

**DG INTERNAL MARKET SERVICES' WORKING  
DOCUMENT ON THE IMPLEMENTATION OF ARTICLE 1  
PARAGRAPHS 1 AND 2 AND ARTICLE 6 PARAGRAPHS 3, 4  
AND 9 OF THE EUROPEAN PARLIAMENT AND COUNCIL  
DIRECTIVE 2003/6/EC ON INSIDER DEALING AND  
MARKET MANIPULATION (MARKET ABUSE)**

**WORKING DOCUMENT ESC 38/2003**

**- SHORT EXPLANATORY NOTE -**

DG Internal Market services (DG MARKT) are making public a working document related respectively to Articles 1 paragraphs 1 and 2 and Article 6 paragraphs 3, 4 and 9 of the European Parliament and Council Directive 2003/6/EC on insider dealing and market manipulation (market abuse). This is to continue the open and transparent regulatory process for Level 2 Lamfalussy measures (comitology). This working document is without prejudice to any final decisions that might be taken by the Commission.

This document is addressed to the members of the European Securities Committee (ESC) and simultaneously to the European Parliament.

Any technical drafting comments should be sent to the Commission via a dedicated e-mail address ([Markt-ESC@cec.eu.int](mailto:Markt-ESC@cec.eu.int)). Any comments received will also be made public and posted on the same Commission website. Taking into account the Commission's timetable, comments should be received by 7 December 2003.

**Given this DG MARKT working document is informal and not definitive, and given it does not have the status of an official Commission draft for implementing measures, the three-month period provided for the ESC to vote upon the measures, and for the European Parliament to consider them, is therefore not triggered by this publication.**

**- Invitation to comment -**

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# **OVERVIEW OF POSSIBLE IMPLEMENTATION OF ARTICLE 1 PARAGRAPHS 1 AND 2 AND ARTICLE 6 PARAGRAPHS 3, 4 AND 9 OF THE EUROPEAN PARLIAMENT AND COUNCIL DIRECTIVE 2003/6/EC ON INSIDER DEALING AND MARKET MANIPULATION (MARKET ABUSE)-**

## **INTRODUCTION:**

This paper provides an overview of the possible implementation of Article 1 paragraphs 1 and 2 and Article 6 paragraphs 3, 4 and 9 of the European Parliament and Council Directive 2003/6/EC on insider dealing and market manipulation (market abuse).

## **1. GENERAL COMMENTS**

The Commission Communication of 11 May 1999 entitled “Implementing the framework for financial markets: action plan” identifies a series of actions that are intended to create a legislative framework to support a single market for financial services. The Lisbon European Council of April 2000 called for the implementation of that action plan by 2005. One of the identified initiatives in the action plan is the need to combat market abuse.

The Stockholm European Council of March 2001 endorsed the final report of the Committee of Wise Men chaired by Baron Lamfalussy on the regulation of European securities markets. This report proposed the introduction of a four-level approach for securities markets regulation: namely framework principles (Level 1), implementing measures (Level 2), co-operation among regulators (Level 3) and enforcement (Level 4). “Level 1” should be confined to broad general framework principles, while “Level 2” should consist of technical implementing measures to be adopted by the Commission with the assistance of the European Securities Committee.

The Stockholm Council also called for the legislative process to be speeded up and made more flexible in order to be able to respond to market developments and new regulatory standards, whilst respecting the requirements of openness, transparency, and legal certainty.

The European Parliament agreed to this new approach in a Resolution adopted on 5 February 2002 - subject to some additional conditions that were specified in President Prodi's Declaration to the EP Plenary of the same date and in Commissioner Bolkestein's letter of 2 October 2001 addressed to Mrs Randzio-Plath, Chairperson of Parliament's Committee on Economic and Monetary Affairs.

The European Parliament and Council Directive 2003/6/EC<sup>1</sup> on insider dealing and market manipulation (market abuse) follows this new approach and establishes framework principles for combating market abuse. In order to guarantee uniform application of its provisions throughout the Community and to take account of developments on financial markets, the

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<sup>1</sup> OJ L xxx

Directive requires the necessary technical implementing measures to be adopted through the comitology procedure, following the agreements made between the three institutions.

In line with this approach for regulating securities markets and in conformity with the above agreements, the European Commission provisionally requested the Committee of European Securities Regulators (CESR)<sup>2</sup> for technical advice on possible implementing measures regarding Article 1 paragraphs 1 and 2 and Article 6 paragraphs 3, 4 and 9 of the Directive on insider dealing and market manipulation (market abuse). This request by the Commission was transmitted to CESR on 31 January 2003. The European Parliament has been informed of the mandate given to CESR. The mandate has also been posted on Commission's Internal Market website. In addition, in order to guarantee the necessary transparency, CESR has consulted market participants and the broader public prior to finalising its advice. CESR delivered its finalised advice to the Commission on 1 September 2003.

This working document takes into account the measures proposed in CESR's level 2 advice.

## **2. DESCRIPTION OF ARTICLES**

### **Article 1 – Definitions**

Article 1 includes the definitions of the terms used for the purpose of this Directive.

### **Article 2 – Factors to be taken into account by competent authorities when considering accepting or not market practices**

Directive 2003/6/EC on insider dealing and market manipulation (market abuse) makes use of the notion of 'accepted market practices' in two different contexts: as a defence for persons being suspected of some forms of market manipulation (point 2 (a) of Article 1 of Directive 2003/6/EC), but also as part of the definition of inside information for derivatives on commodities (second subparagraph of point 1 of Article 1 of Directive 2003/6/EC).

Article 1 (5) of Directive 2003/6/EC defines this notion, and provides for guidelines to be followed by competent authorities when considering accepting or not market practices. These guidelines shall be adopted by the European Commission under the form of implementing measures.

These implementing measures have to take into account permanent market developments and, therefore, clarify that new market practices shall not be refused by competent authorities simply because that they were not accepted before. These permanent market developments imply also that competent authorities will have to review their assessments from time to time.

Competent authorities shall assess market practices by examining the interaction of proper supply and demand as well as the consequences of such practices for other market participants and for market integrity as a whole. In particular, the more such practices may increase market efficiency, transparency and liquidity, the more likely they would be deemed to be acceptable. However, these general elements must be regarded together with the characteristics of the different markets concerned.

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<sup>2</sup>CESR was established by Decision 2001/527/EC of 6 June 2001, OJ L 191, 13 July 2001, p.43

### **Article 3 – Procedures to be followed by competent authorities when considering accepting or not market practices**

In order to optimise their decision when considering accepting or not market practices, competent authorities shall consult widely on the relevant market practice. The disclosure not only of their decision, but also of the factors taken into account by competent authorities is required for legal certainty of market participants.

### **Article 4 – Inside information in relation to derivatives on commodities**

The second subparagraph of point 1 of Article 1 of Directive 2003/6/EC refers to information market participants would expect to receive in accordance with accepted market practices, which has to be implemented through comitology.

Market users may expect to receive information where its disclosure is required by rules, contracts or customs, or where the relevant information is routinely made available.

### **Article 5 – Insider lists**

This Article lays down that insider lists to be drawn up by issuers or entities acting on their behalf or for their account include all persons with access to inside information, whether on a regular or occasional basis. These lists have to be regularly updated wherever there is a change in the information about the insiders. As persons referred to in the second subparagraph letter (a) of Article 2 (1) of Directive 2003/6/EC are deemed to be permanent insiders, they have therefore to appear permanently on these lists.

In order for the competent authorities to monitor the markets appropriately, these lists shall remain available for a minimum period.

For the prevention of insider dealing, all persons having access to inside information have to acknowledge the duties and sanctions related to the possession of inside information.

### **Article 6 – Managers transactions**

This Article lays down the details of managers transactions which must be known by competent authority in order to fulfil its duties. The time period for notification of such details shall be short in order to allow for rapid reaction by the competent authority, if necessary.

### **Article 7 – Suspicious transactions to be notified**

Assessment of reasonable suspicion whether transactions might constitute market abuse has to be carried out case by case on the basis of Articles 1 to 5 of Directive 2003/6/EC.

### **Article 8 – Timeframe for notification of suspicious transactions**

In order to be able to react rapidly, in particular to avoid increasing market distortions, competent authorities need to receive the notification of suspicious transactions at the first instant.

**Article 9 – Content of notification of suspicious transactions**

This Article requires the minimum content necessary for the competent authorities to investigate properly whether market abuse occurred.

**Article 10 – Means of notification of suspicious transactions**

This Article clarifies the means to be used for notification.

## DRAFT COMMISSION DIRECTIVE

- (1) Practising fairness and efficiency by market participants is required in order not to create prejudice to normal market activity and market integrity. In particular, 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. On the other hand, market practices which enhance liquidity are more likely to be accepted than those practices reducing them. Market practices breaching rules and regulations designed to prevent market abuse, or codes of conduct, are less likely to be accepted by competent authorities. Since market practices change rapidly in order to meet investors' needs, competent authorities need to be alert to new and emerging market practice.
- (2) 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 be less transparent for structural reasons than similar practices on regulated markets. Such practices should not be in themselves considered as unacceptable by competent authorities.
- (3) Competent authorities, while considering the acceptance of a particular market practice, shall consult other competent authorities, particularly for cases where comparable markets to the one under scrutiny exist. With regard to their decisions about such acceptance, competent authorities shall ensure a high degree of transparency vis-à-vis market participants.
- (4) Particular market practices in a given market shall not put at risk market integrity of other, directly or indirectly, related markets throughout the European Union, whether those markets are regulated or not. Therefore, the higher the risk for market integrity on such a related market within the European Union, the less those practices are likely to be accepted by competent authorities. Competent authorities, while considering the acceptance of a particular market practice, shall consult other competent authorities, at least in cases where comparable markets to the one under scrutiny exist. However, there might be circumstances in which a market practice can be deemed to be acceptable on one particular market, and unacceptable on another market, within the European Union.
- (5) It is essential for market participants on derivative markets the underlying of which is not a financial instrument, to get legal certainty on what constitutes inside information.
- (6) The establishment of lists of persons having access to inside information within issuers of financial instruments, or within persons acting on their behalf or for their account, is a valuable instrument for competent authorities when monitoring the application of market abuse legislation. Moreover, these lists may serve issuers or such persons to control the flow of inside information and thereby manage their confidentiality duties.

- (7) The notification of transactions conducted by persons discharging managerial responsibilities within an issuer on their own account, or by persons closely associated with them, is not only a valuable information for market participants, but also constitutes an additional means for competent authorities to supervise markets.
- (8) 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 can seem completely void of anything suspicious, but these transactions might deliver sufficient indications of possible market abuse when seen in perspective with other transactions, certain behaviour or other information.
- (9) The measures provided for in this Directive are in accordance with the opinion of the European Securities Committee.

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### *Chapter 1 (Definitions)*

#### *Article 1*

For the purpose of this Directive, the following definitions shall apply in addition to those laid down in Directive 2003/6/EC:

- (1) 'Insiders lists' shall mean lists of persons drawn up for the purpose of applying the third subparagraph of Article 6 (3) of Directive 2003/6/EC.
- (2) 'Person discharging managerial responsibilities within an issuer' shall mean a natural person who is
  - a member of the administrative, management or supervisory bodies of the issuer, or
  - a senior executive, who is not a member of the bodies as referred to in the first indent, having regularly access to inside information and the right to make decisions on behalf of the issuer.
- (3) 'Person closely associated with a person discharging managerial responsibilities within an issuer of financial instruments' shall mean:
  - the spouse of the person discharging managerial responsibilities, or any partner of that person considered by national law as equivalent to the spouse,
  - dependent children of the person discharging managerial responsibilities,
  - other relatives of the person discharging managerial responsibilities, who share the same household as that person,

- any legal person whose management responsibilities are discharged by a person as referred to under paragraph 3 of this Article or under the previous indents of this paragraph, or which is owned by such a person.

*Chapter 2 (Guidelines for competent authorities when considering accepting or not market practices)*

*Article 2 (Factors to be taken into account)*

1. For the purposes of applying subparagraph 2 of point 1 and point 2 (a) of Article 1 of Directive 2003/6/EC, Member States shall ensure that the following non exhaustive factors are taken into account by competent authorities when assessing whether they can accept a particular market practice:
  - the level of transparency of the relevant market practice to the whole market;
  - the need to safeguard the operation of market forces and the proper interplay of the forces of supply and demand. In particular, competent authorities shall analyse the impact of the relevant market practice against the main market parameters, such as the specific market conditions before carrying out the relevant market practice, the weighted average price of a single session or the daily closing price;
  - the degree to which the relevant market practice has an impact on market liquidity and efficiency;
  - the level 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;
  - 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 European Union;
  - 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, directly or indirectly, on related markets within the European Union;
  - the structural characteristics of the relevant market including whether it is regulated or not, the types of financial instruments traded and the type of market participants, including the extent of retail investors participation in the relevant market.
2. Member States shall ensure that new or emerging market practices will not be assumed to be unacceptable by the competent authority simply because they have not been previously described as accepted by it.
3. Member States shall ensure that competent authorities shall regularly review the market practices they have accepted, in particular taking into account significant

changes to the relevant market environment, such as changes to trading rules or to market infrastructure. Any review shall follow the same consultation procedure.

### *Article 3 (Procedures to be followed)*

For the purposes of applying subparagraph 2 of point 1 and point 2 (a) of Article 1 of Directive 2003/6/EC, Member States shall ensure that the following procedures are observed by competent authorities when considering whether to accept or continue to accept a particular market practice:

- Without prejudice to Article 11 (2) of Directive 2003/6/EC, competent authorities shall, before accepting or not the relevant market practice, consult as appropriate relevant bodies such as representatives of issuers, financial services providers, consumers, other authorities and market operators. The consultation procedure shall include consultation of other competent authorities, in particular where comparable markets exist. The same consultation procedure shall apply for any review of existing accepted market practices as referred to in Article 2 (3) above.
- Competent authorities shall publicly disclose their decisions regarding the acceptability of the relevant market practice. In addition, the Committee of European Securities Regulators shall also publicly disclose such decisions. The disclosure shall include a description of the factors taken into account in determining whether the relevant practice is regarded as acceptable, in particular where different conclusions have been reached regarding the acceptability of the same practice on different Member States markets.

### *Chapter 3 (Inside information in relation to derivatives on commodities)*

#### *Article 4*

For the purposes of applying the second subparagraph of point 1 of Article 1 of Directive 2003/6/EC, users of markets on which derivatives on commodities are traded, are deemed to expect to receive information relating, directly or indirectly, to one or more such derivatives which is:

- routinely made available to the users of those markets, or
- required to be disclosed in accordance with legal or regulatory provisions, market rules, contracts or customs on the relevant underlying commodity market or commodity derivatives market.

### *Chapter 4 (Insiders lists)*

#### *Article 5*

- (1) For the purposes of applying the third subparagraph of Article 6 (3) of Directive 2003/6/EC, Member States shall ensure that insiders' lists include all persons who have access to inside information whether on a regular or occasional basis.

- (2) Insiders' lists shall be updated whenever
  - there is a change in the identity or function of any person already on the list, or
  - there is a change in the reason why any person is already on the list, or
  - any new person has to be added to the list.
- (3) Insiders' lists shall state at least:
  - the identity of any person having access to inside information;
  - the functions of any such person;
  - the reason why any such person is on the list;
  - the date the insiders' list was created and updated.
- (4) Member States shall ensure that insiders' lists will be kept for at least five years.
- (5) Member States shall ensure that those persons required by the third subparagraph of Article 6 (3) of Directive 2003/6/EC to draw up insiders' lists ensure that any person that has access to inside information is aware of and acknowledges the legal and regulatory duties, as well as the penal, administrative or disciplinary sanctions that may be occurred through the misuse or undue circulation of such information.

## *Chapter 5 (Managers Transactions)*

### *Article 6*

- (1) For the purposes of applying Article 6 (4) of Directive 2003/6/EC, Member States shall ensure that all relevant transactions are notified to the competent authorities with the following information:
  - name of the person discharging managerial responsibilities within the issuer, or, where applicable, name of the person closely associated with such a person,
  - reason for responsibility to notify,
  - name of the relevant issuer,
  - description of the financial instrument,
  - nature of the transaction (acquisition or disposal),
  - date and market of the transaction
  - price and volume of the transaction.
- (2) The notification to the competent authority shall take place within three working days following from the trading date.

## *Chapter 6 (Suspicious transactions)*

### *Article 7(Transactions to be notified)*

For the purposes of applying Article 6 (9) of Directive 2003/6/EC, Member States shall ensure that persons as referred to thereof

- assess the relevant transactions by reference to the elements constituting insider dealing or market manipulation, as referred to by Articles 1 to 5 of Directive 2003/6/EC, by Commission Directive XXX implementing Directive 2003/6/EC as regards the definition and public disclosure of inside information and the definition of market manipulation, as well as by Article XXX above/below,
- decide on a case-by-case basis whether a transaction is reasonably suspicious for insider dealing or market manipulation.

### *Article 8 (Timeframe for notification)*

Member States shall ensure that notification of suspicious transactions takes place immediately after persons as referred to in Article 6 (9) of Directive 2003/6/EC become aware of any fact that makes the relevant transaction reasonably suspicious.

### *Article 9 (Content of notification)*

(1) Member States shall ensure that persons subject to the notification obligation transmit to the competent authority the following information:

- nature of the transactions,
- reasons for suspicion that the transactions might constitute market abuse,
- name, address and other means for identification of the persons on behalf of whom the transactions have been carried out, and of other persons involved in the relevant transactions,
- name and nature of the financial instruments concerned,
- capacity in which the person subject to the notification obligation operates (such as for own account or on behalf of third parties),
- the market of the transactions (whether regulated or not) and, where applicable, whether the transactions were off market,
- date and time of the transactions,
- volume and price of the transactions,
- the type of order (such as limit order, market order or other characteristics of the order) and the type of trading market (such as block trade),

- any information which may have significance in reviewing the suspicious transactions.
- (2) Where the information required above is not available at the time of notification, the notification shall include at least the reasons why the persons referred to in paragraph 1 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*

##### *(Means of notification)*

Member States shall ensure that notification to the competent authority can be done by mail, electronic mail, telecopy or telephone, provided that in the latter case confirmation is notified by any written form upon request by the competent authority.

#### *Article 11*

##### *(Transposition)*

4. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 12 October 2004 at the latest. They shall forthwith communicate to the Commission the text of the provisions and a correlation table between those provisions and this Directive.

When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

5. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

#### *Article 12*

##### *(Entry into force)*

This Directive shall enter into force on the day of its publication in the *Official Journal of the European Union*.

#### *Article 13*

##### *Addressees*

This Directive is addressed to the Member States.

Done at Brussels, [...]

*For the Commission*

[...]

*Member of the Commission*