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Dear M. Demarigny

Market Abuse

Additional Level 2 Implementing Measures

I set out below my responses to three of the questions raised in the Consultation Paper of April 2003, and I am very grateful to you for allowing me to send in my comments a little after the 15 June deadline.

1 **Question 4**

I would agree that it should be possible to undertake the practice before it is identified as having been explicitly accepted. However, it seems to me that, regrettably, this would make the transaction or order to trade constitute market manipulation if it gives or is likely to give false or misleading signals, because in that case the safe harbour does not apply.

2 **Question 5**

In my view, the most important example of accepted market practices is the practice of segregating confidential information behind a Chinese wall. A Chinese wall is referred to by the Market Abuse Directive as an important safeguard for confidential transactions (see Recital 24). The main consequence of having a Chinese wall is that directors or employees in front of it do not know what is being discussed behind it. By encouraging Chinese walls, therefore, the Directive unfortunately ensures that transactions may take place despite the firm (but not the individuals concerned) knowing that what is happening behind the Chinese wall may make transactions by directors or employees in front of the Chinese wall misleading. The practice of having Chinese walls is widespread amongst securities firms and banks and accordingly they would be "reasonably expected" in both the cash and the derivatives markets. They have certainly been accepted by regulators (in particular, the UK Financial Services Authority). Accordingly, they should be immediately specified as accepted market practices.

Although Article 1(2)(a) refers to accepted market practices "on" the regulated market, the definition of "accepted market practices" in Article 1(5) refers to practices which are reasonably expected "in" the regulated market. In my view, this is wide enough to cover practices established outside the market itself and therefore includes the practice of Chinese walls.

Although this is helpful in relation to Article 1(2)(a), it is in my view not only helpful but also necessary in the case of information giving false or misleading signals (Article 1(2)(c)) and, indeed, in relation to insider dealing in Article 2(1); however, I cannot see how it is possible to include them as a safe harbour in those cases. I would be very grateful (and so would the whole financial services industry, at least in the UK) if the Committee is able to persuade the European Commission to provide a safe harbour for them in those cases as well. For example, a director or employee in front of the Chinese wall says something about an issuer which is true so far as he is aware but is made misleading or untrue by what is being agreed

behind the Chinese wall, which he is not allowed to know anything about. Similarly, a director in front of the Chinese wall buys shares in a company at a price much lower than the price the shares would be once the transaction being organised behind the Chinese wall becomes public. In both cases, the firm would be guilty of market abuse, even though it is totally innocent.

3 **Question 12**

In my view, the Directive does not require persons other than the issuer to draw up lists; it says “or”, not “and”. Instead, when the third sub-paragraph of Article 6(3) refers to persons acting on behalf of issuers or for their account, it seems to mean that issuers can require another person to draw up the list on their behalf. This language is also used in the first sub-paragraph of Article 6(3) and, again, I am of the view that the disclosure obligation is imposed on the issuer only; however, the issuer must disclose the inside information even when the disclosure to a third party is made by a person acting on behalf of the issuer or for his account. Surely the Directive does not want persons other than the issuer to make inside information public because this would mean that potentially lots of different persons (for example a merchant bank or stockbroker) must make public inside information relating to the issuer; this would lead to much confusion in the market.

Accordingly, the obligation to draw up lists is surely imposed only on the issuer, although the expression “working for them” covers directors or employees of other persons (typically a corporate finance firm acting for the issuer). Surely all that the extension in the third sub-paragraph of Article 6(3) is trying to do is to allow the issuer to delegate to those other persons the task of drawing up and maintaining the lists. Importantly, the only difference between my interpretation and that adopted by the Committee is that the consequence of the Committee’s view is that those other persons can be guilty of an offence under the Directive, although my view would mean that their involvement would only be as a help to the issuer.

If you would like me to explain my comments to you in any more detail please do let me know.

Yours sincerely

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