OBSOLÈTE

COMMISSION de SURVEILLANCE
du SECTEUR FINANCIER

Luxembourg, le 5 février 2007

A toutes les personnes concernées

CIRCULAIRE CSSF 07/280

telle que modifiée par la Circulaire CSSF 07/323

Concerne : **Modalités d'application de la loi du 9 mai 2006 relative aux abus de marché**

Mesdames, Messieurs,

Nous avons l'honneur de faire suite à la Circulaire CSSF 06/257 du 17 août 2006 qui avait pour but de signaler l'entrée en vigueur de la loi relative aux abus de marché (ci-après, la « **Loi** »). La présente circulaire a pour objet de fournir des précisions et des lignes de conduite concernant (i) les éléments pouvant constituer des indices d'une manipulation de marché, (ii) les modalités et le format à respecter en matière de déclaration d'opérations suspectes, (iii) les listes à établir par les émetteurs ou les personnes agissant en leur nom ou pour leur compte comprenant les personnes ayant accès régulièrement ou occasionnellement aux informations privilégiées, et (iv) les déclarations relatives aux opérations effectuées par les personnes exerçant des responsabilités dirigeantes au sein d'un émetteur et les personnes qui leur sont étroitement liées ainsi que les modalités de publication desdites opérations. De même, la présente circulaire donne certaines précisions en matière d'opérations de rachat et de stabilisation tombant dans le champ d'application des exemptions « safe harbour » établies par le Règlement (CE) N° 2273/2003 de la Commission du 22 décembre 2003 portant modalités d'application de la directive 2003/6/CE du Parlement européen et du Conseil du 28 janvier 2003 sur les opérations d'initiés et les manipulations de marché (abus de marché) (ci-après, la « **Directive Abus de marché** ») en ce qui concerne les dérogations prévues pour les programmes de rachat et la stabilisation d'instruments financiers (ci-après, le « **Règlement (CE) N° 2273/2003** »). Finalement, la présente circulaire clarifie certains éléments relatifs aux obligations imposées par la Loi aux OPC en tant qu'émetteurs ou, le cas échéant, à leurs dirigeants.

La présente circulaire abroge, avec effet immédiat, la Circulaire CAB 91/2 du 1er juillet 1991 concernant la loi du 3 mai 1991 sur les opérations d'initiés.

1. Remarques générales sur les éléments pouvant constituer des indices d'une manipulation de marché

Le point 2) de l'article 1er de la Loi reprend la définition de « manipulation de marché » figurant au point 2) de l'article 1er de la Directive Abus de marché. La Directive Abus de marché fournit par ailleurs dans ce même article une liste non exhaustive de comportements à considérer comme des manipulations de marché. Compte tenu de sa nature exemplative, cette liste n'a pas été reprise à l'article 1. 2) de la Loi.

Le Comité européen des régulateurs des marchés de valeurs mobilières (CERVM - CESR), a publié le 11 mai 2005 des orientations de « niveau 3 » pour la mise en oeuvre de la Directive Abus de marché (Réf. CESR/04-505b). Le CESR veille à une interprétation commune de la Directive Abus de marché par l'ensemble des régulateurs européens. Nous vous invitons à tenir compte du document « Market Abuse Directive Level 3 – first set of CESR guidance and information on the common operation of the Directive Ref: CESR/04-505b », annexé à la présente circulaire comme ANNEXE A, et notamment de la partie IV (Market Manipulation: Types of practice that CESR members would consider to constitute Market Manipulation) pour des exemples plus concrets d'éléments constitutifs d'une manipulation de marché.

Le 12 juillet 2007, le Comité européen des régulateurs des marchés de valeurs mobilières a publié une deuxième série d'orientations et d'informations de « niveau 3 » pour la mise en œuvre de la Directive Abus de marché (« Level 3 – second set of CESR guidance and information on the common operation of the Directive to the market » Réf. CESR/06-562b). Nous vous invitons à vous référer également à ce document, annexé à la présente circulaire comme ANNEXE F, et plus particulièrement aux différentes précisions relatives à la définition d' « information privilégiée » (cf. partie I « What constitutes inside information under the market abuse directive? » et partie III « When does information relating to a client's pending orders constitute inside information »).

L'article 1. 2) a) de la Loi définit certains comportements qui peuvent constituer des « manipulations de marché ». La Loi précise cependant que ces comportements ne sont pas à considérer comme des « manipulations de marché » si « la personne ayant effectué les opérations ou émis les ordres concernés [établit] que les raisons qui l'ont poussée à le faire sont légitimes et que ces opérations ou ces ordres sont conformes aux pratiques de marché admises sur le marché réglementé concerné ». En effet, les régulateurs peuvent accepter des pratiques de marché qui font échapper à l'interdiction, les opérations conformes à ces pratiques effectuées sur le marché réglementé concerné si elles sont faites pour des raisons légitimes. Dans ce contexte, nous invitons les personnes concernées à tenir compte des parties II et III du document CESR précité relatives aux pratiques de marché acceptées ainsi que du document CESR « Accepted Market Practices (AMP) - FAQ » du 3 juin 2005 (Réf. CESR/05-365). Par ailleurs, les personnes

concernées pourront, le cas échéant, soumettre à la CSSF une demande comprenant une description détaillée d'une pratique de marché qu'ils désirent utiliser sur un marché réglementé luxembourgeois (tel que, actuellement, le marché réglementé de la Bourse de Luxembourg) et qu'ils voudraient faire accepter en tant que telle par la CSSF. Les mêmes principes sont applicables par rapport à des MTF luxembourgeois (tel que, actuellement, le marché Euro MTF de la Bourse de Luxembourg).

Par ailleurs, le fait qu'un émetteur intervienne sur ses propres titres est susceptible d'être constitutif d'un abus de marché. Il est important de rappeler dans ce contexte que le Règlement (CE) N° 2273/2003 définit, sous certaines conditions, une exemption « safe harbour » pour certains cas de figure y déterminés. Il échet cependant de préciser que les opérations sur actions propres ne bénéficiant pas du « safe harbour » ne constituent pas automatiquement et en elles-mêmes des abus de marché.

Dans le cas d'opérations transfrontalières et de multicotations, les participants au marché devront respecter les règles des marchés concernés et notamment vérifier le champ d'application territorial des dispositions étrangères en matière d'abus de marché et, le cas échéant, leurs interprétations et les exemptions y applicables. En ce qui concerne le champ d'application territorial du nouveau régime luxembourgeois en matière de délits d'initié et de manipulations de marché, il échet de se référer au point 2 de la Circulaire CSSF 06/257.

2. Les modalités et le format à respecter en matière de déclaration d'opérations suspectes

Selon l'article 12 de la Loi, tout établissement de crédit ou autre professionnel du secteur financier établi au Luxembourg est tenu, sans préjudice de l'article 27.3 de la Loi[1], d'avertir sans délai la CSSF s'il a des raisons de soupçonner qu'une opération pourrait constituer une opération d'initiés ou une manipulation de marché. Il est précisé que les établissements de crédit ou autres professionnels du secteur financier décident, sur la base d'un examen au cas par cas, si une opération peut raisonnablement être soupçonnée de constituer une opération d'initiés ou une manipulation de marché (en tenant compte des éléments constitutifs d'une opération d'initiés ou d'une manipulation de marché). Cette obligation impose donc au professionnel de prendre les dispositions nécessaires pour pouvoir procéder à une analyse spécifique relative à l'opération concernée à chaque fois qu'il a des raisons de soupçonner qu'elle pourrait constituer un abus de marché, mais ne l'oblige cependant ni à faire *a posteriori* un examen systématique de toutes les transactions effectuées antérieurement par la personne concernée ni à adopter des dispositions structurelles similaires à celles visées par l'article 27 de la Loi devant être adoptées par les organismes exploitant un MTF. Même si le professionnel n'est donc pas tenu par la Loi de déceler et d'empêcher l'intégralité des abus de marché dont sont constitutives des opérations dans lesquelles il intervient, il devra cependant prendre toutes les mesures nécessaires afin de pouvoir remplir ses nouvelles obligations.

[1] Référence est faite à l'article de la Loi relatif aux marchés réglementés établis au Luxembourg ainsi qu'aux établissements de crédit, entreprises d'investissement et opérateurs de marché exploitant un MTF au Luxembourg.

En cas de notification, les personnes visées par l'obligation de notifier sont invitées à utiliser et à transmettre à la CSSF le formulaire reproduit à l'ANNEXE B dûment complété. La notification à la CSSF peut être effectuée par lettre, courrier électronique (à l'adresse : maf@cssf.lu), télécopie (+352 26251-606) ou même par téléphone. Lorsque la notification se fait par téléphone, une confirmation doit obligatoirement être donnée par écrit dans les meilleurs délais.

Il est rappelé dans ce contexte que, sauf disposition légale contraire, il est interdit aux personnes qui procèdent à une notification à la CSSF d'en informer les tiers, y compris les personnes pour le compte desquelles les opérations ont été effectuées ou les parties liées à ces personnes.

La notification n'expose la personne l'ayant effectuée à aucune responsabilité d'aucune sorte pour autant qu'elle agisse de bonne foi. La notification à la CSSF ne constitue pas une violation du secret professionnel, ni une violation d'une quelconque restriction à la divulgation d'informations requise en vertu d'un contrat ou d'une disposition législative, réglementaire ou administrative.

La personne responsable de la fonction « compliance » (telle que décrite dans la Circulaire CSSF 04/155) sera en principe également responsable du respect des obligations dérivées de l'article 12 de la Loi.

3. Les listes à établir par les émetteurs ou les personnes agissant en leur nom ou pour leur compte comprenant les personnes ayant accès régulièrement ou occasionnellement aux informations privilégiées

Selon l'article 16 de la Loi, les émetteurs, ou les personnes qui agissent au nom ou pour le compte de ceux-ci, établissent une liste des personnes travaillant pour eux, que ce soit dans le cadre d'un contrat de travail ou non, et ayant accès, de manière régulière ou occasionnelle, à des informations privilégiées concernant directement ou indirectement l'émetteur et notifient l'inscription sur cette liste aux personnes concernées. En ce qui concerne le champ d'application de l'obligation d'établir une telle liste, l'article 13 de la Loi précise que l'article 16 s'applique uniquement aux émetteurs dont les instruments financiers sont admis à la négociation sur un marché réglementé situé ou opérant au Luxembourg ou dont les instruments financiers font l'objet d'une demande d'admission à la négociation sur un tel marché, que ces émetteurs aient leur siège statutaire au Luxembourg ou à l'étranger. L'article 16 ne s'applique donc pas aux émetteurs qui n'ont pas demandé ou accepté l'admission de leurs instruments financiers à la négociation sur un marché réglementé situé ou opérant au Luxembourg.

La liste d'initiés devra comprendre en particulier les personnes qui, de par leur implication au niveau de décision « managérial », ont un accès régulier à des informations privilégiées et le pouvoir de prendre des décisions de gestion concernant l'évolution future et la stratégie d'entreprise de l'émetteur. Cette liste comprendra par ailleurs les personnes qui travaillent de manière régulière sur des sujets sensibles (c'est-à-dire des initiés permanents telles que les personnes impliquées à un certain niveau dans la

préparation des résultats annuels, trimestriels ou semestriels), ainsi que, le cas échéant, des personnes qui sont appelées de manière occasionnelle à travailler sur des dossiers comprenant des informations privilégiées. La liste d'initiés ne devra pas comprendre les personnes qui pourraient éventuellement avoir accès par hasard à des informations privilégiées. Au cas où il a été constaté que ces personnes ont effectivement eu accès à de telles informations, elles devront bien entendu figurer sur la liste.

La liste d'initiés doit mentionner (i) l'identité de toute personne ayant accès à des informations privilégiées (nom, prénom et adresse de résidence[2]), (ii) le motif pour lequel elle est inscrite sur la liste (p. ex. la fonction et/ou la position auprès de son employeur) et (iii) les dates de création et d'actualisation de la liste. Les émetteurs, ou les personnes qui agissent au nom ou pour le compte de ceux-ci, doivent actualiser la liste d'initiés dans les conditions prescrites dans la Loi et notifier les changements effectués aux personnes concernées. Les émetteurs, ou les personnes qui agissent en leur nom ou pour leur compte, conservent la liste d'initiés initiale et ses versions actualisées pendant au moins cinq ans après sa création ou son actualisation. Ces dispositions visent à assurer que les autorités compétentes pourront avoir accès à des listes à jour dans le cadre de leurs enquêtes sur des abus de marché. Les émetteurs ne sont pas tenus de communiquer les listes d'initiés de leur propre initiative à la CSSF, mais seulement sur demande.

Pour les émetteurs qui ont demandé l'admission de leurs instruments financiers à la négociation sur un marché réglementé situé ou opérant au Luxembourg, et dont les instruments financiers sont également admis à la négociation sur un marché boursier situé ou opérant dans un pays autre que le Luxembourg, la CSSF accepte que les listes d'initiés à établir conformément à l'article 16 de la Loi puissent être établies dans la forme prévue, le cas échéant, par la réglementation applicable sur cet autre marché boursier à condition de comprendre les informations mentionnées aux paragraphes précédents.

4. Les déclarations relatives aux opérations effectuées par les personnes exerçant des responsabilités dirigeantes au sein d'un émetteur et les personnes qui leur sont étroitement liées ainsi que les modalités de publication desdites opérations

Selon l'article 17 de la Loi, les personnes exerçant des responsabilités dirigeantes au sein d'un émetteur ayant son siège statutaire au Luxembourg et, le cas échéant, les personnes ayant un lien étroit avec elles, déclarent à la CSSF et à l'émetteur toutes les opérations effectuées pour leur compte propre et portant sur des actions de l'émetteur admises à la négociation sur un marché réglementé, ou sur des instruments dérivés ou d'autres instruments financiers liés à ces actions. La déclaration doit être faite dans les cinq jours ouvrables suivant la conclusion de chaque opération individuelle. Les émetteurs ayant leur siège statutaire dans un pays tiers déclarent à la CSSF, dès qu'ils en ont pris connaissance, toutes les opérations que les personnes exerçant des responsabilités dirigeantes en leur sein et, le cas échéant, les personnes ayant un lien étroit avec elles, ont effectuées pour compte propre et portant sur des actions de l'émetteur admises à la

[2] Pour des raisons pratiques, les adresses de résidence des employés de l'émetteur peuvent être établies et mises à jour sur une liste distincte tenue par un autre service de l'émetteur (tel que le service des ressources humaines), mais devront impérativement figurer sur la liste unique et exhaustive à remettre à la CSSF sur sa demande.

négociation sur un marché réglementé, ou sur des instruments dérivés ou d'autres instruments financiers liés à ces actions sous réserve que la CSSF soit l'autorité auprès de laquelle ces émetteurs sont tenus de déposer les informations annuelles relatives à leurs actions en vertu de l'article 10 de la directive prospectus (2003/71/CE).[3]

La Loi précise les informations que les déclarations doivent contenir et les déclarants sont invités à utiliser à cette fin le formulaire annexé à la présente circulaire en tant qu'ANNEXE C. Les émetteurs veillent à ce que l'information visée aux paragraphes 1 et 2 de l'article 17 de la Loi soit accessible au public aisément et dès que possible, pour le moins en langue française, allemande ou anglaise.[4]

En ce qui concerne le déclenchement de l'obligation de déclaration, il est précisé que notamment les acquisitions par voie successorale, par voie de donation, en application d'un contrat de travail ou comme partie de la rémunération ne tombent pas sous l'obligation de déclaration de l'article 17 de la Loi.

Il est également à noter que l'article 1. 13) de la Loi inclut parmi les personnes ayant un lien étroit avec un dirigeant, toute « personne morale, patrimoine fiduciaire ou autre trust, ou toute association sans personnalité juridique dont les responsabilités dirigeantes sont exercées par [un dirigeant ou un de ses proches] (…) ou qui est directement ou indirectement contrôlée par [une telle] personne ou qui a été constituée au bénéfice [d'une telle] personne, ou dont les intérêts économiques sont substantiellement équivalents à ceux [d'une telle] personne ». En ce qui concerne le premier type de personne liée (visée au quatrième tiret de l'article 1. 13), à savoir toute personne morale dont un dirigeant est également un administrateur ou autre responsable de haut niveau de l'émetteur coté, ou un proche de cet administrateur ou autre responsable de haut niveau, l'obligation de déclaration ne sera cependant déclenchée dans le chef du dirigeant concerné et d'une telle personne morale que si la personne morale agit dans l'intérêt de ce dirigeant.

5. Les opérations de rachat et de stabilisation et le Règlement (CE) N° 2273/2003

Selon l'article 4 du Règlement (CE) N° 2273/2003 concernant les conditions relatives aux programmes de rachat et à la publicité, le programme de rachat doit respecter les conditions énoncées à l'article 19, paragraphe 1, de la directive 77/91/CEE (deuxième directive concernant la constitution de la société anonyme, le maintien et la modification de son capital)[5]. Le détail du programme approuvé conformément audit article 19 doit

[3] « 2. Le document est déposé auprès de l'autorité compétente de l'État membre d'origine après la publication des comptes annuels. » Prière de se référer à l'article 2.1 (h) de la loi prospectus (transposant l'article 2.1 (m) de la directive prospectus) et à la Circulaire CSSF 05/224

[4] Dans tous les cas où un émetteur doit rendre une information accessible au public, il suffira que l'information soit affichée sur son site Internet. Dans tous les cas où un émetteur doit activement divulguer des informations ou, en vertu de la Loi, les rendre publiques « en utilisant des canaux de distribution dont on peut raisonnablement attendre une diffusion efficace des informations auprès du public », il conviendra de se référer au point 3 de la Circulaire CSSF 06/257 décrivant les moyens d'une divulgation d'informations.

[5] « (…) a) L'autorisation d'acquérir est accordée par l'assemblée générale qui fixe les modalités des acquisitions envisagées, et notamment le nombre maximal d'actions à acquérir, la durée pour laquelle l'autorisation est accordée et qui ne peut excéder dix-huit mois et, en cas d'acquisition à titre onéreux, les contre-valeurs minimales et maximales.

être divulgué d'une manière adéquate au public dans les États membres dans lesquels l'émetteur a demandé l'admission de ses actions à la négociation sur un marché réglementé avant le début des opérations. En ce qui concerne les moyens appropriés pour une divulgation active d'informations au public luxembourgeois, les personnes concernées sont invitées à se référer au point 3 de la Circulaire CSSF 06/257.

Ces informations comprennent notamment l'objectif visé conformément à l'article 3 du Règlement (CE) N° 2273/2003 (à savoir la réduction de capital d'un émetteur (en valeur ou en nombre d'actions) ou le moyen de lui permettre d'honorer des obligations liées i) à des titres de créances donnant accès à des titres représentatifs de capital (*equity instruments*) ; ou ii) à des programmes d'options sur actions ou autres allocations d'actions aux salariés de l'émetteur ou d'une entreprise associée), la contre-valeur maximale, le nombre maximal d'actions à acquérir et la durée pour laquelle le programme a été autorisé. Toute modification ultérieure du programme fait à nouveau l'objet d'une divulgation adéquate au public dans les Etats membres concernés.

L'émetteur doit, en outre, mettre en place le dispositif nécessaire pour s'acquitter des obligations d'information concernant ces opérations envers l'autorité compétente du marché réglementé sur lequel les actions ont été admises à la négociation. Ce dispositif doit permettre d'enregistrer chaque opération liée à un programme de rachat, y compris toutes les informations et données pertinentes y relatives (c'est-à-dire notamment le nom et le nombre des instruments achetés ou vendus, la date et l'heure de la transaction, le prix de la transaction et la possibilité d'identifier l'entreprise d'investissement). Par ailleurs, les détails de toutes les opérations visées ci-dessus sont rendus publics par l'émetteur (par exemple, en les affichant sur son site Internet) au plus tard à la fin de la septième journée boursière suivant leur date d'exécution. La notification à la CSSF de même que la publication des informations se fait au moyen du formulaire reproduit à l'ANNEXE D de la présente circulaire.

Dans le contexte de l'article 8 2. deuxième paragraphe du Règlement (CE) N° 2273/2003, il est utile de clarifier que le Luxembourg fait partie des Etats membres qui autorisent les opérations de stabilisation avant le début des négociations sur un marché réglementé.

Selon l'article 9 du Règlement (CE) N° 2273/2003 concernant les conditions relatives à la publicité et à l'information concernant la stabilisation, les émetteurs ou les offreurs[6], ou les entités entreprenant la stabilisation agissant ou non pour le compte de ces personnes, divulguent au public les informations ci-après avant le début de la période durant laquelle les valeurs concernées sont offertes :

Les membres des organes d'administration ou de direction sont tenus de veiller à ce que, au moment de toute acquisition autorisée, les conditions indiquées sous b), c) et d) soient respectées;
b) la valeur nominale ou, à défaut de valeur nominale, le pair comptable des actions acquises, y compris les actions que la société aurait acquises antérieurement et qu'elle aurait en portefeuille ainsi que les actions acquises par une personne agissant en son propre nom mais pour le compte de cette société, ne peut dépasser 10 % du capital souscrit;
c) les acquisitions ne peuvent avoir pour effet que l'actif net devienne inférieur au montant indiqué à l'article 15 paragraphe 1 sous a) (capital souscrit, augmenté des réserves que la loi ou les statuts ne permettent pas de distribuer);
d) l'opération ne peut porter que sur des actions entièrement libérées. »

[6] Par « offreur » au sens du Règlement (CE) N° 2273/2003, on entend le détenteur préalable ou l'entité émettrice des valeurs concernées.

a) le fait qu'une stabilisation peut être entreprise, qu'il n'est pas garanti qu'elle le soit effectivement et qu'il peut y être mis fin à tout moment ;
b) le fait que les opérations de stabilisation visent à soutenir le prix des valeurs concernées sur le marché ;
c) le début et la fin de la période durant laquelle une stabilisation peut avoir lieu ;
d) l'identité du gestionnaire de la stabilisation, à moins qu'elle ne soit pas connue au moment de la publication, auquel cas elle est divulguée au public avant le début des opérations de stabilisation ;
e) l'existence éventuelle et la taille maximale de toute facilité de surallocation ou option de couverture correspondante, la période d'exercice d'une telle option et les modalités éventuelles du recours à cette facilité ou de l'exercice de cette option.

Ces dispositions ne s'appliquent cependant pas aux offres entrant dans le champ des mesures d'application de la directive prospectus (2003/71/CE), c'est-à-dire qu'elles ne s'appliquent pas aux offres pour lesquelles un prospectus doit être établi en accord avec le Règlement prospectus (CE) N° 808/2004. Pour certaines de ces offres, le Règlement prospectus (CE) N° 808/2004 prévoit alors expressément l'insertion d'informations en relation avec des opérations de stabilisation dans le prospectus.

Sans préjudice de l'article 12, paragraphe 1, point c)[7], de la Directive Abus de marché, les émetteurs ou les offreurs, ou les entités entreprenant la stabilisation agissant ou non pour le compte de ces personnes, notifient les détails de toutes les opérations de stabilisation à la CSSF pour les opérations sur des instruments financiers admis à la négociation sur un marché réglementé au Luxembourg, ou pour lesquels une demande d'admission à la négociation sur un tel marché a été présentée, au plus tard à la fin de la septième journée boursière suivant la date d'exécution de ces opérations. Cette notification se fait au moyen du formulaire de l'ANNEXE E de la présente circulaire (qui peut être envoyé par courriel à l'adresse suivante : maf@cssf.lu).

Dans la semaine qui suit la fin de la période de stabilisation, les émetteurs ou les offreurs, ou les entités entreprenant la stabilisation agissant ou non pour le compte de ces personnes, divulguent d'une manière adéquate au public les informations suivantes:
a) le fait qu'une stabilisation a été effectuée ou non ;
b) la date de début de la stabilisation ;
c) la date à laquelle la dernière opération de stabilisation a été effectuée ;
d) la fourchette de prix à l'intérieur de laquelle la stabilisation a eu lieu, pour chaque date à laquelle des opérations de stabilisation ont été effectuées.

Les émetteurs ou les offreurs, ou les entités entreprenant la stabilisation agissant ou non pour le compte de ces personnes, enregistrent chaque ordre ou chaque opération de stabilisation, avec – au minimum – toutes les informations et données pertinentes y relatives (c'est-à-dire notamment le nom et le nombre des instruments achetés ou vendus, la date et l'heure de la transaction, le prix de la transaction et la possibilité d'identifier

[7] « L'autorité compétente est investie de tous les pouvoirs de surveillance et d'enquête nécessaires à l'exercice de ses fonctions. Elle exerce ces pouvoirs:
(…) c) sous sa responsabilité, par délégation à d'autres autorités ou aux entreprises de marché. »

l'entreprise d'investissement) étendues aux instruments financiers autres que ceux qui sont admis ou appelés à être admis sur le marché réglementé.

6. Eléments relatifs aux obligations imposées aux OPC en tant qu'émetteurs d'instruments financiers

Les éléments exposés ci-dessous ne visent que les obligations imposées par la Loi aux OPC en tant qu'émetteurs d'instruments financiers ou, le cas échéant, à leurs dirigeants. Ne sont pas reprises de manière distincte sous ce point les autres dispositions de la Loi qui s'appliquent également aux OPC, dont notamment l'interdiction de procéder à des opérations d'initiés ou à des manipulations de marché.

a. Les OPC auxquels la Loi impose des obligations dans ce contexte

Les OPC auxquels la Loi impose des obligations dans ce contexte sont les OPC ayant leur siège statutaire au Luxembourg ou à l'étranger dont les actions ou parts sont admises à la négociation sur le marché réglementé de la Bourse de Luxembourg ou dont les actions ou parts font l'objet d'une telle demande d'admission. La Loi ne s'applique pas aux OPC qui n'auraient pas demandé ou accepté une telle admission de leurs actions ou parts. Ne sont pas non plus concernés par les obligations discutées dans ce point 6, les OPC luxembourgeois ou étrangers dont les actions ou parts sont uniquement admises à un MTF (tel que le marché Euro MTF de la Bourse de Luxembourg).

b. La qualité d'émetteur

Si l'OPC a la forme d'une société d'investissement, l'OPC est à considérer comme émetteur. Dans le cas d'un FCP, la société de gestion doit être considérée comme émetteur. Néanmoins dans la définition du terme «informations privilégiées », il faudra lire la référence aux informations qui concernent un « émetteur d'instruments financiers » comme une référence au FCP.[8]

c. L'application pratique de certaines dispositions de la Loi applicables aux OPC concernés

Dans ce contexte, la présente circulaire précise quelles sont les obligations imposées de manière générale par la Loi aux émetteurs d'instruments financiers qui s'appliquent aussi aux OPC, ainsi que la manière dont ces obligations doivent alors être mises en œuvre en pratique.

(i) L'obligation de rendre publiques les informations privilégiées

[8] Une information concernant la société de gestion ne sera « privilégiée » que si elle concerne indirectement le FCP (par exemple le fait qu'une société de gestion se trouve en cessation de payements et que son crédit est ébranlé avant la déclaration formelle en état de faillite) et si elle est susceptible d'influencer de façon sensible le cours des parts du FCP.

L'obligation de rendre publiques les informations privilégiées s'applique en principe aux OPC. Toutefois l'impact pratique d'une telle obligation devrait être limité, notamment pour les OPC largement diversifiés et qui publient leur VNI (valeur nette d'inventaire) de manière quotidienne ou à des dates, qui compte tenu de la politique d'investissement, peuvent être considérées comme étant rapprochées. Il s'agit notamment des OPCVM soumis à la Partie I de la loi du 20 décembre 2002 relative aux organismes de placement collectif et des autres OPC largement diversifiés qui suivent des règles de diversification comparables à celles prévues par la Partie I de cette loi.

En effet, dans ce cas, le cours de bourse est étroitement lié à la VNI applicable, ce qui devrait écarter en principe tout risque majeur d'existence d'une information répondant aux exigences de l'article 1.1) de la Loi et étant susceptible d'influencer de façon sensible le cours de bourse. La correction d'une VNI déjà publiée est susceptible d'être considérée comme une information privilégiée. Il est rappelé dans ce contexte que l'obligation de rendre publique une VNI recalculée existe par ailleurs déjà en application des lois applicables aux OPC. En dehors de ces cas, l'existence d'informations privilégiées devrait être rare.

Par contre, des informations privilégiées sont susceptibles d'exister par rapport à des OPC qui ne suivent pas des règles de diversification comparables à celles prévues par la Partie I de la loi du 20 décembre 2002 relative aux organismes de placement collectif ou qui ne calculent pas leur VNI à des dates rapprochées et le cas échéant aux OPC dont le cours de bourse est susceptible d'afficher une décote ou une surcote non marginale par rapport à la VNI.

(ii) L'obligation d'établir des listes d'initiés

Il convient de faire la même distinction que sous le point précédent. En effet, il faudra juger de la nécessité d'établir des listes d'initiés en tenant compte de la distinction entre :

i) les OPC largement diversifiés et qui publient leur VNI de manière quotidienne ou à des dates, qui compte tenu de la politique d'investissement, peuvent être considérées comme étant rapprochées (notamment les OPCVM soumis à la Partie I de la loi du 20 décembre 2002 relative aux organismes de placement collectif et les autres OPC largement diversifiés qui appliquent des règles de diversification comparables à celles prévues par la Partie I de cette loi) ;
ii) les OPC qui ne suivent pas les règles de diversification de la Partie I de la loi du 20 décembre 2002 relative aux organismes de placement collectif ou qui ne calculent pas leur VNI à des dates rapprochées ; et
iii) les OPC dont le cours de bourse est susceptible d'afficher une décote ou une surcote non marginale par rapport à la VNI.

Pour les OPC largement diversifiés et qui calculent leur VNI à des dates rapprochées, les cas où des personnes doivent figurer sur la liste devraient être rares en pratique. En ce qui concerne les autres OPC, les cas dans lesquels une

liste d'initiés devra être établie peuvent être plus nombreux et comprendraient alors les personnes chargées de prendre des décisions d'investissement et celles en charge de l'orientation stratégique de l'OPC (les « initiés permanents »). En outre, dans ces OPC, la liste d'initiés devrait inclure les personnes responsables pour la préparation des résultats annuels, trimestriels ou semestriels et/ou les personnes qui sont impliquées dans la détermination de la valeur des actifs de l'OPC ou de la valeur d'une partie substantielle des actifs de l'OPC et qui peuvent ainsi se forger une vue globale sur la valeur des parts de l'OPC.

La liste est à établir et à tenir à jour par l'OPC ou par sa société de gestion au cas où il s'agit d'un fonds commun de placement ou d'une société d'investissement fonctionnant avec une société de gestion désignée.

(iii) L'obligation de déclaration des opérations effectuées par des dirigeants

L'article 17 de la Loi prévoit en principe une obligation de déclaration en cas d'opérations qui seraient effectuées par certaines catégories de personnes. Une interprétation tenant compte de la finalité de cette disposition indique que les OPC ne sont pas visés par cette dernière. La prise en considération de la terminologie utilisée par la Loi amène à la conclusion que, dans ce contexte spécifique, l'article 17 de la Loi n'est pas applicable aux OPC.

(iv) L'obligation de notification des opérations suspectes

Il est rappelé que les OPC (et leurs sociétés de gestion) ne sont pas concernés par l'obligation de notification des opérations suspectes prévue par l'article 12 de la Loi. Ce dernier s'applique uniquement aux établissements de crédits et aux autres professionnels du secteur financier. Ainsi, les obligations de l'article 12 s'appliqueront aux établissements de crédit agissant comme banque dépositaire ou comme agent chargé de l'administration centrale d'un OPC coté et aux PSF agissant comme agent chargé de l'administration centrale d'un OPC coté, si à l'occasion de l'exercice de leurs fonctions, ils prennent connaissance de faits qui leur donnent des raisons de soupçonner qu'une opération pourrait constituer un abus de marché.

Nous vous prions d'agréer, Mesdames, Messieurs, l'expression de nos sentiments distingués.

COMMISSION DE SURVEILLANCE DU SECTEUR FINANCIER

Simone DELCOURT	Arthur PHILIPPE	Jean-Nicolas SCHAUS
Directeur	Directeur	Directeur général

Annexes :

Annexe A : « Market Abuse Directive Level 3 – first set of CESR guidance and information on the common operation of the Directive; Ref: CESR/04-505b »

Annexe B : Formulaire de notification des opérations suspectes
(format .xls : http://www.cssf.lu/fileadmin/files/cssf07_280_annexeB.xls)

Annexe C : Déclaration des opérations des personnes exerçant des responsabilités dirigeantes
(format .xls : http://www.cssf.lu/fileadmin/files/cssf07_280_annexeC.xls)

Annexe D : Formulaire de notification relative aux opérations de rachat
(format .xls : http://www.cssf.lu/fileadmin/files/cssf07_280_annexeD.xls)

Annexe E : Formulaire de notification relative aux opérations de stabilisation
(format .xls : http://www.cssf.lu/fileadmin/files/cssf07_280_annexeE.xls)

Annexe F : « Market Abuse Directive Level 3 – second set of CESR guidance and information on the common operation of the Directive to the market; Réf.: CESR/06-562b »

ANNEXE A :
« Market Abuse Directive Level 3 – first set of CESR guidance and information on the common operation of the Directive Ref: CESR/04-505b »

THE COMMITTEE OF EUROPEAN SECURITIES REGULATORS

Ref: CESR/04-505b

Market Abuse Directive

Level 3 – first set of CESR guidance and information on the common operation of the Directive

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Index

I. Executive Summary

1.1 CESR's first set of guidance at level 3 concentrates on three market facing issues that CESR members consider to be priorities. The priority areas cover accepted market practices in relation to market manipulation, guidance on what CESR members consider to constitute market manipulation and guidance and a common reporting format for reporting suspicious transactions.

1.2 Chapter two sets out the key issues facing CESR members when operating the Accepted Market Practices (AMPs) regime established in the directive. In chapter three, CESR has established a common format for the analysis of AMPs which will facilitate the consultation obligations placed upon CESR members.

1.3 Chapter four provides guidance to the market on types of practices that CESR members would consider to constitute Market Manipulation. They are described in non-legal terms and they are not intended to affect the scope of interpretation of the relevant directives and regulation.

1.4 Chapter five concludes the paper with guidance and a common format for reporting suspicious transactions. CESR's aim is to ensure that the directive obligation on reporting such transactions operates in a proportionate and effective manner.

II. Accepted Market Practices

2.1 In undertaking its level 3 work, CESR has been particularly mindful of the need to focus its energy on ensuring the proper operation of the regime for accepted market practices (AMPs) in relation to market manipulation. This is dealt with in this section of the paper.

2.2 It should be noted that the concept of accepted market practices also applies to the information which users of commodity derivatives markets would expect to be made public concerning commodity derivatives. This aspect of the Directive is not dealt with in this paper. However, CESR confirms that it is mindful of the need to ensure the smooth operation of AMPs in this field and will keep this under review.

Guidance Provided by the Directive and Level 2 Advice

2.3 Preamble 20 of the Directive 2003/6/EC states that "a person who enters into transactions or issues orders to trade, which are constitutive of market manipulation may be able to establish that the reasons for entering into such transaction or issuing orders to trade were legitimate and that the transactions and orders to trade were in conformity with accepted practice on the regulated market concerned."

2.4 Article 1(5) of the Directive 2003/6/EC defines Accepted Market Practices as 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…".

2.5 These guidelines have now been set out in level 2 implementing measures in Directive 2004/72/EC. In article 2 of that Directive, competent authorities need to assess a particular market practice before accepting it against a non-exhaustive list of factors. Article 3 then sets out the process that the competent authority must follow which includes consultation and disclosure of the decisions.

2.6 It should be emphasised that accepted market practices in no way constitute safe harbours similar to those provided by Articles 7 and 8 of the Directive (which deal with share buy-backs and stabilisation). The intention of the accepted market practice concept is to avoid the penalising of behaviours which would constitute market manipulation under the effect based definition of market manipulation in Article 1(2)(a) of Directive 2003/6/EC, as under certain conditions such behaviours might be justified. However, to benefit from the defence provided, in addition to the transaction/order to trade conforming with an accepted market practice, the person who entered into the transaction or issued the order to trade must establish that their reasons for so doing are legitimate. In the absence of a legitimate purpose the accepted market practice defence would not be available.

Operational issues raised by the legal framework

2.7 The legal framework applicable to accepted market practices raises a number of operational issues that need to be dealt with by CESR and its members.

Process, consultation and disclosure

2.8 The decision as to whether a process constitutes an AMP or not, is a matter of national discretion. AMPs, therefore, are the responsibility of individual CESR members and so a practice which one competent authority considers is an AMP, may not be viewed as such by another. However, each member has a duty to consult, both nationally and with other competent authorities, and to disclose any market practices that they have accepted. There is also an obligation on CESR to publish the AMPs on its website. These will be published in the standard CESR format and a link provided to the national legal text.

2.9 In order to facilitate the implementation of the Directive, CESR members have, during the course of working on this paper, exchanged views on AMPs. It has been decided not to

publish the AMPs which are currently under consideration or have been agreed, as an annex to this paper. Instead, AMPs, once they have been recognised and have undergone the requisite national and European consultation process, are to be published on CESR's website. This means that information upon them can remain contemporaneous as would not be the case if they were published as a static annex. In the future, CESR through CESR-Pol, will exchange views on both existing and emerging AMPs to ensure that European market integrity is maintained.

Market practices versus activities

2.10 CESR has consistently made a distinction between practices and activities carried out in financial markets. The implementing measures at level 2 were based on advice CESR submitted to the Commission in August 2003 (CESR/03-212c). In paragraph 5 of that advice CESR stated that 'Activities' "would cover different types of operations or strategies that may be undertaken such as arbitrage, hedging and short selling. On the other hand, market 'practices' would cover the way these activities are handled and executed in the market."

2.11 In the view of CESR members, 'activities' are considered to be too broad to qualify for the status of accepted market practices. An 'activity' such as short selling or hedging could be undertaken in many different ways. If the activity is carried out in a way which does not constitute market manipulation, then the question of giving it accepted market practice status does not arise. On the other hand, if the 'activity' is carried out in a way which would constitute market manipulation, it is unlikely that a competent authority would be prepared to accept it as an accepted market practice. Hence to give an activity a blanket accepted market practice status would neither be meaningful nor desirable.

2.12 CESR members also considered the issues of whether certain more specific practices, such as crossing/pre-arranged trades, should be given accepted market practice status, subject to the condition that these practices should be undertaken according to the rules of the relevant regulated market applicable to their conduct. However, CESR members came to the conclusion that, in most of the cases considered, conduct of the practice in conformity with the rules of the relevant regulated market would be sufficient in itself to promote market integrity and therefore the question of giving the practice accepted market practice status would not arise.

Common format for assessing AMPs

2.13 CESR members have devised a common format for assessing AMPs. This is set out in accordance with the Directive 2004/72/EC and is designed to facilitate the consultation and disclosure processes. The form is set out in Section III of this guidance.

III. Format of the table for assessing AMP's

Description of the National AMP:

Rationale for why the practice would constitute manipulation

[refer to article 1(2) (a) of Directive 2003/6/EC]

List of Factors

Commission Directive 2004/72/EC Article 2

Non-exhaustive list of factors to be taken into account by Competent Authorities when assessing particular practices whether they occur on a regulated market or an OTC market:

- The level of transparency of the relevant market practice to the whole market(art 2(1) (a))

Transparency of market practices by market participants is crucial for considering whether a particular market practice can be accepted by competent authorities. The less transparent a practice is, the more likely it is not to be accepted. However, practices on non regulated markets might for structural reasons be less transparent than similar practices on regulated markets. Such practices should not be in themselves considered as unacceptable by competent authorities. (preamble 2)

Conclusion regulator:
[fill in the rationale for this factor]

- the need to safeguard the operation of market forces and the proper interplay of the forces of supply and demand; (art 2(1) (b))

Market practices inhibiting the interaction of supply and demand by limiting the opportunities for other market participants to respond to transactions can create higher risks for market integrity and are, therefore, less likely to be accepted by competent authorities. (preamble 1)

Conclusion regulator:
[fill in the rationale for this factor]

- the degree to which the relevant market practice has an impact on market liquidity and efficiency. (art 2(1) (c))

  Market practices which enhance liquidity and efficiency are more likely to be accepted than those reducing them. (Preamble 1)

Conclusion regulator: [fill in the rationale for this factor]

- the degree to which the relevant practice takes into account the trading mechanism of the relevant market and enables market participants to react properly and in a timely manner to the new market situation created by that practice(art 2(1) (d)).

Conclusion regulator: [fill in the rationale for this factor]

- the risk inherent in the relevant practice for the integrity of, directly or indirectly, related markets, whether regulated or not, in the relevant financial instrument within the whole Community. (art 2(1) (e))

  Particular market practices in a given market should not put at risk market integrity of other, directly or indirectly, related markets throughout the Community, whether those markets be regulated or not. Therefore, the higher the risk for market integrity on such a related market is within the Community, the less those practices are likely to be accepted by competent authorities. (Preamble 3)

Conclusion regulator: [fill in the rationale for this factor]

- the outcome of any investigation of the relevant market practice by any competent authority or other authority mentioned in Article 12(1) of Directive 2003/6/EC, in particular whether the relevant market practice breached rules or regulations designed to prevent market abuse, or codes of conduct, be it on the market in question or on directly or indirectly related markets within the Community; (art 2(1) (f))

Conclusion regulator: [fill in the rationale for this factor]

- the structural characteristics of the relevant market including whether it is regulated or not, the types of financial instrument traded and the type of market participants, including the extent of retail investors participation in the relevant market; (art 2(1) (g))

Conclusion regulator: [fill in the rationale for this factor]

Overriding Principles

Overriding principles to be observed by Competent Authorities to ensure that accepted market practices do not undermine market integrity, while fostering innovation and the continued dynamic development of financial markets:

- new or emerging accepted market practices should not be assumed to be unacceptable by the Competent Authority simply because they have not been previously accepted by it;
- Practising fairness and efficiency by market participants is required in order not to create prejudice to normal market activity and market integrity.
- Competent Authorities should analyse the impact of the relevant market practice against the main market parameters such as weighted average price of a single session, daily closing price, specific market conditions, before carrying out the relevant market practice.

Conditional elements

In this final section, you should comment on any conditions relating to legitimate reasons and proper execution.

IV. Types of practice that CESR members would consider to constitute Market Manipulation

Introduction

4.1 The work in this area is aimed at providing the competent authorities and market participants with examples of types of market manipulation which have occurred in recent years and which, in the view of CESR members, would breach the prohibitions on market manipulation contained in the Market Abuse Directive. The guidance and accompanying examples are intended to help the development of a common understanding of what constitutes market manipulation.

4.2 The guidance and examples could also facilitate the identification of relevant variables (diagnostic flags or signals of market manipulation) that could be monitored by competent authorities and by market participants within the limits of their sphere of activity in order to detect or avoid engaging in market manipulation. The examples may also be useful in helping the relevant market practitioners to meet the requirement to notify suspicious transactions to competent authorities.

4.3 Market manipulation can often be avoided by implementing adequate market microstructure measures by explicit rules that forbid specific behaviours or by preventative measures set up by market participants. Therefore some unacceptable conduct set out in the following guidance and examples may not actually be feasible in all market environments across Europe and therefore should not necessarily be read as universally applicable.

Disclaimer

4.4 **The examples of types of practice set out in this paper are deliberately described in non-legal technical terms and it is emphasised that the descriptions are not intended to affect the scope of interpretation of market abuse directives and regulations.**

Directive Definition of Market Manipulation

4.5 The Market Abuse Directive defines market manipulation as meaning:-

a. Transactions or orders to trade:-

- which give, or are likely to give, false and misleading signals as to the supply of, demand for or price of financial instruments [for ease of reference this might be termed "false or misleading transactions"]; or

- which secure by a person or persons acting in collaboration, the price of one or several financial instruments at an abnormal or artificial level ["price positioning"]

unless the transaction/order to trade had a legitimate reason and conforms to accepted market practices on the regulated market concerned.

b. Transactions or orders to trade which employ fictitious devices or any other form of deception or contrivance ["fictitious devices"].

c. Dissemination of information through the media… which gives or is likely to give false and misleading signals as to financial instruments … where the person who made the dissemination knew, or ought to have known, that the information was false or misleading… ["false or misleading information"]

4.6 It is noted that the acceptable market practice defence can only be available in respect of the first two categories ("false and misleading transactions" and "price positioning"). No such defence is available in respect of the other categories.

4.7 The Directive itself gives three particular instances of market manipulation:-

i. Conduct by a person, or persons acting in collaboration, to secure a dominant position over the supply of or demand for a financial instrument which has the effect of fixing, directly or indirectly, purchase or sale price or creating other unfair trading conditions;

ii. The buying or selling of financial instruments at the close of the market with the effect of misleading investors acting on the basis of closing prices;

iii. Taking advantage of occasional or regular access to the traditional or electronic media by voicing an opinion about a financial instrument (or indirectly about its issue) while having previously taken positions on that financial instrument and profiting subsequently from the impact of the opinions voiced on the price of that instrument, without having simultaneously disclosed that conflict of interest to the public in a proper and effective way.

Possible Signals of Market Manipulation

4.8 Article 4 of implementing Directive 2003/124/EC sets out the following non-exhaustive signals of false or misleading transactions or price positioning transactions, which should not necessarily be deemed in themselves to constitute market manipulation.

a. The extent to which orders to trade given or transactions undertaken represent a significant proportion of the daily volume or transactions in the relevant financial instrument on the regulated market concerned, in particular when these activities lead to a significant change in the price of the financial instruments;

b. The extent to which orders to trade given or transactions undertaken by persons with a significant buying or selling position in a financial instrument lead to significant changes in the price of the financial instrument or related derivative or underlying asset admitted to trading on a regulated market;

c. Whether transactions undertaken lead to no change in beneficial ownership of a financial instrument admitted to trading on a regulated market;

d. The extent to which orders to trade given or transactions undertaken include position reversals in a short period and represent a significant proportion of the daily volume or transactions in the relevant financial instrument on the regulated market concerned, and might be associated with significant changes in the price of a financial instrument admitted to trading on a regulated market;

e. The extent to which orders to trade given or transactions undertaken are concentrated within a short time span in the trading session and lead to a price change which is subsequently reversed;

f. The extent to which orders to trade given change the representation of the best bid or offer prices in a financial instrument admitted to trading on a regulated market, or more generally the representation of the order book available to market participants, and are removed before they are executed;

g. The extent to which orders to trade are given or transactions are undertaken at or around a specific time when reference prices, settlement prices and valuations are calculated and lead to price changes which have an effect on such prices and valuations.

4.9 Article 5 of the same Directive sets out the following non-exhaustive signals of transactions employing fictitious devices:

a. Whether orders to trade given or transactions undertaken by persons are preceded or followed by dissemination of false or misleading information by the same persons or persons linked with them;

b. Whether orders to trade are given or transactions are undertaken by persons before or after the same persons or persons linked to them produce or disseminate research or investment recommendations which are erroneous or biased or demonstrably influenced by material interest.

Again, these signals should not necessarily be deemed in themselves to constitute market manipulation.

Examples of the various types of practice which would constitute market manipulation

4.10 The following guidance gives examples of types of practice which, in the view of CESR members, would contravene the prohibition on market manipulation as defined by the Directive, although it is acknowledged that in some cases a practice may, in particular circumstances, have a legitimate purpose. The examples are categorised according to which element of market manipulation as defined by the Directive they relate to. However, it should be noted that there can be some overlap: a practice may involve a number of types of market manipulation according to how it is used.

4.11 False/Misleading Transactions

a) Wash trades. This is the practice of entering into arrangements for the sale or purchase of a financial instrument where there is no change in beneficial interests or market risk or where the transfer of beneficial interest or market risk is only between parties who are acting in concert or collusion. (Repo transactions and stock lending/borrowing or other transactions involving transfer of securities as collateral do not constitute wash trades.)

b) Painting the tape. This practice involves engaging in a transaction or series of transactions which are shown on a public display facility to give the impression of activity or price movement in a financial instrument.

c) Improper matched orders. These are transactions where both buy and sell orders are entered at or nearly at the same time, with the same price and quantity by different but colluding parties, unless the transactions are legitimate trades carried out in conformity with the rules of the relevant trading platform (e.g. crossing trades).

d) Placing orders with no intention of executing them. This involves the entering of orders, especially into electronic trading systems, which are higher/lower than the previous bid/offer. The intention is not to execute the order but to give a misleading impression that there is demand for or supply of the financial instrument at that price. The orders are then withdrawn from the market before they are executed. (A variant on this type of market manipulation is to place a small order to move the bid/offer price of the financial instrument and being prepared for that order to be executed if it cannot be withdrawn in time.)

4.12 Price Positioning

a) Marking the close. This practice involves deliberately buying or selling securities or derivatives contracts at the close of the market in an effort to alter the closing price of the security or derivatives contract. This practice may take place on any individual trading day but is particularly associated with dates such as future/option expiry dates or quarterly/annual portfolio or index reference/valuation points.

b) Colluding in the after market of an Initial Public Offer. This practice is particularly associated with Initial Public Offers of securities immediately after trading in the security begins. Parties which have been allocated stock in the primary offering collude to purchase further tranches of stock when trading begins in order to force the price of the security to an artificial level and generate interest from other investors – at which point they sell their holdings.

c) Abusive squeeze. This involves a party or parties with a significant influence over the supply of, or demand for, or delivery mechanisms for a financial instrument and/or the underlying product of a derivative contract exploiting a dominant position in order materially to distort the price at which others have to deliver, take delivery or defer delivery of the instrument/product in order to satisfy their obligations. (It should be noted that the proper interaction of supply and demand can and often does lead to market tightness but that this is not of itself market manipulation. Nor does having a significant influence over the supply of, demand for, or delivery mechanisms for an investment/product by itself constitute market manipulation.)

d) Creation of a floor in the price pattern. This practice is usually carried out by issuers or other entities which control them, and involves transactions or orders to trade employed in such a way that obstacles are created to the share prices falling below a certain level, mainly in order to avoid negative consequences for their share or credit ratings. This needs to be distinguished from legitimate trading in shares as part of "buy-back" programmes or the stabilisation of financial instruments.

e) Excessive bid-ask spreads. This conduct is carried out by intermediaries which have market power – such as specialists or market makers acting in cooperation – in such a way intentionally to move the bid-ask spread to and/or to maintain it at artificial levels and far from fair values, by abusing of their market power, i.e. the absence of other competitors.

f) Trading on one market to improperly position the price of a financial instrument on a related market. This practice involves undertaking trading in one market with a view to improperly influencing the price of the same or a related financial instrument in another market. Examples might be conducting trades in an equity to position the price of its derivative traded on another market at a distorted level or trading in the underlying product of a commodity derivative to distort the price of the derivative contract. (Transactions to take legitimate advantage of differences in the prices of financial instruments or underlying products as traded in different locations would not constitute manipulation.)

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4.13 **Transactions involving fictitious devices/deception**

a) Concealing ownership. This is a transaction or series of transactions which is designed to conceal the ownership of a financial instrument via the breach of disclosure requirements through the holding of the instrument in the name of a colluding party (or parties). The disclosures are misleading in respect of the true underlying holding of the instrument. (This practice does not cover cases where there are legitimate reasons for financial instruments to be held in the name of a party other than the beneficial owner – e.g. nominee holdings. Nor do all failures to make a required disclosure necessarily constitute market manipulation.)

b) Dissemination of false or misleading market information through media, including the internet, or by any other means (in some jurisdictions this is known as 'scalping'). This is done with the intention of moving the price of a security, a derivative contract or the underlying asset in a direction that is favourable to the position held or a transaction planned by the person disseminating the information.

c) Pump and dump. This practice involves taking a long position in a security and then undertaking further buying activity and/or disseminating misleading positive information about the security with a view to increasing the price of the security. Other market participants are misled by the resulting effect on price and are attracted into purchasing the security. The manipulator then sells out at the inflated price

d) 'Trash and cash'. This is the opposite of pump and dump. A party will take a short position in a security; undertake further selling activity and/or spread misleading negative information about the security with the purpose of driving down its price. The manipulator then closes their position after the price has fallen.

e) Opening a position and closing it immediately after its public disclosure. This practice is typically carried out by portfolio managers and other large investors whose investment decisions are usually valued by market participants as relevant signals of future price dynamics. The canonical unfair conduct consists in closing the position previously acquired immediately after having publicly disclosed it putting emphasis on the long holding period of the investment. However, making a report or disclosure will not, in itself, give rise to a false or misleading impression if it was made in the way specified by any applicable legal or regulatory requirement and was expressly required or permitted by such a requirement.

4.14 Dissemination of false and misleading information

This type of market manipulation involves dissemination of false and misleading information without necessarily undertaking any accompanying transaction. This could include creating a misleading impression by failure properly to disclose a price sensitive piece of information which should be disclosed. For example, an issuer with information which would meet the Directive definition of 'inside information' fails properly to disclose that information and the result that the public is likely to be misled.

(a) Spreading false/misleading information through the media. This involves behaviour such as posting information on an internet bulletin board or issuing a press release which contains false or misleading statements about a company whose shares are admitted to trading on a regulated market. The person spreading the information knows that it is false or misleading and is disseminating the information in order to create a false or misleading impression. Spreading false/misleading information through an officially recognised channel for disseminating information to users of a regulated market is particularly serious as it is important that market participants are able to rely on information dissemination via such official channels.

(b) Other behaviour designed to spread false/misleading information. This type of market manipulation would cover a course of conduct designed to give false and misleading impression through means other than the media. An example might be the movement of physical commodity stocks to create a misleading impression as to the supply or demand for a commodity or the deliverable into a commodity futures contract.

V. Possible Signals of Suspected Insider Dealing or Market Manipulation Transactions

Introduction

5.1 Article 6.9 of the Directive 2003/6/EC requires "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 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. Those subject to the requirement clearly need to ensure that they comply with this obligation. However, CESR does not propose in this initial guidance to prescribe how this obligation is discharged, except in respect of the form for reporting suspicious transactions.

5.2 This section is intended to provide those persons subject to the notification requirement with guidance as to indications of transactions which may involve insider dealing or market manipulation. Until the coming into force of the Market Abuse Directive, no Member State operated a mandatory suspicious transactions reporting regime for market abuse. However, in a number of jurisdictions, market participants had already been alerting the authorities on a voluntary basis to situations they regard as suspicious or abnormal in this context. The following guidance draws on these cases as well as the views of CESR members as to what might constitute a signal of a suspicious transaction. Annexed to this guidance is a standard reporting format which should be used by institutions to report suspicious transactions to the relevant competent authority.

The Duty to Notify Suspicious Transactions

5.3 It should be emphasised that the notification regime laid down by the Directive requires that persons subject to it decide on a case-by-case basis where there are reasonable grounds for suspicion concerning the relevant transaction. The indications given below are therefore neither exhaustive (a particular transaction may be suspicious even if it matches none of the indications) nor determinative (a transaction may not necessarily be suspicious simply because it matches one or more of the indications). The indications are therefore merely a starting point and firms need to exercise their judgement and consider the particular circumstances of the case before deciding whether or not to report.

5.4 CESR members are clear that blanket pro forma notifications to the authorities of all transactions conducted through an institution would not be in conformity with the provisions of the notification regime. Such notifications would not benefit from the protection provided by Article 11.3 of Directive 2004/72/EC against breach of restriction on disclosure obligations or other liabilities arising from the notification. This is because in the view of CESR members blanket notifications would not be in good faith. Nor would such practice conform with the requirement to consider on a case by case basis whether there were reasonable grounds for suspicion. CESR members are interested in quality not quantity of reporting and will pursue vigorously cases where firms are notifying transactions without seriously considering whether they meet the test of reasonable suspicion.

Guidance Provided by the Directive

5.5 Directive 2003/6/EC and accompanying implementing Directives outline what constitutes insider dealing and market manipulation. This is supplemented by the proposed CESR guidance on practice that constitutes market manipulation (see Chapter 4 of this paper).

5.6 It is worth noting Recital 9 of Directive (reference) which states

"Notification of suspicious transactions by persons professionally arranging transactions in financial instruments to the competent authority requires sufficient indications that the transactions might constitute market abuse…. Certain transactions by themselves may seem completely void of anything suspicious, but might deliver such indications of possible market abuse, when seen in perspective with other transactions, certain behaviour or other information."

Investment firms and credit institutions should therefore not only notify transactions which they consider are suspicious at the time the transaction is carried out but also any transactions of which, in the light of subsequent events/information (for example publication of financial results, profits warnings or announcement of a takeover bids in relation to the security in question), they might retrospectively become suspicious. However, this does not mean that they are required to go back and retroactively review transactions in the run-up to that event or development.

Indications of Possible Suspicious Transactions

5.7 It is again emphasised that these examples of indications are only a starting point for consideration of whether a transaction is suspicious and are neither conclusive nor comprehensive. Moreover, they are to be applied using judgement rather than necessarily being interpreted literally. It is recognised that transactions meeting signals may be legitimate and hence not give reasonable grounds for suspicion.

5.8 *Possible Signals of Insider Dealing or Market Manipulation*

a) An unusual concentration of transactions in a particular security (for example, with one or more institutional investors known to be affiliated with the issuer or a party with a particular interest in the issuer such as a bidder/potential bidder);

b) An unusual repetition of a transaction among a small number of clients over a certain period of time

c) Unusual concentration of transactions and/or orders with only one client; or with the different securities accounts of one client; or with a limited number of clients (especially if the clients are related to one another).

5.9 Possible Signals of Insider Dealing

a) The client opens an account and immediately gives an order to conduct a significant transaction or, in the case of a wholesale client, unexpectedly large or unusual orders in a particular security – especially if the client is insistent that the order is carried out very urgently or must be conducted before a particular time specified by the client;

b) The client's requested transaction or investment behaviour is significantly out of character with the client's previous investment behaviour. (e.g. type of security; amount invested; size of order; duration of holding). [1]

[1] One case reported by a CESR member involved a client wanting to sell his whole portfolio and immediately invest the proceeds in the securities of a specific company. Others have involved a client who had previously invested only in mutual funds suddenly requesting the purchase of the securities of a single company or a client who had previously only invested in 'blue chip' stocks who made a sudden switch into illiquid securities. In a further case a 'buy and hold' client suddenly conducted a purchase of a particular security just before the announcement of inside information and then a sale directly after the announcement.

c) The client specifically requests immediate execution of an order regardless of the price at which the order would be executed (this indicator pre-supposes more than the simple placing of a 'market order' by the client);

d) Significant trading by major shareholders or other insiders before the announcement of important corporate events.

e) Unusual trading in the shares of a company before the announcement of price sensitive information relating to the company; transactions resulting in sudden and unusual changes in the volume of orders and shares prices before public announcements regarding the security in question;

f) Employees' own account transactions and related orders timed just before clients' transactions and related orders in the same financial instrument.

5.10 *Possible signals of Market Manipulation*

(a) Transactions with no other apparent justification than to increase/decrease the price of or to increase the volume of trading in a financial instrument. Particular attention might be given to orders of this kind which result in the execution of transactions near to a reference point during the trading day – e.g. near the close;

(b) The client submits orders which, because of their size in relation to the market in that security, will clearly have a significant impact on the supply of or demand for or the price or value of the security. Again, particular attention might be given to orders of this kind which result in the execution of transactions near to a reference point during the trading day – e.g. near the close;

(c) Transactions which appear to have the purpose of increasing the price of a financial instrument during the days preceding the issue of a related derivative/convertible;

(d) Transactions which appear to have the purpose of maintaining the price of a financial instrument during the days preceding the issue of a related derivative/convertible when the market trend is downward;

(e) Transactions which appear to be seeking to modify the valuation of a position while not decreasing/increasing the size of that position;

(f) Transactions which appear to be seeking to increase/decrease the weighted average price of the day or of a period during the session;

(g) Transactions which appear to be seeking to set a market price when the liquidity of the financial instrument is not sufficient to fix a price within the session (unless the rules or regulation of the regulated market explicitly allow such operations);

(h) Transactions which appear to be seeking to bypass the trading safeguards of the market (e.g. as regards volume limits; bid/offer spread parameters; etc);

(i) When a transaction is to be concluded/executed, changing the bid-ask prices (as computed by the trading system) when this spread is a factor in the determination of the price of that transaction;

(j) Entering significant orders in the central order book of the trading system a few minutes before the price determination phase of the auction and cancelling these orders a few seconds before the order book is frozen for computing the auction price so that the theoretical opening price might look higher or lower than it otherwise would do;

(k) Transactions which appear to be seeking to maintain the price of the underlying financial instrument below the strike price of a related derivative at expiration date;

(l) Transactions which appear to be aimed at modifying the price of the underlying financial instrument so that it crosses over the strike price of a related derivative at expiration date;

(m) Transactions which appear to be seeking to modify the settlement price of a financial instrument when this price is used as a reference/determinant in the calculation of margins requirements.

Method of Reporting Suspicious Transactions

5.11 Article 9 (2) of Commission Directive 2004/72/EC provides that where the information specified to be reported

> "is not available at the time of notification, the notification shall include at least the reasons why the notifying persons suspect that the transactions might constitute insider dealing or market manipulation. All remaining information shall be provided to the competent authority as soon as it becomes available."

Article 10 of that Directive also provides that

> "Notification to the competent authority can be by mail, electronic mail, telecopy of telephone, provided that in the latter case confirmation is notified by any written form upon request by the competent authority".

Persons making suspicious transactions reports therefore do not need to have all the required information before contacting the competent authority. If the case is one which (the persons subject to the reporting obligation consider) needs to be brought to the attention of the competent authority urgently, then CESR would urge them to make the first contact quickly. This can be by telephone if appropriate, giving the basic details and reasons for suspicion. The other information can be supplied subsequently.

Suspicious transaction reporting format

5.12 CESR considers that it will assist those subject to the obligations to report suspicious transactions if there is a standard reporting format for doing so. CESR has therefore drawn up the format below.

Description of the transaction(s) *Please include details of the financial instrument(s), including the ISIN code of the instrument; the market(s) concerned; the original order's entry date/time, price and size; the times and sizes of the transaction(s); the type and characteristics of the order, etc*
Reasons for suspecting that the transaction(s) might constitute insider dealing/market manipulation

Identities of persons carrying out transaction(s) *Names, address, telephone number, date of birth, account number, client identification code used by the firm, etc*
Identities of any other persons known to be involved in the transaction(s) *Names, address, telephone number, location, date of birth, relation to person carrying out transaction; position held , role played, etc*
Capacity in which the person performing the transaction(s) acts *e.g. broker, underwriter, agent*
Further information which may be of significance (please list any accompanying material you are supplying)
Details of the person making notification. *Name of person, name of firm, position held within firm, contact details etc*
Signed……. (*person making notification*) Dated……(*Date of notification)*

COMMISSION de SURVEILLANCE du SECTEUR FINANCIER

ANNEXE B : FORMULAIRE DE NOTIFICATION DES OPERATIONS SUSPECTES
(version septembre 2007)

Déclarant	

(i) Dénomination, (ii) adresse et (iii) qualité[1] de l'intermédiaire financier	
Nom, prénom(s), et numéro de téléphone de la personne physique effectuant la déclaration, et, si elle est différente, de la personne à contacter par la CSSF	
Instrument financier (émetteur, type, code ISIN)	
Marché (à préciser le nom et le lieu du marché et s'il s'agit d'un « marché réglementé » ou non)	
Description générale de l'opération	
Ordres:	
- Date et heure d'introduction	
- Quantité	
- Sens de l'opération (achat/vente)	
- Caractéristiques (type d'ordre[2], validité…)	
- Mode de négociation (p.ex. « block trade »)	
*Exécution***:**	
- Date et heure	
- Cours	
- Quantités traitées	
- Prix total	
- Autres précisions éventuelles sur l'opération	
Raisons amenant à soupçonner que l'opération pourrait constituer un abus de marché	
Identification de la personne effectuant l'opération et de toute autre personne impliquée dans l'opération	
a) Personne physique : nom, prénom(s), adresse, numéro de téléphone, date et lieu de naissance, nationalité, numéro de compte, toute autre référence utile (profession, fonctions, lien de parenté, …)	
b) Personne morale : Dénomination sociale, siège social, téléphone, numéro de compte, toute autre référence utile (date d'immatriculation,…) et identité du donneur d'ordre au sein de la société	
Toute autre information pertinente	
Eventuellement, liste des pièces jointes	

Date et signature _____

[1] Est visée ici la qualité en vertu de laquelle agit la personne soumise à l'obligation de notification, telle que pour compte propre ou pour le compte de tiers.
[2] Au sens de l'article 9 1. a) de la Directive 2004/72/CE « ordre limité, ordre «au mieux» ou autres caractéristiques de l'ordre ».

ANNEXE C :
DECLARATION DES OPERATIONS DES PERSONNES EXERCANT DES RESPONSABILITES DIRIGEANTES (version septembre 2007)

Identification du déclarant	
a) Nom et prénom(s) du déclarant ; dans le cas des personnes morales : dénomination sociale et siège social	
b) Si le déclarant est une personne mentionnée à l'article 1er, point 12)[3], préciser les fonctions exercées au sein de l'émetteur	
c) Si le déclarant est une personne mentionnée l'article 1er, point 13)[4], indiquer : « Une des personnes ayant un lien étroit avec » et les nom, prénom(s) et fonctions de la personne avec laquelle elles ont un lien personnel étroit	
Dénomination sociale de l'émetteur	
Motif de la notification	
Description de l'instrument financier	
Nature de l'opération Acquisition[5] Cession[6]	
Date de l'opération	
Lieu de l'opération[7]	
Quantité traitée	
Prix par titre	
Montant total de l'opération (hors frais)	

Coordonnées du déclarant ou de son représentant (nom, adresse, téléphone, fax) :

Date et signature _____

[3] - un membre des organes d'administration, de gestion ou de surveillance de l'émetteur,
- un responsable de haut niveau qui, sans être membre des organes visés au tiret précédent, dispose d'un accès régulier à des informations privilégiées concernant directement ou indirectement l'émetteur et du pouvoir de prendre des décisions de gestion concernant l'évolution future et la stratégie d'entreprise de cet émetteur.

[4] - le conjoint de la personne exerçant des responsabilités dirigeantes, ou tout autre partenaire de cette personne considéré comme l'équivalent du conjoint par la loi nationale de la personne concernée,
- les enfants qui, en vertu de leur loi, sont à charge de la personne exerçant des responsabilités dirigeantes,
- tout autre parent de la personne exerçant des responsabilités dirigeantes qui partage le même domicile depuis au moins un an à la date de l'opération concernée,
- toute personne morale, patrimoine fiduciaire ou autre trust, ou toute association sans personnalité juridique dont les responsabilités dirigeantes sont exercées par une personne visée au point 12) du présent article ou aux trois tirets précédents du présent point, ou qui est directement ou indirectement contrôlée par cette personne, ou qui a été constituée au bénéfice de cette personne, ou dont les intérêts économiques sont substantiellement équivalents à ceux de cette personne.

[5] Par acquisition, on entend non seulement les achats, mais également toute autre opération dont le résultat est l'acquisition d'instruments financiers.

[6] Par cession, on entend non seulement les ventes, mais également toute autre opération dont le résultat est la cession d'instruments financiers.

[7] Toutes informations utiles relatives au lieu de l'opération, dont notamment le marché concerné.

ANNEXE D :
FORMULAIRE DE NOTIFICATION RELATIVE AUX OPERATIONS DE RACHAT

PARTIE I (relative aux opérations de rachat envisagées)

Identification et coordonnées du déclarant / de la personne de contact (nom, adresse, téléphone, fax)	
Emetteur	
Objectifs du programme de rachat	
Date et mode de la publication initiale relative au programme de rachat	
Date de la dernière communication relative aux opérations effectuées	
Programme de rachat planifié (si oui, joindre le calendrier)	
Volume quotidien autorisé (25% du volume quotidien moyen du mois précédant celui au cours duquel le programme est rendu public ou volume quotidien moyen des 20 jours de négociation précédant l'achat) (nombre de titres)	
***En cas de dépassement de ce plafond* :**[8]	
Date de notification préalable à la CSSF	
Date de notification au public	
Indiquer si le programme de rachat est géré par une société d'investissement ou un établissement de crédit (si oui, indiquer l'identité du gestionnaire et la date de la convention)	

PARTIE II (relative aux opérations de rachat effectuées)

Date	Heure	Marché	Opération	Quantité	Prix[9]

Date et signature _____

[8] Conformément à l'article 5.3 du Règlement (CE) N° 2273/2003.

[9] Cf. article 5.1 du Règlement (CE) N° 2273/2003: Prix de la dernière opération indépendante ou meilleure offre indépendante.

ANNEXE E :
FORMULAIRE DE NOTIFICATION RELATIVE AUX OPERATIONS DE STABILISATION

Identification et coordonnées du déclarant/ de la personne de contact (nom, adresse, téléphone, fax)	
Emetteur	
Intermédiaire financier en charge de la stabilisation et contact	
Marché	
Nature de l'offre	
Prix et autres caractéristiques éventuelles de l'offre	
Date de début de la négociation OU (en cas d'offre initiale) **Date de publication du prix définitif** (en cas d'offre secondaire)	
Période de stabilisation	
Publication requises effectuées le par le biais de	
Option de surallocation (volume, prix et date d'exercice)	

Détail des opérations

Date	Heure	Sens	Nombre de titres	Prix moyen pondéré	Montant

Date et signature _____

ANNEXE F:
« Market Abuse Directive Level 3 – second set of CESR guidance and information on the common operation of the Directive to the market; Réf. CESR/06-562b »

THE COMMITTEE OF EUROPEAN SECURITIES REGULATORS

Ref: CESR/06-562b

Market Abuse Directive

Level 3 – second set of CESR guidance and information on the common operation of the Directive to the market

July 2007

11-13 avenue de Friedland - 75008 PARIS - FRANCE - Tel.: 33.(0).1.58.36.43.21 - Fax: 33.(0).1.58.36.43.30
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Introduction

1. In December 2005 CESR agreed that CESR-Pol should carry out a second phase of market-facing Level 3 work in respect of the Market Abuse Directive. A draft second set of guidance was published for European-wide consultation on 2 November 2006 (Ref. CESR/06-562). The following issues were covered in the draft guidance.

    I. What constitutes inside information;
    II. When is it legitimate to delay the disclosure of inside information;
    III. When does information relating to a client's pending orders constitute inside information;
    IV. Insider lists in multiple jurisdictions – proposing a mutual recognition system to apply in this area (i.e. a competent authority would accept an insider list maintained in accordance with the rules of another CESR member).

2. The draft guidance has been revised to take account of comments made in the consultation exercise and, following approval of the CESR Chairs, is now published in its final form. A Feedback Statement on the consultation exercise (Ref. CESR/07-402) is being published separately.

3. Preparation of the guidance has been undertaken by CESR-Pol, through the Market Abuse Level 3 Drafting Group. The permanent operational group CESR-Pol is chaired by Mr Kurt Pribil, Chairman of the Austrian Finanzmarktaufsicht (FMA). The Market Abuse Level 3 Drafting Group was chaired by Mr Dilwyn Griffiths, Head of Market Monitoring of the Financial Services Authority (FSA) of the United Kingdom.

Status of the guidance

4. The outcome of CESR's work is reflected in the guidance set out in this paper, which does not constitute European Union legislation and will not require national legislative action.

5. CESR Members will apply the guidance in their day-to-day regulatory practices on a voluntary basis.

6. The way in which the guidance will be applied will be reviewed regularly by CESR. CESR's guidance for the consistent implementation of the Market Abuse Directive will not prejudice, in any case, the role of the Commission as guardian of the Treaties.

Second set of CESR Guidance on the Operation of the Market Abuse Directive

I WHAT CONSTITUTES 'INSIDE INFORMATION' UNDER THE MARKET ABUSE DIRECTIVE?

Introduction

1.1 This section of the guidance covers what constitutes 'inside information' as defined by paragraph 1 of Article 1.1 of the Market Abuse Directive (2003/6/EC) (MAD). It does not deal either with inside information relating to commodity derivatives or inside information relating to client pending orders (i.e. trading information).

1.2 Paragraph 1 of Article 1.1 of the Market Abuse Directive defines 'inside information' by means of the following four criteria. It is

- information of a precise nature
- which has not been made public
- relating, directly or indirectly, to one or more issuers of financial instruments or to one or more financial instruments
- and which, if it were made public, would be likely to have a significant effect on the prices of those financial instruments or on the price of related derivative financial instruments

1.3 The following paragraphs provide guidance on what CESR considers is covered by the four above criteria, taking into account the relevant provisions of the Level 2 Implementing Measures and drawing on the advice CESR provided to the Commission in December 2002 for these Implementing Measures (Ref. CESR/03-212c)[1]. It should be noted that the criteria of information of a precise nature and significant price effect are very much linked to each other and hence it is important not to consider each criterion in isolation. However, CESR considers that it is possible to identify separately the factors which should be taken into account in respect of each criterion.

Information of a Precise Nature

1.4 Article 1 of Commission Directive 2003/124/EC amplifies what is meant by the term "information of precise nature" as follows:

> *"….information shall be deemed to be of a precise nature if it indicates a set of circumstances which exists or may reasonably be expected to come into existence or an event which has occurred or may reasonably be expected to do so and if it is specific enough to enable a conclusion to be drawn as to the possible effect of that set of circumstances or event on the prices of financial instruments or related derivative financial instruments*."

1.5 The precise nature of information is to be assessed on a case-by-case basis and depends on what the information is and the surrounding context. However, the following general points can be made. CESR considers that in determining whether a set of circumstances exists or an event has occurred, a key issue is whether there is firm and objective evidence for this as opposed to rumours or speculation[2] i.e. if it can be proved to have happened or to exist. When considering what may reasonably be expected to come into existence, the key

[1] The advice provided to the Commission does not constitute Level 3 guidance
[2] 'Speculation' in this context is used in the sense of conjecture without any definite knowledge.

issue is whether it is reasonable to draw this conclusion based on the ex ante information available at the time. It should be noted that CESR considers that in general, other than in exceptional circumstances or unless requested to comment by the competent regulator pursuant to Art 6.7 of MAD, issuers are under no obligation to respond to speculation or market rumours which are without substance.

1.6 It is also important to note that, if the information concerns a process which occurs in stages, each stage of the process as well as the overall process could be information of a precise nature. An example might be a takeover bid. The fact that the proposed takeover might not in the end take place does not mean that the approach to the target company is not precise information in its own right[3].

1.7 In addition, it is not necessary for a piece of information to be comprehensive to be considered precise. For example, an approach to a target company about a takeover bid can be considered as precise information even though the bidder had not yet decided the price. Similarly, a piece of information could be considered as precise even if it refers to matters or events that could be alternatives. For example, the fact that a company was proposing to launch a takeover bid for one or other of two companies could be considered as precise even though the bidding company had not finally decided which would be its target (this example again assumes that the bidding company cannot take advantage of Article 6.2 of MAD).

1.8 As regards whether a piece of information is specific enough to allow a conclusion to be drawn about its impact on prices, CESR considers this would occur for example in two circumstances. The first would be when the information is such as to allow the reasonable investor to take an investment decision without, or at very low, financial risk – i.e. the investor would be able to assess with confidence how the information, once publicly known, would affect the price of the relevant financial instrument and related derivative financial instruments. For example, someone knowing that a particular issuer was about to be subject to a takeover bid could be confident that that issuer's share price would rise when the bid became public. The second would be when the piece of information was such that it is likely to be exploited immediately on the market – i.e. that as soon as the information became known, market participants would trade on the basis of it.

Made Public

1.9 As regards making information public, companies with inside information to disclose should use the disclosure mechanisms specified by their Competent Authority. So, for example, if they are required to make information publicly available through a particular electronic news service it will not necessarily be sufficient for them only to give the information to a newspaper. However, for the purposes of determining whether a transaction was made using inside information, it should be noted that information can be publicly available[4] even if it was not disclosed by the issuer in the specified manner. This applies whether the information became public through an incorrect disclosure by the issuer or through a third party.

Significant Price Effect

1.10 Article 1 of Commission Directive 2003/124/EC amplifies what is meant by the concept of 'information likely to have a significant price effect'.

> *"…information which, if it were to be made public, would be likely to have a significant effect on the prices of financial instruments or related derivative*

[3] The example here is simply intended to illustrate what precise information is and does not mean that the target company would necessarily have an obligation to make an announcement at this point: it may be able to rely on the provision allowing it to delay disclosure.

[4] In this context publicly available information may also include information which is made accessible on a commercial basis – e.g. electronic information services for which a subscription is required

financial instruments shall mean information a reasonable investor would be likely to use as part of the basis of his investment decisions."

1.11 The 'reasonable investor test' set out above assists in determining the type of information to be taken into account for the purposes of the "significant price effect" criterion. In this context it should be noted Article 17.2 of MAD makes clear that implementing measures do not modify the essential provisions of the Level 1 Directive.

1.12 CESR considers that those with potential inside information need to assess on an ex ante basis whether or not information is likely to have a significant price effect. It is a question of determining the degree of probability with which at that point in time such an effect could reasonably have been expected. The Directive test is "likely" so on the one hand the mere possibility that a piece of information will have a significant price effect is not enough to trigger a disclosure requirement but, on the other hand, it is not necessary that there should be a degree of probability close to certainty.

1.13 CESR is clear that fixed thresholds of price movements or quantitative criteria alone are not a suitable means of determining the significance of a price movement. For example, the volatility of 'blue-chip' securities is typically less than that of smaller, less liquid stocks. Large absolute percentage rises in big company stocks are likely to be rare events and do not mean that smaller percentage share price changes should not be seen as significant. In determining whether a significant effect is likely to occur, the following factors should be taken into consideration[5]:

i) the anticipated magnitude of the matter or event in question in the context of the totality of the company's activity;

ii) the relevance of the information as regards the main determinants of the financial instrument's price;

iii) the reliability of the source;

iv) market variables that affect the price of the financial instrument in question (These variables could include prices, returns, volatilities, liquidity, price relationships among financial instruments, volume, supply, demand, etc.).

1.14 Some useful indicators of whether information is likely to have a significant price effect that should be taken into consideration are whether:

- the type of information is the same as information which has, in the past, had a significant effect on prices
- pre-existing analysts research reports and opinions indicate that the type of information in question is price sensitive
- the company itself has already treated similar events as inside information

It should be emphasised that these factors are only indicators. They should not be treated as definitive in terms of meaning that the information in question will necessarily have a significant price effect. Companies should also take into account that the significance of the information in question will vary widely from company to company, depending on a variety of factors such as the company's size, recent developments and the market sentiment about the company and the sector in which it operates. In addition, what is likely to have a significant price effect can vary according to the asset class of the financial instrument. For example, a piece of information which may be price sensitive for an equity issuer may not be so for an issuer only of debt securities.

Examples of Possible Inside Information Concerning the Issuer

[5] See Recital 1 to Commission Directive 2003/124/EC

1.15 The following is a non-exhaustive and purely indicative list of events of the type which might constitute inside information. The fact that an event does not appear on the list does not mean it cannot be inside information. Nor does the fact that an event is included on the list mean that it automatically will be inside information: the **materiality of the event** needs to be considered. Something would only constitute inside information if it was sufficiently material. Moreover, as noted above, it is the specific circumstances of each case which need to be considered.

Information which directly concerns the issuer:

- Operating business performance;
- Changes in control and control agreements;
- Changes in management and supervisory boards;
- Changes in auditors or any other information related to the auditors' activity;
- Operations involving the capital or the issue of debt securities or warrants to buy or subscribe securities;
- Decisions to increase or decrease the share capital;
- Mergers, splits and spin-offs;
- Purchase or disposal of equity interests or other major assets or branches of corporate activity;
- Restructurings or reorganizations that have an effect on the issuer's assets and liabilities, financial position or profits and losses;
- Decisions concerning buy-back programmes or transactions in other listed financial instruments;
- Changes in the class rights of the issuer's own listed shares;
- Filing of petitions in bankruptcy or the issuing of orders for bankruptcy proceedings;
- Legal disputes;
- Revocation or cancellation of credit lines by one or more banks;
- Dissolution or verification of a cause of dissolution;
- Changes in the assets' value;
- Insolvency of relevant debtors;
- Reduction of real properties' values;
- Physical destruction of uninsured goods;
- New licences, patents, registered trade marks;
- Decrease or increase in value of financial instruments in portfolio;

- Decrease in value of patents or rights or intangible assets due to market innovation;
- Receiving acquisition bids for relevant assets;
- Innovative products or processes;
- Product liability or environmental damages cases;
- Changes in expected earnings or losses;
- Orders received from customers, their cancellation or important changes;
- Withdrawal from or entry into new core business areas;
- Changes in the investment policy of the issuer;
- Ex-dividend date, changes in dividend payment date and amount of the dividend; changes in dividend policy..

1.16 The Directive definition of inside information also encompasses information which relates **indirectly** to issuers or financial instruments. The following is a list of examples of such information. Again, these examples are indicative and non-exhaustive and are subject to the same conditions and caveats set out in paragraph 1.15 above. It should be noted that, where the information meets the tests for being inside information, the confidentiality duty and the prohibition to enter into transactions stated in Articles 2 and 3 of MAD apply. There is, however, no legal basis to require prompt disclosure under Article 6.1 of MAD, because this article only applies to issuers and to information that directly concerns them. (Indeed, it is recognised that in the examples listed below, the issuer would usually either not be aware of the information before it was publicly announced, or, if they were aware, would be precluded from making any disclosure themselves until the other agency had made its announcement.) Nevertheless, if such events when they become public knowledge would have consequences directly affecting the issuer which would meet the tests for inside information, the disclosure requirement in Article 6 of MAD would apply at the relevant point. .

Information which indirectly concerns the issuer

- Data and statistics published by public institutions disseminating statistics;
- The coming publication of rating agencies' reports;
- The coming publication of research, recommendations or suggestions concerning the value of listed financial instruments;
- Central bank decisions concerning interest rates;
- Government's decisions concerning taxation, industry regulation, debt management, etc.;
- Decisions concerning changes in the governance rules of market indices, and especially as regards their composition;
- Regulated and unregulated markets' decisions concerning rules governing the markets;
- Competition and market authorities' decisions concerning listed companies;

- Relevant orders by government bodies, regional or local authorities or other public organizations;

- A change in trading mode (e.g., information relating to knowledge that an issuer's financial instruments will be traded in another market segment: e.g. change from continuous trading to auction trading); a change of market maker or dealing conditions.

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

Introduction

2.1 Article 6.2 of the MAD provides that "*An issuer may under his own responsibility delay the public disclosure of inside information, as referred to in paragraph 1, such as not to prejudice his legitimate interests provided that such omission would not be likely to mislead the public and provided that the issuer is able to ensure the confidentiality of that information.*"

2.2 This section of the guidance deals with situations in which there are legitimate interests for an issuer to delay the publication of inside information. It does not cover the other two conditions set out in Article 6.2 and the relevant implementing measures (that the delay would not likely to mislead the public; and that the issuer is able to ensure the confidentiality of the information).

Legitimate Interests

2.3 The term 'legitimate interests' is amplified by Article 3 (1) of the implementing Directive 2003/124/EC.

"For the purposes of applying Article 6(2) of Directive 2003/6/EC, legitimate interests may, in particular, relate to the following non-exhaustive circumstances:

(a) negotiations in course, or related elements, where the outcome or normal pattern of those negotiations would be likely to be affected by public disclosure. In particular, in the event that the financial viability of the issuer is in grave and imminent danger, although not within the scope of the applicable insolvency law, public disclosure of information may be delayed for a limited period where such a public disclosure would seriously jeopardise the interest of existing and potential shareholders by undermining the conclusion of specific negotiations designed to ensure the long-term financial recovery of the issuer;

(b) decisions taken or contracts made by the management body of an issuer which need the approval of another body of the issuer in order to become effective, where the organisation of such an issuer requires the separation between these bodies, provided that a public disclosure of the information before such approval together with the simultaneous announcement that this approval is still pending would jeopardise the correct assessment of the information by the public."

2.4 The article makes clear that the examples it sets out of circumstances where there are legitimate interests for delaying public disclosure constitutes a non-exhaustive list. So it is open to issuers to delay the disclosure of information in other situations, provided the conditions in Article 6 (2) of the MAD apply.

2.5 CESR has considered whether, in giving guidance on this issue, it should provide any further examples of such situations. However, CESR believes that, as the right to delay the disclosure of inside information is a derogation from the general rule rather than the norm, it would

not be appropriate to give a long list of (other) circumstances in which the issuer has the right to delay. It remains the issuer's responsibility to determine whether, in its own specific circumstances, the disclosure of inside information can be delayed given due regard to the applicable conditions.

2.6 CESR is therefore confining its guidance to providing indicative examples of the two circumstances mentioned in Article 3 (1) of implementing Directive 2003/124/EC. The guidance has the objective of illustrating rather than extending the provisions of the Directive. The guidance draws on the advice CESR provided to the Commission in December 2002 (Ref: CESR/02-089d) in respect of this implementing Directive.

Illustrative Examples of Legitimate Interests for Delay

2.7 As usual, it should be noted that the examples below are not intended to be exhaustive and issuers will need to consider the particular circumstances of their case when deciding whether they can delay disclosure.

2.8 The following are examples of the first set of circumstances ('negotiations in course') mentioned in implementing Directive 2003/124/EC:

- Confidentiality constraints relating to a competitive situation (e.g. where a contract was being negotiated but had not been finalized and the disclosure that negotiations were taking place would jeopardise the conclusion of the contract or threaten its loss to another party). This is subject to the provision that any confidentiality arrangement entered into by an issuer with a third party does not prevent it from meeting its disclosure obligations;

- Product development, patents, inventions etc where the issuer needs to protect its rights provided that significant events that impact on major product developments (for example the results of clinical trials in the case of new pharmaceutical products) should be disclosed as soon as possible;

- When an issuer decides to sell a major holding in another issuer and the deal will fail with premature disclosure;

- Impending developments that could be jeopardised by premature disclosure.

2.9 Cases within the scope of the second set of circumstances ('decisions taken which need the approval of another body') include those where there are complex decision-making processes involving multiple hierarchical layers in the issuer's organization.

Other Guidance

2.10 Finally it should be emphasized that meeting the test for having a legitimate interest in delaying a disclosure is not by itself sufficient reason to delay the disclosure. In all the situations a further evaluation should be done to decide whether the other conditions in Article 6.2 of the MAD apply i.e. that the delay in disclosing the inside information would not be likely to mislead the public; and that the issuer is able to ensure the confidentiality of the information.

2.11 As regards how companies should behave in the period between inside information arising and the time when it is disclosed or its ceasing to be inside information, CESR offers the following observations. At the time the decision is made to delay disclosing the inside information, companies may wish to consider recording the reasons for doing so. This provides a clear audit trail which may be to the advantage of the issuer if the regulator

requires that this information is provided to them. Once the decision to delay disclosure has been made, companies will need to ensure that knowledge of the information is restricted to those who need to have access to it and that those who are insiders are aware that the information is confidential and recognise their resulting obligations. If the issuer subsequently becomes aware that the information has not been kept confidential and there has been a leak, it should disclose the information as soon as possible in the manner specified. Issuers should also keep under review whether the delay in disclosing the information is likely to be misleading and, if they conclude that this is the case, again the information should be announced as soon as possible.

2.12 CESR does not propose at this stage to offer any further guidance on when delay in disclosing inside information would not be likely to mislead the public. It is aware, however, of the argument that any delay in disclosing information would be misleading. CESR does not share this view. If this argument were correct, then clearly there would have been no purpose in including a provision in the Directive which allowed for delay since the criteria for doing so could never be met.

III WHEN DOES INFORMATION RELATING TO A CLIENT'S PENDING ORDERS CONSTITUTE INSIDE INFORMATION

Introduction

3.1 As regards information relating to client orders, the relevant legislative provision is Article 1.1 par.3 of MAD which specifies that "*For persons charged with the execution of orders concerning financial instruments, 'inside information' shall also mean information conveyed by a client and related to the client's pending orders".*

3.2 These persons should properly manage that kind of inside information in order to avoid the abuse of it. This means that, according to Art. 2 and 3 of MAD, , such a person shall not:

a. use that information by acquiring or disposing of, or by trying to acquire or dispose of, for his own account or for the account of a third party, either directly or indirectly, financial instruments to which that information relates[6];
b. disclose that information to any other person unless such disclosure is made in the normal course of the exercise of his employment, profession or duties;
c. recommend or induce another person, on the basis of that information, to acquire or dispose of financial instruments to which that information relates.

3.3 According to Art. 4 of MAD the same prohibitions apply to any other person who possesses that information and who, at the same time, knows, or ought to have known, that that information is inside information.

3.4 The persons typically involved in the above situations are employees of intermediaries.

3.5 Considering that intermediaries work in complex environments, these prohibitions imply that they should find measures and tools that allow them to act without using inside information. Therefore, guidance could be helpful to allow intermediaries and their employees to better understand when information related to a client's pending orders is inside information.

"*Client's pending order*" as inside information: conditions set out by the Directives

[6] Article 2.3 provides that this shall not apply to transactions conducted in the discharge of an obligation that has become due to acquire or dispose of financial instruments where that obligation results from an agreement concluded before the person concerned possessed inside information.

3.6 According to Article 1.1 par.3 of MAD "*information conveyed by a client and related to the client's pending orders"* is inside information if it satisfies three conditions[7]:

a. it "*is of a precise nature*",
b. it "*relates directly or indirectly to one or more issuers of financial instruments or to one or more financial instruments*",
c. "*if it were made public, it would be likely to have a significant effect on the prices of those financial instruments or on the price of related derivative financial instruments"*.

3.7 Conditions *sub* a) and c) are further defined by Art 1(1) of implementing Directive 2003/124/EC.

As to condition a): "*information shall be deemed to be of a precise nature:*

1) "*if it indicates a set of circumstances which exists or may reasonably be expected to come into existence or an event which has occurred or may reasonably be expected to do so and*"

2) "*if it is specific enough to enable a conclusion to be drawn as to the possible effect of that set of circumstances or event on the prices of financial instruments or related derivative financial instruments".*

As to condition c): *"information which (…) would be likely to have a significant effect on the prices" (..,) shall mean information a reasonable investor would be likely to use as part of the basis of his investment decisions"*.

"Information conveyed by a client and related to a client's pending order" : Guidance

i) Client's pending order

3.8 Neither MAD nor the relevant implementing Directive define the term 'client's pending order'. CESR does not consider it can produce a single definitive definition of the term but offers the following guidance to assist in clarifying when there is a pending client order. An indication that there is a pending order for a client is that a person charged with executing orders is approached by another in relation to a transaction and

a) the transaction is not immediately executed in response to a price quoted by that person ; and
b) the person concerned has taken on a legal or regulatory obligation relating to the manner or timing of the execution of the transaction.

Thus, for example, merely polling for a price (contacting various brokers to establish at what price they are prepared to buy or sell a particular financial instrument or type of financial instrument) would not in itself constitute a client's pending order as no order has yet been placed.

ii) When is the information conveyed by a client inside information: general considerations

3.9 The main difficulties in understanding when information conveyed by a client relating to their pending order is inside information basically refer to the problem of determining when the above mentioned conditions on the precise nature and the price sensitivity are met.

3.10 Before examining the scope of guidance on the precise nature and the price sensitivity of such information, it is convenient to recognise that orders are in general characterised by several elements concerning three parameters: price, quantity and execution timing. Many

[7] In addition, implicitly the fourth condition is that information should not be already public.

different combinations of these elements can be valued in different ways. The identity of the client and the financial instrument to which the order relates may also be relevant.

3.11 In addition, these elements are different across markets according to their specific microstructure. For instance, some electronic trading systems can allow stop-loss orders, or partially-displayed orders, and so on. Furthermore the market impact of the order execution may depend on the market's liquidity; the way in which the order will be executed; the trading method used (auction, continuous trading, etc); and so on.

3.12 All the relevant factors should be taken into account in order to determine whether the information conveyed by a client relating to their pending order is inside information. As usual, it should be emphasised that the following guidance is indicative and not exhaustive.

iii) Price sensitivity

3.13 The price sensitivity of information relating to a client's pending order is likely to be influenced by:

a. The order's dimension/size, compared, for example, with the average size of the orders in that market or the daily trading volume. The greater the size of the order as compared with the average size of orders in that market, the more likely it is to have an influence on the price of the financial instrument;

b. the liquidity of the market during the period of the order execution;

c. the bid-ask spread: the wider the spread, the more likely that an order may have an impact on the price;

d. the price limit for the order and the relationship of that price limit to the current bid-ask spread;

e. the execution timeframe as instructed by the client (e.g. the quicker the client wants the order executed, the more likely there is to be a price impact);

f. the execution timing in relation to determining relevant or reference prices such as opening, closing minimum or maximum prices or exercise prices of related financial instruments such as derivatives, covered warrants, structured bonds, etc;

g. the identity of the client;

h. whether the order is likely to influence the behaviour of other market participants.

iv) Precise nature

3.14 As set out in implementing Directive 2003/124/EC (see paragraph 3.7 above) the relevant conditions for determining if the information is of a precise nature are twofold: "1) *if it indicates a set of circumstances which exists or may reasonably be expected to come into existence or an event which has occurred or may reasonably be expected to do so and 2) if it is specific enough to enable a conclusion to be drawn as to the possible effect of that set of circumstances or event on the prices of financial instruments or related derivative financial instruments".*

3.15 While the second condition is very close in nature to that of price-sensitivity, discussed above, the first expresses quite clearly that information does not have to be certain to constitute inside information. i.e. information relating to an order could be inside information even if all of its characteristics are not yet completely defined. In this respect a set of useful guidance can be outlined as follows.

3.16 The test for the precise nature of information relating to an order is more likely to be satisfied:

a. the more defined are the order's size, price limit and execution period;

b. the more predictable the pattern of the trading behaviour of a client, the more precise will be the nature of a particular order from that client.

Other Guidance

3.17 CESR has been asked what a person charged with executing client orders should do if, having received a client order to conduct a significant transaction in a financial instrument, it subsequently received orders from other clients concerning that same instrument. Recital 18 of MAD is relevant in this context. The pertinent element of the Recital is as follows

> "…. The mere fact that market-makers, bodies authorised to act as counterparties, or persons authorised to execute orders on behalf of third parties… confine themselves … to pursuing their legitimate business of buying or selling financial instruments … should not in itself be deemed to constitute use of …inside information."

The fact that a person charged with executing client orders receives a big order from a client does not mean that it has to cease executing other orders it may receive concerning the same financial instrument until the first order has been completed.

IV INSIDER LISTS

4.1 Article 6.3 paragraph 3 of MAD obliges Member States to require issuers, or persons acting on their behalf or for their account, to establish insider lists, to be regularly updated and to be provided to competent authority upon request. In addition, the implementing Directive 2004/72/EC [8] provides for further details as to the content of the insider list, the way it should be updated and maintained, and the information duties related to such insider list.

4.2 In general, across Europe, Member States have implemented these provisions so that they apply to issuers whose financial instruments are admitted to trading on a domestic regulated market and/or to domestic issuers having financial instrument admitted to trading on a Regulated market of another EU or EEA Member State.

4.3 There are already a certain number of issuers whose financial instruments are admitted to trading on regulated markets in different European jurisdictions. Consequently, it appears that the same issuer has to comply with the requirement to draw up and maintain insider list in accordance with the legal framework applicable in each of the concerned jurisdictions. In other words, there may be overlapping requirements with respect to keeping the insider list, in certain circumstances. From the competent authorities' perspective, it is considered that overlapping is preferable to loopholes. However, it may be argued that such overlapping could prove "burdensome" for issuers.

4.4 It should be recalled that the requirements to keep, maintain and provide the competent authority with insider lists only applies to the issuer that has requested or approved admission of its financial instruments to trading on a regulated market in a Member State (Article 9 par. 3 MAD).

[8] Commission Directive 2004/72/EC of 29 April 2004 implementing Directive 2003/6/EC of the European Parliament and of the Council as regards accepted market practices, the definition of inside information in relation to derivatives on commodities, the drawing up of lists of insiders, the notification of managers' transactions and the notification of suspicious transactions.

4.5 For issuers subject to the jurisdiction of more than one EU or EEA Member State with respect to insider list requirements, it is recommended that the relevant competent authorities recognise insider lists prepared according to the requirements of the Member State where the issuer in question has its registered office.

4.6 This recommendation does not challenge the obligation on an issuer in each of the relevant jurisdictions to establish an insider list and the right for the competent authority from any of these jurisdictions to request such list. In this context it should be noted that under the MAD a competent authority only needs to be supplied with an insider list if it requests it from the issuer: there is no obligation on an issuer spontaneously to provide its insider list to the competent authority or inform it of updates to the list.

4.7 With respect to the persons acting on behalf of for the account of the issuer, regardless of their nationality or their location or place of incorporation, the rules to follow have to be the rules of the jurisdiction applicable to the issuer.

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