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RE: MARKET ABUSE DIRECTIVE – PUBLIC CONSULTATION ON CESR'S LEVEL 3 SECOND SET OF GUIDANCE AND INFORMATION ON THE COMMON OPERATION OF THE DIRECTIVE TO THE MARKET

I. INFORMATION OF A PRECISE NATURE

According to art. 1 of the Commission Directive 2003/124/EC *information is of a precise nature*

A. **if** :
a. **indicates** a
a.1.set of circumstances which
a.2. exists or
a.3. may *reasonably be expected* to come into existence
or
b. **indicates** an event which
b.1. has occurred or
b.2. may *reasonably be expected* to do so

B. **and if**
a. it is **specific** enough to enable a conclusion to be drawn as to the possible effect
a.1. of a set of circumstances

a.2. or event
b. on the prices of financial instruments or related derivative instruments

A clear distinction should be drawn between: 1) the object or the content of the information (what information *indicates* according to lett. A)) and 2) the distinguishing feature of the information (*specificity* according to lett. B))

1) According to the Consultation Paper, as far as the object of the information is concerned (*lett. A*) we think that a further exemplification should be made in order to explain the meaning of the phrases "*reasonably be expected to come into existence"* – relating to "a set of circumstances" – and *"reasonably be expected to occur"* relating to "events" *(Lett. A, a.3, b.2.).*
It is not of help to state that the key issue here "is whether it is reasonable to draw this conclusion based on the *ex ante* information available at the time".
The key issue here is to understand what the Directive means for "reasonable" about the expectation that a set of circumstances or a event will come into existence or occur.
In particular it should be made clear: a) to whom should be reasonable the expectation and b) if the word "reasonable" means "probable" .
For what concerns the issue underlined at lett. *a)* there are two possible approaches. The first one is to opt for a *subjective* test of reasonability; the second one is to opt for an *objective* test.
In first case (subjective test of reasonability) the term reasonable should be interpreted according to the specific skills or the proximity to the information of the people dealing with the information. It is easy to understand that an investment banker's *reasonable* judgement about the expectation of an event to occur is different from that of the laymen. In the second case (objective test of reasonability) the expectation of an event to occur should be interpreted in the light of the average investor test.
We think that the objective test should be appropriate, at least for disclosure purposes.
For what concerns the issue underlined at lett. *b)* we think that *only high probability* of coming to existence should characterize the *reasonable* expectation test. Here the key issue is to make a clear distinction between soft information and future oriented information – *which are not and will never be inside information for MAD*

purposes - and inside information about an event or set of circumstances that someone is expecting to come into existence. In the latter case reasonability should mean probability close to certainty.

It is mostly the case of informations regarding processes *which occur in stages*. The question is to identify at what stage of the *negotiation* relating to a merger or an acquisition and at what stage of a corporate action could be reasonably expected that the merger, the acquisition or the corporate action will occur. In other words, at what stage of the underlined processes the information content should be considered of a *precise nature*.

Only a very high probability test can lead to a acceptable degree of certainty in selecting the relevant informations that should be disclosed or not abused of.

Only a very high probability judgement can lead to the crucial distinction between soft information and inside information regarding events or circumstances that have not occurred yet.

As far as *negotiations* are concerned, for example, an objective index of probability could be – at least in some cases – represented by the degree of legal binding measures that the issuer and its counterparties have agreed on, before the negotiation is terminated or positively concluded. For example if an acquisition is at issue, not the *mere talks* between parties should be deemed as relevant, but the arrangement of an *agreement in principle* on the acquisition, even if details (timing, financing) have not already agreed on. The agreement in principle test is a very well known criterium under US regulation.

It must be stressed that the concept of *negotiation in course* is crucial not only in selecting the relevant information to be disclosed, but also in selecting the situations relevant for the "delay procedure" purposes.

It is self-evident that the more the notion of *negotiation in course* (consistent with the inside information definition) is extensive, the more the procedure for delaying the publication will come at issue.

The risk here is that the *delay procedure* could become the rule, rather than an exception. If the concept of *negotiation in course* for disclosure purposes is relaxed to the point that it embraces even mere talks or negotiations that are not mature in stage, or not very probable events, the issuer will be forced to apply for the delay procedure or will be forced to disclose noising informations.

A further issue that should be point out at this stage of the discussion is weather takeovers should be treated as any other issue for disclosure regulation purposes. We believe that the peculiarity of *takeovers*, wether they are friendly or hostile, should need a specific price-sensitive disclosure guidelines.

2) For what concern *specificity*, § 1.8 of the Consultation Paper exemplify two circumstances according to which it is possible to draw a conclusion about the possible effect of the information on the prices of the financial instruments. The first one is the possibility for the average rational investor to make an investment at no risk or at low risk. The second one is the possibility to exploit immediately the piece of information on the market.
First, it should be explained if the "risk test" means that the investor could expect with high probability *in which direction* prices will go if information is disclosed. In other words it seems that "no risk" or "low risk" exists where the investor is sure that the price will move towards one direction or another . Second, it would be helpful an exemplification of what "*immediate exploitation*" means. Does it mean that the insider is able to act immediately on the market on the basis of the information? Does it mean that if the market is closed at the moment in which the insider possess the information, there is no possibility to draw a conclusion on the price effect?

II. SIGNIFICANT PRICE EFFECT

We agree with the document approach

III. WHEN ARE THERE LEGITIMATE REASONS TO DELAY THE PUBLICATION OF INSIDE INFORMATION

As we referred above here the crucial issue is to define more precisely the circumstances under which an issuer can delay the disclosure of information.
From one side, the concept of *negotiation in course* is very important. In addition to the comments above, we think that in order to support issuers and market Authorities in interpreting regulation, a further exemplification exercise should be made.

From the other side we appreciate the attempt to include in the second set of circumstances which can fall under the delay procedure, cases in which "there are complex decision-making processes involving multiple hierarchical layers in the issuer's organization". The question here is to take note of the fact that sometimes the hierarchical layers are not inside the issuer's organization, but outside it.

Let's take the case of groups of companies, where some deals, which are negotiated by the subsidiary, should be approved not only *ex ante*, but sometimes *ex post*, by the controlling companies board. Sometimes important decisions of the issuer must be previously discussed with or authorized by those shareholders which individually or jointly with other shareholders own an important stake in the issuer's share capital. In the latter case issuer's ownership structure has relevant downfalls on the information flows inside and outside the organization.

An attempt to distinguish these cases for disclosure purposes should be – in our view - greatly appreciated by the issuers.