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EU Commission
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Bundesanstalt
für Finanzdienstleistungsaufsicht
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per email: Julia.Buttlar@bafin.de

Hamburg, 5. December 2003

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Regulations of implementation regarding the Directive on insider dealing and market manipulation (market abuse) (working document ESC 38/2003 of 10.11.2003)

Dear Sir, dear Madam!

We like to thank you for supplying us with the information and documents in connection with the regulations of implementation of Article 1 paragraphs 1 and 2 as well as Article 6 paragraphs 3, 4 and 9 of the Directive on insider dealing and market manipulation (market abuse) and the possibility granted with it to make a statement.

We like to take a stand on the following three ambits of regulation of the mentioned regulations of implementation:

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1. Managers Transactions (Article 6 paragraph 4 Directive; Article 6 Regulations of Implementation)

In this case the previous regulation in § 15a of the local Securities Trading Law (WpHG) which was created by the 4th Financial Market Development Law has proven successful. It was already discussed very controversially at that time during the mentioned legislation procedure and it was finally rejected – for good reasons – to further extend the circle of notifiable persons beyond the executive members of the issuer as well as the husband or wife and first relatives. According to the regulations of implementation this is supposed to take place now by including senior executives and persons closely associated with executive members (particularly: in the joint household), too, and by assigning them to the circle of persons notifiable as far as that is concerned. Furthermore, the so-called petty regulation is supposed to be dropped as it can be found in the local law in § 15a paragraph 1 sentence 4 WpHG.

The following objections to the planned extensions arise:

- a) As far as persons are concerned who are not associated with the issuer (no executive members and no senior executives), there should be *at most* a duty of notification towards the market supervisory board, but a general duty of publication should not be implemented. As far as that is concerned, it is, however, also doubtful whether the circle of concerned persons in this case is not extended in a manner which is neither called for in view of the facts nor necessary; that is to say that these persons originally do not have any direct relationship to the issuer. As far as that is concerned, the regulations of the insider law which are valid anyway would suit much better in this case and should constitute the concluding legal matter as far as that goes.
- b) Senior executives should belong to the registered circle at most if they hold a comparable office and have a comparable field of activity as the executive members of the issuer. In this case it probably depends on the assessment in the specific isolated case, so that a generalised extension of the registered circle to senior executives is out of question anyway.
- c) It is probably disproportionate and not necessary for practical reasons to renounce a petty limit up to which a notification of corresponding transactions is not required. A renouncement of an exactly defined petty limit would otherwise cause a considerable effort on the part of the

notifiable persons and persons subject to publication which is not necessary for practical reasons and thus finally disproportionate.

2. Insiders' Lists (Article 6 paragraph 3 Directive; Article 5 Regulations of Implementation)

The drawing up of insiders' lists of the issuer related to the occasion or process should be renounced at least in cases where the general responsibility is incumbent on a compliance office within the company to take and supervise measures by means of which actual suspicious cases of insiders can be followed up. Otherwise an additional and/or administrative expenditure of the institutes would develop which is not justified for practical reasons.

Besides, there was a consensus in the local hearings under the direction of the Federal Office for Supervision of Financial Services (BaFin) insofar that it would be advisable to recommend to the EU Commission via the CESR to leave the more detailed practical organisation of the legal frame in the above connection largely to the Member States. We recommend this, too, as far as this point is concerned.

3. Suspicious transactions/Transactions to be notified (Article 6 paragraph 9 Directive; Article 7 Regulations of Implementation)

In this connection it was stated clearly in hearings of the local central organisations at the BaFin that the field of application of this regulation concerns in particular banks, property administrators and investment consultants (persons arranging transactions), but not stockbrokers and local lead brokers who pursue the price assessment at the stock market and act as a mediator in transactions. An exclusion of the last-named persons from the field of application of the regulation is also absolutely necessary as transactions conducted in this way are completely documented and supervised anyway by the trading supervisory offices and besides are of mass transaction character which makes investigations on a case-by-case basis practically impossible. On top of that there is the anonymity of the stock exchange trading and the fact that the stockbrokers' customers are no private investors, but exclusively institutions; the latter are again institutes to which the regulations of market abuse apply extensively, so that in this case an unnecessary "second supervision or notification level" for stockbrokers has actually been introduced.

In our opinion it should now be stated clearly within the scope of the part of explanation of the regulations of implementation concerning the Directive on

insider dealing and market manipulation (market abuse) that stockbrokers and lead brokers (in Germany) are not a group of persons which is covered by the field of application of Article 6 paragraph 9 of the Directive on insider dealing and market manipulation (market abuse) within the scope of their typical participation in the stock exchange and securities trading.

As in this case the peculiarities of the single stock markets of the Member States should be absolutely taken into consideration, we also strongly suggest to transfer the specific organisation and implementation of the instrument of regulation of Article 6 paragraph 9 of the Directive on insider dealing and market manipulation (market abuse) as far as possible to the single legislators or authorities passing decrees and market supervisory boards of the Member States.

We kindly request the EU Commission and BaFin to take our above considerations and petitions into account within the scope of their further plans to implement the Directive on insider dealing and market manipulation (market abuse).

Sincerely yours,

Claus-Jürgen Diederich

Dr. Hans Mewes