Comments on

CESR's Consultation Paper

Market Abuse Additional Level 2

Implementing Measures

15th June 2003

Introduction

The Deutsches Aktieninstitut e.V. is the association of German exchange-listed stock corporations and other companies and institutions with an interest in the capital market. Its most important task is to strengthen Germany's position as the location for financial services in the international competition, to support the development of the relevant framework, to enhance corporate financing in Germany and to promote the acceptance for equity among investors and companies.

The BDI is the umbrella organisation for a total of 35 industrial sector associations and groups of associations in Germany. It represents the interests of 107,000 enterprises employing 7.7 million people.

Apart from the questions to be answered there is an additional point to be considered:

The Market Abuse Directive includes a duty on an issuer to disclose inside information that directly concerns it to the public as soon as possible. Dissemination of the information must be through an appropriate channel.

In its previous consultation paper CESR is proposing that inside information can only be considered as having been publicly disclosed (for the purposes of Article 6(1)) when it is disclosed through an officially appointed mechanism (so that even though the information is publicly known due to other forms of publication, e.g. newspapers, an issuer would not have complied with the duty to disclose unless it had also made a disclosure through the officially appointed mechanism).

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According to our point of view this point should be dealt with on level 1 in the transparency directive and not on level 2 of the market abuse directive.

The consequences of allowing disclosure only through an officially appointed mechanism would mean that an issuer in a worst-case scenario had to use currently 15 different information channels, which would hinder a simultaneous publication in all member states. The lack of a language regime would also lead to the need of multiple translations. There can be no doubt that the costs for the issuers would rise significantly.

One should think about introducing an European passport for ad-hoc-disclosure which would allow certified providers to distribute the information in all the member states where the securities of the issuers are listed.

V. Insiders' Lists

Question 10: Do you agree on the relevance of establishing a list for each matter or event when it becomes inside information?

No. We can understand the reasons why CESR is proposing such an approach. However, establishing such a list for each matter or event when it becomes inside information, is a measure that requires a lot of costs and effort in organisation of a stock listed company.

CESR itself mentions, that the lists are quite demanding activities that require continuous monitoring of inside information flows (Number 57). It suggests the implementing of a dedicated resource like a compliance office that could govern these activities. Most stock listed companies already have a compliance office. This is getting more and more common in regard to the fulfilling of the current and already existing regulations of the capital market law. To require furthermore such lists, would overburden the stock listed companies with such effort at a time when we don't know whether this is necessary in the planned form.

There are already regulations now for more transparency e.g. in regard of directors' dealings or ad hoc disclosure and also the general drawing up of an insiders' list. So we should wait, if these smaller steps will suffice before we implement difficult and expensive regulations on insiders' lists where every matter or event and the persons working on them have to be listed, especially when it is planned to update those daily.

We also see problems arising when the criteria for such lists are very broadly defined. The danger of an overly broad definition would mean that, in cases of doubt, companies might have to compile a list of their staff and business partners and transmit it to the Competent Authority upon request. Again, it has to be stressed out that the level of cost and expense for regular updates of the list should be held on a reasonable scale.

We prefer a list with so called permanent insiders, who have access and influence to inside information or work in confidential areas in the financial, legal and strategic departments. Another materiality threshold could be, that the information concerned must be able to have a significant influence on the market value.

Question 11: Should the minimum content of the list be specified at Level 2?

Yes.

Question 12: Should Level 2 give examples of those persons acting on behalf of or for the account of the issuer who should be required to draw up lists?

Yes.

Question 13: To what extent is drawing up a list of "*permanent insiders*" useful? Should Level 2 identify the jobs, which typically provide access to inside information?

As already mentioned in Answer 10, we prefer a list of permanent insiders. There should only exist a duty, to put those in the insiders' list. An identification of the jobs would be helpful. However, on level 2 a definition should be given which jobs are taken into account. Examples would be helpful. We regard the listing in Number 62 as a good indicator for permanent insiders.

Question 14: Would it be useful to further develop at Level 3 the "*illustrative system*" outlined?

Yes.

Question 15: Would it be useful to describe the meaning of the expression '*working for them*' (article 6, paragraph 3) for example, to give clarification regarding people who are not employees of the issuer?

Yes.

Question 16: Do you agree with the approach adopted regarding the criteria, which trigger the duty to update insiders' lists?

We believe that the significant costs for issuers and related persons and the also the effort for the issuers is too high to update insiders' lists on a daily basis. We still prefer a monthly update for these permanent insiders. In individual relevant cases like e.g. the change of a manager of the board this change should be communicated immediately to the competent authority. Nevertheless, such an event would also trigger the duty to make an ad hoc-disclosure, so that the public will be informed about this fact anyway. It

would only mean a formal update for the list for the competent authority but would be helpful.

V. DISCLOSURE OF TRANSACTIONS

Question 17: Is the above description for " persons discharging managerial responsibilities within an issuer" sufficient for level 2 legislation? Are there other persons that should be considered as belonging to the management of the issuer or should there be a specific restriction to persons who can assess the economic and financial situation of the company?

The consultation paper describes “Persons discharging managerial responsibilities within an issuer” as persons who typically have access to inside information and who have decision-making powers. These are no characteristics that could define such a person without leaving doubts. Especially a look to the consultation paper’s broad approach concerning those persons who could end up on the insider’s list underlines that this group is obviously too large. The second criterion of “decision making powers” cannot be regarded as a limiting factor, as it has not been specified what kind of decision is meant.

The only suitable criterion is the membership of the administrative, management or supervisory bodies or being a personally liable partner of an issuer.

Thus, the group of persons required to submit reports should be limited to these persons in order to prevent the publications from getting out of hand, which would be more likely to produce uncertainty in the markets than enhance transparency. Therefore, the idea of expanding the obligation to other persons should not be pursued.

Question 18: Is the above description sufficient for level 2 legislation? Are there other persons that should be considered as belonging to this category?

The consultation paper describes “persons closely associated” as all persons sharing the same household as the person discharging managerial responsibilities. This group might be too large if it includes e. g. domestic workers or au pairs. As persons closely associated with persons discharging managerial responsibilities within an issuer should be regarded (common law) spouses, (registered) partners and relations in the first degree of the members of the managing bodies who live in the same household with the family members.

Question 19: Is the above description sufficient for level 2 legislation? Should there be a threshold concerning the disclosure obligation to the competent authority?

According to the consultation paper the disclosure obligation to the competent authority should cover all transactions in shares of the said issuer or in

derivatives or other financial instruments linked to them regardless of the size of the transaction.

However, it is advisable not to make every single mini-transaction subject to the reporting obligation. This would mean more effort for both, the competent authority and the person or company obliged without any meaning for insider prevention.

Therefore, a de minimis limitation should be introduced, as is already the case in many countries. A disclosure requirement should not exist for transactions whose aggregate value in terms of the total number of transactions carried out by the party subject to the disclosure requirement within 30 days does not exceed 25,000 Euro.

As Article 6 (4) states that member States shall ensure that public access to information concerning such transactions, on at least an individual basis, is readily available as soon as possible, it is obviously planed that the transaction disclosed to the competent authority will be also disclosed to the public. However, the disclosure of mini-transactions would not add to transparency, but to confusion on the markets.

In addition, a disclosure requirement should not exist if the acquisition is made on the basis of an employment contract or as part of the remuneration as there does not exist the danger of insider dealing.

Question 20: Is the above description sufficient for level 2 legislation? Are there any other details that should be covered on this level, for example the number of the relevant securities that the person holds after the transaction?

The disclosure to the competent authority should be made as soon as possible. The consultation paper's approach to allow a maximum of two day seems to be appropriate. A notification that contains name, address, nature of notification duty of the person/relation to the company, name of the relevant issuer, name, class/description of the financial instrument, nature of the transaction (acquisition/disposal/other), date (trading day) and market of the transaction, price and amount/number of financial instruments covers all important details with the exception of the securities identification number

VI. Suspicious Transactions

Question 21: Do you agree with the proposed approach?

Basically, we agree. However, it is rather critical, that the persons subject to the obligation to notify the competent authority about a suspicious transaction do not need any evidence or proof. This might cause an abusive conduct with such an instrument. Thus there is an urgent need for a materiality threshold. At least these persons should have to explain in detail why they

reasonably think, that a suspicious transaction takes place and name indications they draw the conclusion from.

Question 22: Do you think that other possibilities should be taken into account?

Generally, the time of notification should be immediately, after a sufficient suspicion of such a transaction is aroused. It does not matter whether this will be before or after the transaction has taken. When the suspicion is already mentioned before the transaction takes place, there might be a possibility to prevent an illegal transaction.

Question 23: Do you think that other elements should be mentioned?

We regard this listing as sufficient.

Question 24: Do you think that the proposed advice is appropriate?

Basically yes. Nevertheless, we want to point out that the notifying of suspicious transactions by persons professionally arranging financial services – the so called “whistle blowing” in cases where the notifications turns out to be unsubstantiated a lot of harm could be done concerning the relationship to client. In financial transaction the client wants to be able to trust the person arranging his business. This confidence can by easily destroyed by a whistle blowing without a cause. Therefore, a regulation concerning prevention for a good faith suspicion is necessary. This could be e.g. a safe harbour rule.