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24 October 2006

CESR

Attn.: Mr. Fabrice Demarigny
 11-13 Avenue de Friedland
 75008 Paris
 France

Ref.: CESR/06-078

Dear Sir,

We are writing in response to CESR's call for evidence on the evaluation of the supervisory functioning of the EU market abuse regime. We would like to draw your attention to two issues relating to the prohibition of selective disclosure of inside information other than "in the normal course of the exercise of [one's] employment, profession or duties," pursuant to Article 3(a) of Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (the "Directive").

1. The first issue is raised by the EC legislative framework itself and relates to controlling shareholders: in some EU countries listed companies commonly have controlling shareholders that, quite apart from being represented in the board, are actively involved in the design of the issuer's strategies and in its main decisions. These controlling shareholders play a "direction and coordination" role that at least some jurisdictions, like Italy, have explicitly recognized and regulated (see Article 2497 *et seq.* of the Italian Civil Code).

Immediate access to the issuer's inside information is crucial to the controlling shareholders' effective involvement in the controlled company. As a matter of fact, insider trading prohibitions in Italy have traditionally been construed as not preventing an issuer from disclosing inside information to the parent company, whenever this was functional to the latter's role as an active controlling shareholder.

Further, there are transactions, like mergers, acquisitions and the sale of the control block itself, which require a strict co-ordination between the issuer's directors and its controlling entity, well before and beyond the involvement of the issuer's board in the decision-making process. For these transactions to be effectively and smoothly executed it is often necessary for the issuer to disclose inside information to the controlling entity and, in the case of control block sales, to a prospective buyer.

The EC legislative framework is unclear as to whether the information flows described above are in line with Article 3(a)'s prohibition. Both level-1 and level-2 measures, and especially Article 3 of Commission Directive 2003/124/EC of 22 December 2003 implementing Directive 2003/6/EC of the European Parliament and of the Council as regards the definition and public disclosure of inside information and the definition of market manipulation (the "Commission Directive") are silent on this point.

Given the relevance of the issue in some of the Member States, some form of guidance on this topic, whether at level-2 or at level-3, would be of great help for listed companies and their advisers.

2. The second issue we would like to draw CESR's attention to is raised by the Italian rules implementing the EC framework and relates to the possibility of selectively disclosing accounting information.

According to Article 66(7) of Consob Regulation No. 11971/1999 implementing the provisions on issuers of Legislative Decree 58 of 24 February 1998 (the "Regulation"), as modified to implement the Directive, issuers must immediately inform the public "of accounting data that will be reported in their company or consolidated annual financial statements or half-yearly reports and of information and accounting data that will be included in their quarterly reports when such data is disclosed to third parties, unless such third parties are bound by a confidentiality requirement *and* the disclosure is made pursuant to a legal obligation [...]" (emphasis added).

Selective disclosure of accounting data is thus allowed only if a condition is met in addition to those provided for in Articles 3(a) and 6(3), i.e. that the issuer has a legal obligation to disclose the data, such as is the case with the issuer's audit firm. Taken to the letter, this provision makes it impossible for issuers, inter alia, to seek outside advisers' assistance in the preparation of financial reports, as is common practice in other Member States such as Germany and the UK, because issuers may not disclose accounting data to them selectively.

To be sure, in its Communication No. DME/6027054 of 28 March 2006, Consob has subsequently construed the Regulation as allowing, notwithstanding its wording, selective disclosure to advisers assisting the issuer in the preparation of financial reports. However, Consob's interpretation is binding, if at all, for Consob alone. Civil and criminal judges may reach a different conclusion, by sticking to the Regulation's wording, that clearly states otherwise.

Article 66(7) of Consob Regulation also prevents an issuer from selectively disclosing accounting data to a prospective bidder, a joint-venture partner or another company

negotiating a merger, although the Directive appears to allow this so long as a confidentiality agreement is entered into.

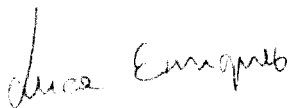
In fact, the Directive and its level-2 measures neither impose a rule like Article 66(7) nor allow Member States to impose it. While it is unclear whether the Directive is a maximum harmonization measure, it would seem that a uniform regime on accounting data disclosure would be consistent with the Directive's and the Financial Services Action Plan's objectives. More specifically, it would help if a level-3 measure clarified that inside information, even when it involves accounting data, may be selectively disclosed to advisers assisting in the preparation of financial reports and, more broadly, to other persons, provided that Articles 3(a) and 6(3) of the Directive are complied with.

If you have any questions on this letter or wish to discuss any matters, please contact Giuseppe Scassellati Sforzolini (+39 06 695 22 220) or Luca Enriques (+39 06 695 22 274).

Yours truly,

Prof. Luca Enriques

Avv. Giuseppe Scassellati Sforzolini

Handwritten signature of Luca Enriques in black ink.Handwritten signature of Giuseppe Scassellati Sforzolini in black ink.