

EUROPEAN SECURITIES COMMITTEE

Meeting of 17 February 2004

COMMISSION DRAFT PROPOSAL FOR A DIRECTIVE 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

WORKING DOCUMENT ESC 48/2003 – REV 1

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Proposal for a

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of

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(Text with EEA relevance)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse)¹, and in particular the second paragraph of point 1 and point 2 (a) of Article 1 and the fourth, fifth and seventh indents of Article 6 (10) thereof,

After consulting the Committee of European Securities Regulators (CESR)² for technical advice,

Whereas:

- (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 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.

¹ OJ L 96, 12.4.2003, p. 16

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

- (3) 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 within the Community, the less those practices are likely to be accepted by competent authorities.
- (4) Competent authorities, while considering the acceptance of a particular market practice, should consult other competent authorities, particularly for cases where there exist comparable markets to the one under scrutiny. 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 Community. With regard to their decisions about such acceptance, competent authorities should ensure a high degree of consultation and transparency vis-à-vis market participants and end-users.
- (5) It is essential for market participants on derivative markets the underlying of which is not a financial instrument, to get greater legal certainty on what constitutes inside information.
- (6) The establishment, by issuers or persons acting on their behalf or for their account, of lists of persons working for them under a contract of employment or otherwise and having access to inside information, is a valuable measure for protecting market integrity. These lists may serve issuers or such persons to control the flow of inside information and thereby manage their confidentiality duties. Moreover, these lists may also constitute a useful tool for competent authorities when monitoring the application of market abuse legislation.
- (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 transactions should be in accordance with the rules on transfer of personal data laid down in Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the movement of such data.
- (9) 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, i.e. transactions which give reasonable ground for suspecting that insider dealing or market manipulation is involved. 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.
- (10) This Directive respects the fundamental rights and observes the principles recognised in particular by the Charta of Fundamental Rights of the European Union and in particular by Article 8 of the European Convention on Human Rights.
- (11) The measures provided for in this Directive are in accordance with the opinion of the European Securities Committee.

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HAS ADOPTED THIS DIRECTIVE:

Article 1(Definitions)

For the purpose of applying Article 6 (10) of Directive 2003/6/EC;

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(1) "Person discharging managerial responsibilities within an issuer" shall mean a natural person who is

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(a) a member of the administrative, management or supervisory bodies of the issuer;

(b) a senior executive, who is not a member of the bodies as referred to in point (a) , having regularly access to inside information and the power to make managerial decisions on the future developments and business prospects of the issuer.

(2) 'Person closely associated with a person discharging managerial responsibilities within an issuer of financial instruments' shall mean;

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(a) the spouse of the person discharging managerial responsibilities, or any partner of that person considered by national law as equivalent to the spouse;

(b) dependent children of the person discharging managerial responsibilities;

(c) other relatives of the person discharging managerial responsibilities, who have shared the same household as that person for at least one year on the date of the transaction concerned;

(d) any legal person, trust or partnership, whose management responsibilities are discharged by a person referred to in point 1 of this Article or in letters (a), (b) and (c) of this point, or which is directly or indirectly controlled by such a person, or that is set up for the benefit of such a person, or whose economic interests are substantially equivalent to those of such person.

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(3) 'Person professionally arranging transactions' shall mean investment firm or credit institution.

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Article 2

(Factors to be taken into account when considering market practices)

1. For the purposes of applying paragraph 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:

(a) the level of transparency of the relevant market practice to the whole market;

(b) the need to safeguard the operation of market forces and the proper interplay of the forces of supply and demand.;

(c) the degree to which the relevant market practice has an impact on market liquidity and efficiency;

(d) 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;

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(e) 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;

(f) 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;

(g) 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.

When considering the need for safeguard referred to in point (b) of the first subparagraph, competent authorities shall, in particular, 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.

2. Member States shall ensure that new or emerging market practices are not assumed to be unacceptable by the competent authority simply because they have not been previously accepted by it.
3. Member States shall ensure that competent authorities review regularly 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.

Article 3

(Consultation procedures and disclosure of decisions)

1. For the purposes of applying paragraph 2 of point 1 and point 2 (a) of Article 1 of Directive 2003/6/EC, Member States shall ensure that the procedures set out in paragraphs 2 and 3 of this Article are observed by competent authorities when considering whether to accept or continue to accept a particular market practice.
2. Without prejudice to Article 11 (2) of Directive 2003/6/EC, competent authorities shall, before accepting or not the market practice concerned, 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 there exist comparable markets, i.e. in structures, volume, type of transactions.

3. Competent authorities shall publicly disclose their decisions regarding the acceptability of the market practice concerned, including appropriate descriptions of such practices.

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.

Article 4

(Inside information in relation to derivatives on commodities)

For the purposes of applying the second paragraph 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:

- (a) routinely made available to the users of those markets, or
- (b) 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.

Article 5

(Lists of insiders)

1. For the purposes of applying the third subparagraph of Article 6(3) of Directive 2003/6/EC, Member States shall ensure that lists of insiders include all persons covered by that Article who have access to inside information whether on a regular or occasional basis.
2. Lists of insiders shall state at least:
 - (a) the identity of any person having access to inside information;
 - (b) the reason why any such person is on the list;
 - (c) the date at which the list of insiders was created and updated.
3. Lists of insiders shall be promptly updated whenever
 - (a) there is a change in the reason why any person is already on the list;
 - (b) any new person has to be added to the list;

(c) any person already on the list has no longer access to inside information.

4. Member States shall ensure that lists of insiders will be kept for at least five years after being drawn up or updated.

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5. Member States shall ensure that the persons required to draw up lists of insiders take the necessary measures to ensure that any person that has access to inside information acknowledges the legal and regulatory duties entailed and is aware of the sanctions attaching to the misuse or improper circulation of such information.

Article 6

(Managers' Transactions)

1. For the purposes of applying Article 6 (4) of Directive 2003/6/EC, and without prejudice to the right of Member States to provide for notification obligations by other persons than those covered by that Article, Member States shall ensure that all transactions conducted on the own account of persons referred to in Article 1 are notified by these persons to the competent authorities. The rules to which those persons have to comply with shall be those of the Member State where the related issuer is registered. The notification shall be made within five working days of the transaction date to the competent authority of that Member State. When the issuer is not registered in a Member State, this notification shall be made to the competent authority of the Member State where the issuer was admitted to trading for the first time in the European Union.

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2. The Member State as referred to in paragraph 1 may decide that the notification be delayed until the total amount of transactions has reached five thousand Euros. If this amount has not been reached at the end of a calendar year, notification may be delayed until the 31 January of the following year.

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3. The notification shall contain the following information:

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(a) name of the person discharging managerial responsibilities within the issuer, or, where applicable, name of the person closely associated with such a person,

(b) reason for responsibility to notify,

(c) name of the relevant issuer,

(d) description of the financial instrument,

(e) nature of the transaction (acquisition or disposal),

(f) date and place of the transaction

(g) price and volume of the transaction.

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<#>The notification as referred to in paragraph 2 may be delayed until the total amount of transactions referred to in paragraph 1 has reached five thousand Euros. If this amount has not been reached at the end of a calendar year, notification may be delayed until the 31 January of the following year.¶

Article 7

(Suspicious 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 therein decide on a case-by-case basis whether there are reasonable grounds for suspecting that a transaction involves insider dealing or market manipulation, taking into account the elements constituting insider dealing or market manipulation, referred to in Articles 1 to 5 of Directive 2003/6/EC, in Commission Directive XXX³ implementing Directive 2003/6/EC as regards the definition and public disclosure of inside information and the definition of market manipulation, and in Article 4 of this Directive.

Article 8

(Timeframe for notification)

Member States shall ensure that in the event that persons, as referred to in Article 6 (9) of Directive 2003/6/EC, become aware of a fact or information that gives reasonable ground for suspicion concerning the relevant transaction, make a notification without delay.

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:
 - (a) description of the transactions, including 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);
 - (b) reasons for suspicion that the transactions might constitute market abuse;
 - (c) 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;
 - (d) capacity in which the person subject to the notification obligation operates (such as for own account or on behalf of third parties);
 - (e) any information which may have significance in reviewing the suspicious transactions.
2. Where that information 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.

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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

(Liability and professional secrecy)

1. Member States shall ensure that the person notifying to the competent authority as referred to in Articles 7 to 10 shall not inform the persons on behalf of whom the transactions have been carried out, or parties related to those persons, of this notification. The fulfilment of this requirement shall not involve the notifying person in liability of any kind, providing the notifying person acts in good faith.
2. Member States shall ensure that competent authorities do not disclose ~~the identity of~~ the person having notified these transactions, without prejudice to the requirements of the enforcement and the sanctioning regimes under Directive 2003/6/EC.
3. The notification in good faith to the competent authority as referred to in Articles 7 to 10 shall not constitute a breach of any restriction on disclosure of information imposed by contract or by any legislative, regulatory or administrative provision, and shall not involve the person notifying in liability of any kind.

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Article 12

(Transposition)

1. 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.

2. 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 13

(Entry into force)

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

Article 14
(Addressees)

This Directive is addressed to the Member States.

Done at Brussels, [...]

For the Commission
[...]
Member of the Commission