

18 June 2003 (cesr cons. 2 market abuse)

De heer Drs P.W. van Gerwen
Autoriteit Financiële Markten
Postbus 11723
1001 GS AMSTERDAM

Dear Mr van Gerwen,

Reference: **CESR Consultation 2 on EU Directive Market Abuse**

Please find below our remarks on the CESR Consultation 2 on the Additional Level 2 Implementing Measures.

The numbers used and the questions replied to refer to those used in the CESR Consultation Paper CESR/03-102b.

General

According to AFM, the non-listed products (*niet gereguleerde markt*) are also covered under the inside information. Rationale: AFM supervises adequate working of financial markets, of which the non-listed products form part. Most non-supervisors attending the meeting at the offices of the AFM at 8 May 2003 opposed this view. Questions arises as to whether the term 'OTC' includes transactions not effected on a regulated market (which can include transactions in listed products but effected 'over-the-counter') or transactions in non-listed products only.

ACCEPTED MARKET PRACTICES

General

There is a potential conflict between the objective to respect national market practices and the aim to promote harmonization throughout the community. CESR and the Competent Authorities should primarily strive to remove all differences between national market practices. To the extent this would not be feasible, CESR should provide for conflict of law rules that determine the applicable law in case of cross-border transactions.

Question 1

The term 'accepted market principles' is prone to long lasting interpretation discussions. To provide guidance for the scope of the term, further detailing is

done by providing overriding principles and a non-exhaustive list of factors. We are of the opinion that the competent authorities should not be bound by too many limitations and therefore welcome the use of a non-exhaustive list.

The precondition however should be that each time the competent market authority accepts a market principle, the acceptance is well-argued and made public, so that market participants are able to learn and understand what factors the authority will take into account when assessing such market practices.

Pt 34, under 'Overriding principles', third bullet point, CESR uses the term 'intermediaries'. This term is defined neither in the Consultation Paper nor in the Directive. Who are considered to be intermediaries?

Question 2

Given the above, adding more principles and factors is not recommended. However, as stated above, public disclosure of decisions and related arguments is clearly important to improve understanding of market participants and gain insight in EU market practices.

Question 3

The question is what the term 'OTC' means:

- does it see to all transactions as long as they are not effected on a regulated market (which can include transactions in listed products but which are effected 'over-the-counter'); or
- does it see to transactions in non-listed products only; or
- does it see to transactions between professional investors not effected on a regulated market?

We do not see the need to apply the 'guidelines for determining accepted market practices' to transactions between professional investors, which effect a transaction in non-listed products 'over-the-counter' (i.e. not on a regulated market). Furthermore, it is likely that the concept of "accepted market practices" on OTC-markets may differ from that on the regulated market.

Question 4

The concept of "accepted market practices" would become entirely meaningless as a defense against alleged market manipulation, in case an accepted market practice may not be undertaken before it has been explicitly accepted by the Competent Authority. Consequently, we fully agree with CESR's advice that no explicit acceptance is needed in advance of a transaction – this, however, underlines the need for public disclosure of decisions and arguments referred to above. We welcome that CESR doesn't attempt to specify a fixed set of practices at EU level, allowing flexibility, fluidity and innovation. Competent authorities also need to be sensitive to innovation.

Question 5

An example of a particular practice is a buy-back of shares with the possibility to resell at a later stage (subject to compliance with rules on insider trading).

DEFINITION OF “INSIDE INFORMATION” FOR DERIVATIVES ON COMMODITIES MARKETS

General

This is a difficult area where different markets have unique characteristics (e.g. coffee vs. oil vs. electricity). The most obvious issues relate to market abuse, rather than insider dealing, so CESR’s advice should focus on those.

CESR should question whether “information which users of markets on which such derivatives are traded would expect to receive in accordance with accepted market practices” could serve as a clear and unambiguous basis for a prohibition that is sanctioned under penal law. In any case, the references in the proposed Level 2 advice to customs of the relevant commodity derivatives market do not really contribute to objectify the prohibition. For a trader in derivatives on commodities it remains virtually impossible to assess whether the users thereof can be deemed to have been adequately informed

INSIDERS’ LISTS

Question 10, 11, 12, 13, 15 and 16

We have severe objections against the way CESR proposes to implement the requirement of the Directive that “issuers, or persons acting on their behalf or for their account, draw up a list of those persons working for them, under a contract of employment or otherwise, who have access to inside information.” The proposal is overly prescriptive, too burdensome, not feasible and creates a lot of bureaucracy and offers only the pretention of protection.

The current system where a/o employees of complete departments are made subject to stringent insider dealing regulations is far more preferable. Level 2 should not identify which jobs typically provide access to insider information. In case internal persons have regular access to inside information it should be sufficient to establish a permanent list. In that case it should therefor not be required to establish in addition thereto a separate list which regard to each matter or event when it becomes inside information.

Without prejudice to the foregoing, a light touch regime would be desirable for issuers that exclusively issue debt instruments (and not equity(linked) instruments).

Question 14

No, as level 3 does not provide for EU Commission or Parliament involvement.

DISCLOSURE OF TRANSACTIONS

General

We feel that in general disclosure of securities transactions by certain persons within an issuing institution can be useful for the supervision on financial markets provided this disclosure is made to the Competent Authority only and is not made public. Therefore we do not subscribe to the second aim named under pt 71: it indeed provides investors with ‘additional information’, but knowledge of transactions effected e.g. by a member of the board of directors in itself may well

qualify as insider information. Publication thereof could easily lead to disturbance of the market.

Question 17 and 18

The term 'persons with managerial responsibilities' includes far too many people. We feel that a drastic restriction of the persons falling under this regulation is needed. The employees assigned to fall under the scope of the regulation should be limited to the board of directors and board of supervisors.

Furthermore we find that certain employees of the Competent Authority should also fall under the scope of the 'disclosure of transactions' regulations.

Question 19

If disclosure is required, then we feel that the categories of securities should not be limited and there should be no threshold.

Question 20

If eventually data on transactions will be disclosed to the public, we suggest - for privacy reasons - not to disclose the address of the person involved (cf. current practice with AFM on art. 2a Wmz notifications). Furthermore, we do not see why the 'nature of transaction' must be disclosed: acquisition or disposal is quite clear (as it follows from whether the person has bought or sold the securities). The other possibility ('other') creates an unclear situation.

SUSPICIOUS TRANSACTIONS

Question 21

Mentioned during AFM meeting:

- When notifying, the notifying party is not indemnified against claims of the customer whose transaction is notified.
- It is impossible to build systems that can cope with all the proposed requirements:
 - We disagree with the approach of transfer of responsibilities from Competent Authorities to intermediaries. Intermediaries can not see the full market picture and so, may misinterpret activities and do not dispose of authorities to pursue investigations in possibly suspected transactions.
 - Reporting a suspicion unsupported by any evidence carries material legal risk.
 - There is moreover no protection in the Directive against breach of duties/confidentiality and liability.
 - There is no indication of the responsibilities of the Competent Authority on receipt of information.
- The proposed EU Directive and Basel II requirements should be in line.
- We would favour a system that:
 - Limits the requirement to notify suspicious transactions to transactions that clearly (and without further investigation) meet an exhaustive list of predetermined and objective indicators. An unconditional indemnification against this liability shall in any case be indispensable.

- Requires intermediaries to refuse orders where they have reasonable grounds to suspect abuse or insider trading;
- Recognises that detection and enforcement of these issues is for competent authorities/regulated markets which have the cross-market view and tools (e.g. trade and transaction reporting).

It is not entirely clear whether the duty of notification is also applicable to transactions executed for own account or for the account of affiliated parties. If this would be the case, the requirement to notify suspicious transactions would result in self-incrimination. Consequently, a requirement to notify suspicious transactions should in any case be limited to transactions of clients that are unrelated parties.

Question 23

The list of indicators should be exhaustive (which means that the last point should be deleted). Notifications should not include the names and any other means of identification of the client or other involved parties. The competent authority should first demand for the delivery of this information based on its right to execute investigations

Question 24

Notification should be possible in any form, provided that an oral notification is confirmed in writing.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Hubar', with a stylized flourish at the end.

Mr A. van Hellenberg Hubar
Head of Legal, Fiscal and Securities Dept.