- Date and time of the transactions
- Size of transaction

On these points we observe that normally the intermediary does not have knowledge, and also it is not part of its role, to ask the reasons for a transfer of financial instruments, that is if the operation is done for direct interests or for third parties.
Therefore we suggest to eliminate form the list above the items referred to as "reasons" and "Indication if the operation was done for direct interests or for third parties".

4. Procedures for the disclosure to the competent Authority
No remarks.

We remain at your disposal for any clarification you might need.

Your sincerely

MEDIOBANCA
Banca di Credito Finanziario S.p.A.

(Stefano Vincenzi Francesco Ripandelli)