



Milan, 31<sup>st</sup> January 2005  
Prot. n. 10/05/MCO/mco

CESR  
The Committee of European  
Securities Regulators  
11-13 avenue de Friedland  
75008 Paris - France

**Re: Market Abuse Directive - Level 3 – preliminary CESR guidance and information on the common operation of the Directive.**

## **Introduction**

ASSOSIM is the Italian Association of Financial Intermediaries, which represents the majority of Italian financial intermediaries, banks and branches of foreign institutions, active in the Investment Services Industry.

First of all, we would like to thank CESR for arranging such an important consultation in the light of a coherent transposition of the level 1 and 2 legislation in all member states.

This is a very delicate stage of the Lamfalussy Process, since in case member states do not carry out the transposition properly, the risk is to nullify the efforts and time spent in dealing with the previous levels of legislation.

Very recently on the occasion of the last consultation on MiFID, ASSOSIM again expressed its view on the issue of **harmonisation of legislations**. We do believe that in the field of market abuses, in particular, it is very important to pursue a profound harmonization of legislations in order to get a real integration of financial markets and a real level playing field.

## **Accepted market practices**

The following considerations on the accepted market practices are deeply linked to the issue of the harmonisation.

The Lamfalussy Process which foresees the first two levels legislation characterised by a different degree of detail and a third level which guarantees the coherent transposition of the adopted regulation is a perfect means to get the harmonisation of legislations.

However, we believe that the choice of putting off the list of accepted market practices at the third level legislation - a phase where the discretionality of single member states could emerge- may lead to profound, substantial differences in the domestic regulations as finally transposed by members states, which in turn means that eventually different behaviours could be allowed in different countries.

In the particular field of market abuses, this would be a very negative signal in the perspective of integration of financial markets.

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What we do not agree on is that a list which clearly states admitted or not admitted behaviours is given at the third level legislation. In fact, because of the way this stage of the Lamfalussy Process has been thought or better interpreted, there is room for discretionality. Our concern is that - after all the work done dealing with level 1 and 2 legislation to define what is a market abuse - such a list of AMPs can raise very different realities in member states.

Provided that such a list should have been given at the second level legislation (where it would have drawn the same line between admitted and not admitted behaviours for all countries), any other intervention at the third level legislation which takes the form of a list of admitted or not admitted behaviours should be taken through another legislative act, otherwise it could hugely differentiate domestic legislations.

Given the above, we do not believe sufficient the coordination among Regulatory Authorities, provided for by art. 3, 2 of the Directive 2004/72/CE, finalised to the admission of an AMP. Our members have stressed that the admission of different practices can deeply change the operative framework nullifying the level playing field.

Since we have a legal tradition of civil law we are more confident with a legislation which regulate the way of carrying out an activity and forbids certain behaviours and not with one which lists the permitted behaviours. This is the reason why we have chosen with awareness not to give examples of AMPs.

In particular, in our system, the market abuses will probably represent various types of crimes and at this stage it is difficult for us to understand the way the AMPs will work within our system of criminal law.

Therefore we suggest, in order to make the regulation more precise, that the list of examples of market manipulations given by CESR in the consultation document be adopted through appropriate means by the Institutions in charge of legislative power at European level.

However, in case CESR decides to go forward with the list of AMPs, the same would be valid for such a list too.

## **Suspicious transactions**

First of all we would like CESR to make clear that the obligation of notification is, as for art. 7 and 1, 3 of the Directive 2004/72/CE, on the company (bank or investment firm) and not on the physical person.

Given the above, we do not agree with the duty to indicate the detail of the physical person making the notification, in the reporting form.

At all the different stages of consultation conducted on this piece of legislation, ASSOSIM has expressed the concerns of intermediaries on such an obligation. They still point out that, especially in the case of suspicion of market manipulation, the assessment requested on the transaction should be carried out with respect to the impact of this on the market, clearly arguing that they do not have the means and the appropriate perspective for complying with the duty imposed upon them.

Given that such an obligation is not in discussion anymore, we have to find a way to make this discipline workable. The Authorities should be satisfied with the implementation by the intermediaries of the necessary systems and controls which

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detect and proceed at the notification of the suspicious transactions. As recognised by CESR at pag. 15 “ the Directive and its implementing measures do not deal with the steps which those persons subject to this requirement need to take to identify such transactions” therefore intermediaries should be left free to set their own systems.

Given that the situations of outright abuse are not the rule and that abuse is not usually perpetrated with codified behaviour which is immediately recognisable, we believe that the only way to make the rule workable **is to set the systems and procedure on objective factors (such as quantitative threshold) which can be immediately traced, so that only in their presence shall the intermediary without any doubt proceed to notification. The possibility that the intermediary is in a condition to carry out merit assessment is excluded.**

In case CESR does not accept our suggestion on quantitative thresholds and intermediaries are asked to carry out merit assessment on the basis of the signals listed by CESR in the document under consultation, we suggest that the consideration CESR makes at par. 4.2 be kept in mind, namely that authorities and market participants carry out the control they are asked *within the limits of their sphere of activity*.

This implies that it must be taken into account the differences between intermediaries, regulated markets and authorities, in the light of the different perspective each one of them has of what happens on the market.

But also the differences between intermediaries carrying out different activities should be considered. The intermediary carrying out reception and transmission of orders has a deeper knowledge of the client and his trading history.

The broker has a better visibility of the market. In both cases we do have to keep in mind that the perspective they have is partial and therefore the assessment not necessarily adequate.

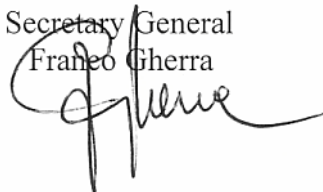
In addition we believe that CESR's interpretation of recital n. 9 of the Directive 2004/72/CE is far too wide in that it provides for the intermediary to notify a suspicious transaction carried out long before with no specific reference to the time limits.

ASSOSIM believes that the adequate interpretation should be that the intermediary make a general assessment of its client's activity regardless of any responsibility for what may have happened earlier on.

We remain at your disposal for any other clarifications you should require.

Yours sincerely

Secretary General  
Franco Gherra



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