



Rome, 2 February 2007

Your ref: CESR/06-562

Our ref: Prot. N. 64/07

Response to CESR public consultation on Market Abuse Directive: “Level 3 – second set of CESR guidance and information on the common operation of the Directive to the market”.

Assogestioni¹ welcomes CESR’s invitation to comment on its Draft Second Set of CESR Guidance on the Operation of the Market Abuse Directive. We would like to submit the following observations in relation to the four identified areas of future guidance in the hope to contribute to the development of a common understanding amongst CESR members regarding the treatment of issues in artt.1-6 of the Directive 2003/6/EC (hereinafter “MAD”) and its implementing measures.

We would also like to take advantage of this opportunity to ask CESR to clarify as a further profile of the Market Abuse regime: the subjective scope of the prompt notification requirement of suspicious transactions (art. 6 (9) MAD).

I. What constitutes “Inside information” under the Market Abuse directive.

Our preliminary observation is that - in order to prevent any uncertainty in this respect - It would be important that CESR clarifies that in its guidelines on what constitutes “inside information” apply in all cases where the concept of inside information is utilised under MAD i.e. irrespective of the scope of the different provisions of the Directive: by way of an example, the notion of “inside information” in art. 6 (1) MAD which sets out the public disclosure requirement should not be different from the notion of used in the prohibition set in art. 2 (1) MAD.

With respect to specific criteria that define an inside information we comment as follows:

a) Information of a Precise Nature. We agree that a distinction is to be made between mere *rumours* or *speculation* and information that can properly be qualified as an inside information and invite CESR to provide clear guidance to develop a uniform definition of what constitutes “rumour” or “speculation”.

More precisely, we ask CESR to clarify whether rumours and speculations are *information for which there is no firm and objective evidence that the set of*

¹ Assogestioni is the Italian national association for the investment fund and asset management industry and represents the interests of 148 members who currently manage assets valued over 1.000 billion euro. Our members are both directly and indirectly affected by the issues involved in the implementation and interpretation of MAD.



circumstances exist or the event which form the content of the information has occurred in the sense that it qualifies as such any information in relation to both facts that have never occurred (i.e. unsubstantiated (false) information) and facts that have occurred but for which firm and objective evidence on their existence or the exact set of circumstances in which they occurred can not be provided (i.e. disputable information).

We also agree with CESR's guideline that issuers are under no obligation to rectify or generally to take initiatives in order to respond to "*market rumours which are without substance*" in the sense of the meaning indicated above of *false information* (i.e. rumours regarding facts that have never occurred), unless there are exceptional circumstances or unless issuers are requested to comment by the competent authority pursuant to art. 6(7) MAD.

b) Made Public. It should be noted that in their operational reality asset managers and more generally all market operators make often direct contact with individuals who legally represent an issuer and are therefore responsible for it (one-to-one contacts).

In our opinion it is necessary to establish that when market operators become aware of a piece of information during the course of *one-to-one contacts* with one of the above individuals they ought to be able to rely upon the fact that the information had already been made public or that in any event it became public during the course of the one-to-one communication through an incorrect disclosure performed by the issuer (see para.1.9 of the consultation document).

In reaching this conclusion proper consideration ought to be given to the fact that it would be too burdensome to impose on the interlocutor of one those subjects the heavy duty to verify that the information has already been made public by the issuer (either through the correct procedure or through an incorrect disclosure or through a third party) before being able to make legitimate use of it. To impose such a burdensome verification duty would be contrary to market efficiency and trading speed and would tip the balance of due diligence duties against the subject who receives the information (the asset manager and any other market operator) in favour of the issuer (i.e. the subject who is in the best position to control and be aware of the inside information).

c) Inside Information which directly or indirectly concerns the issuer. We suggest that it would be appropriate to include in the proposed non-exhaustive list of information which **directly** concern the issuer or financial instruments some specific examples related to funds whose shares are traded on securities markets, in consideration of the fact that useful guidance ought to be given to those fund shares issuers in order to enable them to correctly identify what might constitute an inside information which relates directly to the fund issuer or to the fund units.

With regards to the proposed non-exhaustive list of information which **indirectly** concern the issuer or financial instruments (at page 8 and 9 of the consultation document), we observe that CESR's purported interpretation according to which the disclosure requirement in art. 6 (1) of MAD applies also to the disclosure of



consequences which *directly* concern the issuer resulting from events that *indirectly* concern it, would entail an excessive expansion of the number of relevant information that have to be disclosed. This consideration is even more forceful if one considers the number and type of events listed by CESR (by way of example, all amendments to the markets governing rules).

Despite the fact that CESR indicates the list as non-exhaustive, it is our opinion that the disclosure requirement of art. 6 (1) MAD ought to be more appropriately circumscribed to the cases where the above mentioned consequences are really relevant to the issuer.

II. Legitimate reasons to delay the publication of inside information.

We note that CESR has provided some clarification only in relation to the “legitimate interests” which might entitle the issuer to delay public disclosure of an inside information and elected not to give any guidance on the other two legal conditions that legitimate this delay according to art.6 (2) MAD (that the delay would not likely mislead the public; and that the issuer is able to ensure the information confidentiality).

However, in our opinion the fragmented treatment of this issue that results from a separate consideration of those requirements is not coherent with the goal of these Level 3 Second Set of CESR guidelines which – as CESR itself indicated –is to give further guidance to competent authorities and market participants for a convergent treatment of MAD provisions in order to achieve a convergent application of its legal requirements on a day-to-day basis.

On the basis of this objective and in consideration of the importance and the delicacy of this issue, we think that it is necessary that CESR:

- a) give further guidance on all the legal requirements in art. 6(2) MAD;
- b) provide clarification on their complex interplay.

Finally in relation to the notification requirement to the competent authority, we invite CESR to verify the national implementing rules enacted by those Member States which adopted the facultative provision of art. 6 (2) MAD in order to achieve a convergent practice on this issue as well amongst competent authorities.

III. Client order which might constitute inside information.

With reference to art. 1(1), para.3 MAD, further clarification ought to be given by CESR in order to establish what constitutes information related to the “*client pending order*”. In particular we ask CESR to clarify when a client pending order does not constitute any longer inside information (i.e. time of transmission, time of execution or clearing).

Furthermore we invite CESR to specify clear quantitative thresholds, that may eventually take into account the client identity (qualified or retail), to better clarify the quantitative indications at para.3.9 and 3.13, lett.a of the public consultation document.



V. Suspicious transactions notification requirement.

As anticipated in the introduction of this document, we would like to take advantage of the occasion granted by this consultation to ask CESR to provide guidelines as to the subjective scope of the notification requirement with respect to suspicious transactions in art. 6 (9) of MAD.

Art. 6 (9) MAD provides that “*any person professionally arranging transactions in financial instruments*” shall promptly notify the competent authority if he reasonably suspects that a transaction might constitutes insider dealing or market manipulation.

Art. 1(3) of Directive 2004/72/EC (hereinafter the “Implementing Directive”) specifies that the expression “*person professionally arranging transactions*” shall mean “*at least an investment firm or a credit institution*”. This provision indicates the minimum subjective scope of the requirement notification in art. 7 of the Implementing Directive.

In our opinion, in order to correctly define the subjective scope of the suspicious transactions notification requirement in art. 6(9) of MAD, the provision of art. 9 of the Implementing Directive setting out the content of this notification ought to be considered. Amongst the information that ought to be the object of the notification are:

- “*means for identification of the persons on behalf of whom the transactions have been carried out, and other persons involved in the relevant transactions*” (art. 9 (1), lett.c)
- “*Capacity in which the person subject to the notification obligation operates (such as for own account or on behalf of third parties)*”(art. 9(1), lett.d).

Art. 11(1) of the Implementing Directive provides further clarification because it requires that “the person notifying to the competent authority as referred to in Articles 7 to 10 shall not inform any other person, in particular the person on behalf of whom the transactions have been carried out (...)” in order to safeguard the inquiring activities of the competent authority and to protect the fiduciary duties owed by the person to its clients.

In consideration of these provisions, we submit that the duty to be alert to detect insider dealing or market manipulation transactions in order to notify the competent authority, exists only upon those subjects who deal or are authorised to deal: only dealing activities can in fact be properly said to be exercised “*on own account or on costumers account*”. It follows that the indication contained in art. 1(3) of the Implementing Directive - although of non-exhaustive type - should be indented to relate only to persons who exercise or are authorised to exercise dealing.

In consideration of the above reasoning, we ask CESR to confirm that the *investment firms* or *credit institutions* required to notify suspicious transactions under art. 1(3) of the Implementing Directive are *exclusively investment firms that deal or that may have direct access to the market* and that the subjective scope of the notification



requirement *does not include asset managers who execute orders through dealers when providing the service of (collective or individual) portfolio management.*

We hope that our comments will be of help for CESR to finalise the “Level 3 - second set of guidance and information on the common operation of the Directive to the market” and remain at your disposal for any clarification or information that you may need.

The Director General

Fabio Galli