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MARKET ABUSE MANDATES SECOND CALL FOR EVIDENCE

Background:

On 7 February 2003, the European Commission published its second mandate to CESR for advice on technical implementing measures under the Directive on Insider Dealing and Market Manipulation (Market Abuse) which was adopted on 3 December 2002. CESR has been asked to deliver its advice by 31st August 2003. The request for advice is attached.

CESR's Expert Group on Market Abuse, which was responsible for delivering CESR's advice to the Commission under the first mandate, will take this work forward. The Group is chaired by Stavros Thomadakis, Chairman of the Hellenic Capital Markets Commission. Nigel Phipps, member of the CESR Secretariat, acts as secretary to the Group.

Call for evidence:

In releasing these requests for technical advice, CESR is inviting all interested parties to submit views on the areas which CESR should address in its advice to the European Commission. Respondents should ensure that any suggestions fall clearly within the scope of the mandate within which CESR must operate. All contributions should be addressed to Mr Fabrice Demarigny, Secretary General, CESR, 11/13 Avenue de Friedland, 75008, Paris or by email to fdemarigny@europesfesco.org by 28 February 2003.

Timetable:

In order to meet the Commission's deadline of 31 August 2003, the provisional timetable for the work that CESR will be undertaking in response to the request from the European Commission, is as follows:

- Call for evidence – 7 February 2003
- Publication of consultation paper in April 2003 (CESR will aim for a publication date of 15th April)
- Consultation to close on 30th June 2003
- Final paper to be signed off by CESR on 30th August 2003

N.B. Particular attention should be given to the fact that the consultation period will not be a full 3 months in view of the August deadline.

Previous papers published by CESR (or FESCO) in this area:

- CESR's Advice on level 2 Implementing Measures for the proposed Market Abuse Directive (CESR/02-089d) and Feedback Statement (CESR/02-287b)
- Stabilisation and Allotment, a European Supervisory Approach – April 2002 - (Ref. CESR/02-020b)
- Measures to promote Market Integrity – February 2002 - (Ref. CESR/01-052h)
- A European Regime Against Market Abuse – September 2000 - (Ref. FESCO/00-0961)



EUROPEAN COMMISSION
Internal Market DG

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Orig.

An Additional Mandate to CESR for Technical Advice on Possible Implementing Measures concerning the Directive on Insider Dealing and Market Manipulation (Market Abuse)

This additional mandate supplements the first mandate on the Market Abuse Directive and follows the agreement on implementing the Lamfalussy recommendations reached with the European Parliament on 5 February 2002. In this agreement, the Commission committed itself to a number of important points including on transparency. For this reason, this request for additional technical advice to CESR will be made available on DG Internal Market's web site.

After adoption of the Market Abuse Directive on 3 December 2002, the initial provisional mandate of 18 March 2002 has been converted into a formal mandate and is not affected by this additional mandate.

1. BACKGROUND

In its Resolution on more effective securities market regulation, the Stockholm European Council called for rapid implementation of the prioritised Financial Services Action Plan, in order to achieve an integrated securities market **by the end of 2003**, including notably the priorities set out in the Lamfalussy Report.

To meet this challenge, the European Council not only endorsed the proposed four-level approach (essential principles, implementing measures, co-operation and enforcement); it also welcomed the proposed establishment of an independent Regulators Committee (CESR) to act as an advisory group to assist the Commission in its preparation of draft implementing measures.

On 18 March 2002, DG Internal Market addressed to CESR two first provisional requests for technical advice; one of those was a request for technical advice on possible implementing measures on the Market Abuse Directive. If the political deadline of 2003 is to be met, this will mean not only Directives being adopted before this deadline, but the technical implementing measures as well.

Timely adoption of the implementing measures is even more important given that some Member States may need 6 months – in case the implementing measures are adopted in the form of a Directive - to have them implemented into national legislation. Implementation of Level 1 and most of Level 2 measures will need to occur at the same time – so respecting the deadlines is imperative. In order to speed up the implementation process, the European Commission might consider proposing Regulations for the implementation of Level 2

measures. The Stockholm European Council, the European Parliament itself and the Lamfalussy report all urged the use of Regulations whenever possible.

The first CESR mandate focussed on a number of priority issues and was drafted on the basis of the initial Commission proposal adopted on 30.5.2001 COM(2001) 281 final. Both the European Securities Committee and the EMAC were informed. CESR adopted its advice on the first mandate on 16 December 2002.

During discussions in the European Parliament and the Council the text of the Directive has been changed in a number of cases. In particular, several implementing measures which were not included in the initial Commission proposal, were added. Consequently, an additional mandate to CESR seeking its technical advice is needed.

2. THE PRINCIPLES THAT CESR SHOULD TAKE ACCOUNT OF

2.1. The working approach agreed between DG Internal Market and the European Securities Committee

On 30 January 2003, DG Internal Market consulted the European Securities Committee on a draft request for additional technical advice. At that meeting, it was agreed that DG Internal Market would request additional technical advice on certain priority issues having been introduced into the Directive by the European Parliament and the Council, and that CESR should immediately start the groundwork on these to meet the 2003 deadline set by the Stockholm European Council Resolution. The meeting agreed that this request should be based on the following approach:

- CESR should take account of the principles set out in the Lamfalussy Report and mentioned in the Stockholm Resolution of 23 March 2001.
- CESR should start work on the basis of the Directive adopted on 3 December 2002.
- The technical advice given by CESR should not take the form of a legal text.

2.2. Consultation of the public

The Stockholm European Council endorsed the Lamfalussy recommendations on consultation and transparency. In particular, it invited the Commission to make use of early, broad and systematic consultation with the institutions and all interested parties in the securities area, especially by strengthening its dialogue with consumers and market practitioners. It also stated that CESR should “*consult extensively, in an open and transparent manner, as set out in the final report of the Committee of Wise Men and should have the confidence of market participants*”.

Article 5 of the Commission Decision establishing the CESR provides that “*before transmitting its opinion to the Commission, the Committee [CESR] shall consult extensively and at the early stage with market participants, consumers and end-users in an open and transparent manner*”.

In this respect, DG Internal Market also draws CESR's attention to the European Parliament's Resolution on the implementation of financial services legislation of 5 February 2002 and the Commission's formal Declaration in response.

DG Internal Market will ensure that the Stockholm European Council recommendations on consultation have been fully met. In particular, it will satisfy itself that CESR has consulted all interested parties on its technical advice in accordance with the CESR Public Statement on Consultation Practices. This mandate will also be posted on DG MARKT's website.

Once the Commission has received the CESR's advice, it will draw up draft legal texts to put forward to the ESC and the European Parliament. It simultaneously publishes those texts on its Internet site. If the Commission amends its draft to reflect discussions in the ESC, those amended drafts will also be made public on the website.

Interested parties will have the opportunity to comment on published draft legal texts. The Commission has set up a dedicated e-mail address (Markt-ESC@cec.eu.int), allowing all interested parties to send their contributions to the Chairman of the ESC. All such comments will in turn be made public on the same Commission website.

Interested parties will have sufficient time to participate in this exercise because the ESC will not be asked for a vote until at least three months have elapsed from the publication of initial draft implementing rules. This will also allow the European Parliament to follow the process and, if it so wishes, to make its views known.

2.3. Market integrity and investor protection

In giving its advice on possible implementing measures, CESR should take full account of the key objective of the Market Abuse Directive: the need to increase market integrity and to protect investors.

2.4. Scope of this additional mandate

The European Parliament and the Council have introduced provisions to establish a number of implementing measures on the basis of Articles 1, 6 and 14. In some cases, implementing measures are not immediately necessary in order to implement the provisions of the Directive. Consequently, this additional mandate is limited to implementing measures considered by the European Commission as necessary to fully implement the provisions of the Directive.

3. CESR IS INVITED TO PROVIDE ADVICE ON THE FOLLOWING TWO PRIORITY ISSUES BY 31 AUGUST 2003 AT THE LATEST:

3.1. Implementing measures related to the definitions of 'Accepted market practices', and of 'Inside information' for derivatives on commodities (Article 1 of the Directive)

In order to take account of developments on financial markets and to ensure uniform application of the Directive in the Community, DG Internal Market requests CESR to provide technical advice on possible draft implementing measures related to these definitions. Such measures shall not alter the substance of the definitions contained in Article 1.

In developing its advice, CESR shall have regard to the need to:

- * respect national market practices where these do not unduly impinge on the coherence and the progress towards the Single Market;
- * promote harmonisation throughout the community;
- * promote sufficient transparency of accepted market practices for all market users.

(1) Implementing measures consisting of guidelines related to the definition of 'Accepted market practices' (Article 1 paragraph 5 of the Directive)

Article 1 paragraph 5 states: “(5) *"Accepted market practices" shall mean practices that are reasonably expected in one or 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).*”

The possible draft implementing measures, which shall consist of guidelines to be followed by a competent authority when accepting market practices, should take account of:

- factors which need to be taken into account in deciding whether and when a practice can be accepted by a competent authority, in particular including whether and when a practice can be reasonably expected in one or more financial markets
- the need to consider existing market practices and recognise emerging ones.

(2) Implementing measures related to the definition of ‘Inside information’ for derivatives on commodities (Article 1 paragraph 1 subparagraph 2 of the Directive)

Article 1 paragraph 1 subparagraph 2 states: “*In relation to derivatives on commodities, “inside information” shall mean information of a precise nature which has not been made public, relating, directly or indirectly, to one or more such derivatives and which users of markets on which such derivatives are traded would expect to receive in accordance with accepted market practices on those markets.*”

The possible draft implementing measures should take account of:

- factors which need to be taken into account in deciding whether and when users of markets on which such commodity derivatives are traded would expect to receive the piece of information in accordance with market practices accepted by the competent authority on those markets.

3.2. Implementing measures regarding some preventative measures related to issuers, corporate managers and professional intermediaries (Article 6 of the Directive)

In order to take account of developments on financial markets and to ensure uniform application of the Directive in the Community, DG Internal Market requests CESR to provide technical advice on possible draft implementing measures for some provisions of Article 6 of the Directive. Such measures shall not alter the substance of these provisions.

(1) Implementing measures concerning the conditions under which issuers, or entities acting on their behalf, are to draw up a list of those persons working for them and having access to inside information; implementing measures concerning the conditions under which such lists are to be updated (Article 6 paragraph 10 fourth indent of the Directive)

Article 6 paragraph 10 fourth indent states: “(10)[*In order to take account of technical developments on financial markets and to ensure uniform application of this Directive, the Commission shall adopt, in accordance with the procedure referred to in Article 17(2), implementing measures concerning:...*]

- *the conditions under which issuers, or entities acting on their behalf, are to draw up a list of those persons working for them and having access to inside information, as referred to in paragraph 3, together with the conditions under which such lists are to be updated.*”

Article 6 paragraph 3 states: “... *Member States shall require 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. Issuers and persons acting on their behalf or for their account shall regularly update this list and transmit it to the competent authority whenever the latter requests it*”.

The possible draft implementing measures should take account of:

- the criteria which trigger the duty to draw up insiders' lists
- the criteria which trigger the duty to update insiders' lists.

(2) Implementing measures concerning the categories of persons subject to a duty of disclosure of transactions conducted on their own account and the characteristics of a transaction, including its size, which triggers that duty; implementing measures concerning the technical arrangements for disclosure to the competent authority (Article 6 paragraph 10 fifth indent of the Directive)

Article 6 paragraph 10 fifth indent states: “(10)[*In order to take account of technical developments on financial markets and to ensure uniform application of this Directive, the Commission shall adopt, in accordance with the procedure referred to in Article 17(2), implementing measures concerning: ...]*”

- *the categories of persons who are subject to a duty of disclosure as referred to in paragraph 4 and the characteristics of a transaction, including its size, which trigger that duty, and the technical arrangements for disclosure to the competent authority.”*

Article 6 paragraph 4 states: “4. *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.”*

The possible draft implementing measures should take account of:

- the criteria for identifying persons discharging managerial responsibilities within an issuer
- the criteria for identifying persons closely associated with persons referred to at the previous indent
- the criteria (including in terms of size) for determining when a transaction triggers the duty of disclosure
- the criteria for how and when the persons mentioned above shall inform the competent authority of 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

(3) Implementing measures concerning technical arrangements governing notification of suspicious transactions to the competent authority by any person professionally arranging transactions in financial instruments (Article 6 paragraph 10 last indent of the Directive)

Article 6 paragraph 10 last indent states: “(10)[*In order to take account of technical developments on financial markets and to ensure uniform application of this Directive,*

the Commission shall adopt, in accordance with the procedure referred to in Article 17(2), implementing measures concerning: ...]

- *technical arrangements governing notification to the competent authority by the persons referred to in paragraph 9.*”

Article 6 paragraph 9 states: “ 9. 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.”

The possible draft implementing measures should take account of:

- the criteria for determining how and when persons professionally arranging transactions in financial instruments shall notify the competent authority of suspicious transactions; in particular, the criteria for determining the notifiable transactions, the timeframe for such notification and the characteristics of the transactions to be notified, taking into account the Directive on Insider Dealing and Market Manipulation (Market Abuse) and the first advice delivered by CESR to the European Commission on 31 December 2002.