

Mr. Fabrice Demarigny,
Secretary General, CESR

Consultation response concerning “CESR's Advice on possible Level 2 Implementing Measures for the Market Abuse Directive” – 2nd mandate.

The Danish Bankers Association and the Danish Securities Dealers Association are in receipt of CESR's consultation paper on the above issue and welcome the consultation of the market. By setting up Expert Groups and by using Open Meetings CESR shows its willingness to hear the industry's views on this issue.

CESR's advice is to some extent very detailed, differing considerably from conventional North European legal traditions. The Associations agree that harmonised rules in this area benefit the creation of a single capital market and benefit investors and securities traders alike; however, the detailed nature of the provisions makes it difficult to apply the rules appropriately to each market, which may hinder appropriate application of the rules.

The Associations' specific comments to each section followed by the Associations' responses to the questions asked by CESR are set out below.

Guidelines for Determining Accepted Market Practices

The Associations welcome that guidelines are set up for competent authorities to follow when considering if a practice should be deemed to be an accepted market practice.

The Associations agree that a completed list of accepted market practices should not be drawn up. However, the Associations think that it should be mandatory for the competent authorities to consult the relevant market participants when considering if particular market practices should be accepted. Consulting the relevant market participants would help to ensure that the competent authorities have due consideration to the background of existing market practices in the individual markets.

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Responses to CESR's Questions

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Question 1: *Is the proposed approach appropriate, focussing both on the characteristics of particular market practices and the procedures that Competent Authorities should follow?*

Yes.

Question 2: *Are the suggested principles, factors and procedures appropriate?*

Yes.

Would you consider adding more factors such as the degree to which a practice has a significant effect on prices and in particular on reference prices?

No.

Question 3: *The Directive focuses on accepted market practices "on the regulated market concerned", but the prohibitions of the Directive also apply to OTC trading. Is it necessary to make any distinction between standards of acceptable market practices on regulated markets and OTC practices? Is it also necessary to make distinctions between standards of acceptable market practices in different kind of regulated markets or MTFs (e.g. order driven or price driven)?*

No. This has already been taken into account by considering "the structural characteristics of the market".

Question 4: *Do you agree that a practice need not be identifiable as already having been explicitly accepted by a competent authority before it can be undertaken?*

Yes - certainly. The alternative would bear the risk of hindering innovations in trading practices.

Definition of "Inside Information" for Derivatives on Commodities Markets

Responses to CESR's Questions

Question 6: *Has CESR correctly identified all the relevant and material market, product and information factors relevant to the definition of "inside information" for commodity derivatives?*

Yes.

Question 7: *Is there further information, which is material, relevant and disclosable in relation to commodity derivatives markets?*

Not necessarily.

Question 8: *Does the draft advice accurately reflect the information relating to underlying commodities, which commodity derivatives markets users expect to receive?*

Yes.

Question 9: *Is there any additional guidance that CESR should consider giving in relation to the definition of "inside information" for commodity derivatives?*

No comments.

Insiders' Lists

In its mandate the Commission asks CESR for its advice on the conditions under which issuers or entities acting on their behalf are to draw up a list of those persons working for them and having access to inside information together with the conditions under which such lists are to be updated.

According to CESR's level 2 advice issuers and persons acting on their behalf should establish a list for each matter or event when it becomes inside information and a permanent list of internal persons who have regular access to inside information within the issuer.

Reading the mandate from the Commission, however, there is some uncertainty about whether the wording of the mandate contains an obligation for issuers to establish a list **of each matter or event** when it becomes inside information. The mandate reads: "persons ... having access to inside information". "Persons having access" may actually be the same category of persons due to their function within issuer, and the category of persons may not differ from projects. According to the mandate the issuer in this case has to

draw up new lists when a new matter or event arises even though it is the same category of persons who have access to inside information within the issuer. In practice, this obligation is very bureaucratic and burdensome to fulfill. Read in the context of the purpose of the rule the wording of the mandate leaves issuer the possibility of drawing up a permanent list of persons who normally have access to the information and supply this list with persons only having access to inside information when a concrete matter or event arises.

Responses to CESR's Questions

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

No.

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

No.

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?*

No.

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?*

Yes, it seems reasonable that the category of "persons of permanent insiders" is defined at level 2.

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

No comments.

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.

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

Yes.

Disclosure of Transactions

Responses to CESR's Questions

Question 17: *Is the above description for "persons discharging managerial responsibilities within an issuer" sufficient for level 2 legislation?*

Yes.

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?

Not necessarily.

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

No. According to CESR's level 2 advice persons closely associated with the person discharging managerial responsibilities are all persons **sharing the same household** as this person. It is very uncertain how "sharing the same household" should be understood, and given the consequence of the rule it should be clarified in the advice how to interpret "sharing the same household".

No.

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

Yes there should be a threshold concerning the disclosure obligation to the competent authorities. It is not relevant to disclose minor transactions and the disclosure of all the transactions in shares would merely overload the market with information. By overloading the market there is a risks of un-

dermining the purpose of the disclosure namely to give relevant information about such transactions.

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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?*

According to the CESR advice the disclosure to the competent authority should be made as soon as possible, in any case within 2 working days. It should be noted that it is not always possible to give this relevant information to the competent authority within 2 days why the time limit on 2 days should be reconsidered.

The CESR advice on what the notification should contain seems sufficiently detailed.

Suspicious Transactions

Responses to CESR's Questions

Question 21: *Do you agree with the proposed approach?*

Yes. It is appropriate that it is left for the competent authorities to decide if a suspicious transaction constitutes insider dealing or market manipulation.

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

No.

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

No.

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

Yes.

Yours faithfully

Sidsel Nordengaard