



*Economic, Financial and
Fiscal Affairs*

Legal Affairs

**Market Abuse
Additional Level 2 Implementing Measures
(CESR consultation document 03 102b)**

Medef Position

Accepted market practices

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

CESR's technical advice is making provision for Competent Authorities to publish their conclusions regarding the acceptability of market practices. MEDEF regrets that this technical advice does not oblige competent authorities to include a full description of the accepted market practices in their conclusions.

MEDEF is asking CESR to modify its technical advice and to provide that :

conclusions regarding the acceptability of market practices, including appropriate descriptions of such practices, should be published to aid transparency for all market users

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

MEDEF support the commitment of CESR in the process of recognising a practice as an accepted market practice and would like to see included in its advice that the competent authority, prior to any market practice recognition, consult the other competent authorities, as mentioned, but also do its best effort to obtain a minimal consensus within the group.

CESR should report the result of these debates and the list of accepted market practices applicable according to the market to the EU Commission on a yearly basis. Furthermore, any investment firm member of a regulated market should be notified the accepted market practice applicable according to the market. Finally, for obvious issues of visibility, it must be the responsibility of the competent authority to notify and to update this list on a regular basis to all members of the market.

These information and notification procedures should minimise the legal and regulatory risks involved by the existence of different sets of accepted market practices within the European Union.

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 ?

MEDEF agrees with CESR's technical advice.

Question 5 : CESR is committed to the future discussion of specific market practices as part of the Level 3 work necessary to increase the harmonisation of accepted practices where appropriate. Please specify any examples of particular practices which you consider could be classified as accepted market practices for the purpose of the Directive.

- Use of VWAP ;
- Sells/backs of securities in the regulated market for the sole purpose of evidencing an official market price for illiquid securities ;
- Pre-arranged post trading for options and its hedging ;
- Marking the close practice in case of orders executed on behalf of certain clients ;
- Trading at last practice, when requested by the client.

Insiders' lists

Medef agrees that an insiders' list could be very useful in order to encourage issuers to implement an appropriate structure for quotation and to ensure that employees who have access to inside information are aware of the associated legal and regulatory duties. It is also a way to insist on the confidential character of this information.

Nevertheless, Medef insists on the cultural and organizational differences existing between financial intermediaries and issuers. Those differences have to be taken into account in determining the implementing measure of insiders' lists established by issuers. Banks realise many financial operations and are structurally in a position to have access to insider information, that is the reason why they need a very strong structure with Chinese walls, often a dedicated person in charge of compliance to business code ("déontologie"). Issuers, in general, do not realise many financial operations, that is why implementing measures must be flexible to be adapted to the issuers' sizes and their implication in financial markets. CESR has to keep in mind that a significant part of issuers has few resources to allocate to this problem.

Taking into account those restrained means, and the fact that a too heavy regulation could lead to an application that would not respect the directive spirit (for instance, issuers could put on those lists anybody which could get an insider information at any time without operating a real selection), it is necessary to adopt a restrictive approach :

- a permanent list could be established with persons who have a regular access to periodic information (as stated by the "Transparency" directive), when it is still an inside information ;
- "ad hoc" lists dedicated to market operations (exclusively).

It must be specified that persons belonging to the permanent list are not automatically informed of specific market operations and therefore it cannot be presumed that they systematically belong to “ad hoc” lists. Furthermore, regarding the permanent list, it is necessary to select persons having a wide vision of periodic information.

Consequently, we propose the following amendments :

58. Issuers and persons acting on their behalf or for their account should ~~immediately~~ as soon as possible establish an "insider" list of natural and legal persons who have, or have had, access to a matter or event when it becomes inside information.

59. Issuers and persons acting on their behalf or for their account should ensure that the persons that may have access to inside information are aware and acknowledge the legal and regulatory duties, as well as the penal, administrative and disciplinary sanctions that may be incurred through the misuse or undue circulation of such information.

60. Each list should indicate at least :

- the related matter or event,
- the person's functions and responsibilities,
- when the person had access to it for the first time,
- if and when the person had no more access to subsequent information relating to the event or matter.

61. ~~In the event that an issuer has internal persons who have regular access to inside information within the issuer, the issuer should draw up a "permanent" list of these persons.~~ Regarding periodic information, a dedicated list can be established (by type of periodic information). That permanent list can be linked with a memorandum, which stipulates how persons exposed to periodic information must act when they are in an insider position.

Persons included on those lists may be included or not in lists dedicated to a precise matter or event (“ad hoc lists”).

62. (no change)

63. (no change)

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

Yes, as stated below, but exclusively concerning market operations. Regarding the restrained means of issuers, it cannot be extended to any type of matter or event. Furthermore, it can be more difficult for an issuer to identify persons that could have been part to a matter or event which may constitute an inside information, when that matter or event belong to the normal course of the issuer activity (new commercial agreement, technical difficulties on a product...). Those types of events are more difficult to identify at an early stage by the person in charge of insiders' lists and would oblige the issuer to implement a very costly and heavy structure.

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

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 ?

We think that the proposed Level 2 advice is sufficient. Those precisions are not needed.

There is no real difficulties to know which persons will be on that list, it can be assumed that that list will include the same functions (with small differences) in all companies. Therefore it is not useful in the perspective of an investigation. Nevertheless, we consider that this list can be useful for a prophylactic objective. Furthermore, for the persons having access to periodic information, it is easier to draw that list a single time than doing it for each periodic event.

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

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?

We think that the proposed Level 2 advice is sufficient. Those precisions are not needed.

Disclosure of transactions

Medef understands the transactions disclosure duty of persons discharging managerial responsibilities within an issuer as aiming at bringing the best information possible to the investors and the markets. It is important to restrict this duty to strict necessary information. However relevant information for the market is to know when the persons of the management and supervisory bodies make important transactions on their shares because it can give an indication on the way he or she evaluates the company future. But this objective must be balanced with respect of labour law and fundamental rights (privacy). Furthermore, as this information may be misleading (the transaction may be justified by personal reasons and thus do not give any useful information regarding the company future), the procedure must be limited to the minimum requirements.

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 ?

We disagree with the second indent ("senior managers who are not necessarily members of these bodies ..."). In France, the management and supervisory bodies hold all decision-making functions. There is thus no need to extend the definition. Besides including senior managers would contradict labour law, as employer may not require that kind of notification from their employees (especially in case of share-based payments). It could be very embarrassing for a senior manager to have to disclose its transactions as he could be obliged to justify its choice to his hierarchic superiors.

Consequently, we propose the following amendments :

73. Persons discharging managerial responsibilities within an issuer are persons who typically have access to inside information and who have decision making powers. This is usually the case for members of the administrative, management or supervisory bodies of the issuer,
- ~~senior managers who are not necessarily members of these bodies but perform similar decision making functions within the issuer~~

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

We do not believe that "sharing the same household" or "an economic equivalence of interest" can be the adequate criteria to use. "Sharing the same household" is either too wide or too narrow and has no logical justification : a family member may not share the same household but enable the manager to realise transactions on his banking account.

Furthermore, asking a notification by anybody sharing the same household would constitute an infringement of fundamental rights (privacy).

The proposed notion of "economic equivalence of interest" is really vague and does not give any additional benefit to appreciate the existence of a power to manage a business or to materially influence management decisions.

Consequently, we propose the following amendments :

75. Persons closely associated are all persons who gave a proxy on their banking accounts to the person discharging managerial responsibilities. ~~sharing the same household as the person discharging managerial responsibilities.~~ Furthermore, all trusts, companies and other legal persons are subject to the disclosure requirements, if a person discharging managerial responsibilities within an issuer is the sole shareholder or controlling shareholder of this trust, company or other legal person or has otherwise the power to manage its business or to materially influence its management decisions. ~~An indicator for this is an economic equivalence of interest between the trust, company or other legal person and the person discharging managerial responsibilities.~~

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

We think that the proposed Level 2 advice is sufficient and that a threshold would necessarily be arbitrary. Besides, it is not really relevant as insider dealer could easily segment its transactions to stay below the threshold.

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 proposed level 2 is sufficient. Nevertheless, we consider that a 2 working days delay is not enough in order to disclose the transactions to the competent authority, as the issuers are not structured in a way enabling a disclosure in two days. We propose this delay to be extended to 5 working days, starting at the reception of the transaction order.

The name, address and relation to the company are not elements needed by the investors or the markets and are not required by the directive, which asks individual information but no personal information. The interesting element is that a member of management and supervisory bodies (regardless of his identity) has made some transactions.

Consequently, we propose the following amendments :

79. The disclosure to the competent authority should be made as soon as possible, in any case within ~~2~~ 5 working days. The notification must contain :

- ~~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

Suspicious transactions

Article 6.9 of the Directive illustrates the concern on the part of the European legislator to make market integrity a focus for all professional economic operators, both through combating market abuse and by preventing such abuse. Medef agrees with the European legislator's and CESR's aim but is really concerned with the practical aspects of the duty of notification of suspicious transactions as it could lead to important consequences.

Medef is particularly concerned by the fact that CESR's advice regarding suspicious transaction totally occults the financial intermediary advice duty towards its clients. Regarding the fact that the directive does not take into account any intentionality criterion, the advice duty is very important in order to prevent accidental market abuses. With the proposed level 2 advice, CESR could favour an objective of market abuse detection rather than prevention, whereas the most important for the market is to prevent market abuse.

More precisely, the proposed notification of suspicious transactions procedure raises many crucial problems :

- The lack of concern for the issuer is worrying. Medef believes that it is obvious that an issuer has to be informed of any relevant event or matter concerning its financial instrument, especially if someone is trying to take advantage of an inside information (at least in order to secure the information channels inside the issuer). Medef wants to highlight the fact that persons ordering transactions are not always issuers' employees or members of supervisory and management bodies (for instance, individual investors, pension funds...)

- Procedure of notification to the competent authority proposed by CESR would be unworkable, as it requires that financial intermediaries behave as if they were working for the competent authorities, whereas they have no means and knowledge to do it. Besides, when the person ordering the suspicious transaction is the issuer, it would be very damaging for the relationship with the person arranging the transaction, as the financial intermediary will in the same time execute the order and denounce its client. The proposed level 2 advice seems to imply that financial intermediaries have no advice duty in those cases. Medef asks CESR to further precise in its advice the articulation between that procedure and the financial intermediaries' advice duty.

Considering those different problems, Medef is opposed to CESR proposed advice as long as it doesn't require the information of the issuer.

When the financial intermediary has sufficient reasons to consider the transaction as suspicious, he must notify it as soon as possible to the competent authority. It would be difficult at that stage to inform the person ordering the transaction, as there would be a real risk of withholding of evidence. However, Medef insists on the crucial necessity of adequate information of the issuer. The best way to ensure the information of the issuer would be to include it in CESR's technical advice as being one of the mandatory steps of the procedure. Some requirements introduced by the directive will lead issuers to designate a person in charge of compliance (a “déontologue”), particularly to follow insider's lists. It is thus possible to identify that responsible person as the permanent correspondent for the competent authority, which would then transmit him any notification for suspicious transaction concerning the issuer. This transmission should not cause any problem, as it is his liability to ensure an adequate enforcement of financial law. There is thus no risk of withholding of evidence. Furthermore, the deontologue would thus be in a position to prevent potential new market abuses, for instance by creating new insiders' lists by using the content of the notification.

<i>Question 21 : Do you agree with the proposed approach ?</i>
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Medef agrees with the first indent : the reference to the Directive is clear and precise. Nevertheless, some problems remain, as the proposed approach would be workable only if it corresponds to a procedure allowing an adequate information of all parties.

- ☞ "Transaction" must be understood in a restrictive way only (for any financial instrument listed on a regulated market, the execution of an order carried out on or outside a regulated market). Indeed, this definition is precise and objective. Medef considers that it would be better to implement a realizable measure, which would effectively bring a benefit to prevent market abuse than a too ambitious measure, which would be impossible to apply for financial intermediaries and could be damaging for issuers.
- ☞ Nowadays, most transactions are electronically executed, without any human intervention. Therefore, it will be very difficult for financial intermediaries to check all the orders transmitted (for instance for orders transmitted via Internet by investors themselves and automatically executed). Furthermore, it will render almost impossible the check of a transaction " in perspective with other transactions ". That is the reason why the proposed approach would be workable only if it corresponds to a restricted procedure.

- ☞ CESR's advice is wide and ambiguous as it is stated that "these persons need not have any evidence" but also that "the person arranging transactions has sufficient indications that the transaction might be abusive". The distinction is not clear enough and could lead to legal uncertainty.

Therefore, we propose the following amendments :

94. As regards the criteria for determining the notifiable transactions, CESR proposes the following :

- In order to determine whether a transaction in financial instruments might constitute insider dealing or market manipulation, transactions must be assessed by reference to the elements constituting insider dealing and market manipulation as defined in Articles 1 to 5 of the Directive itself, completed with any implementing measure adopted by the European Commission in accordance with Article 17.2 of the Directive.
- If the competent authority considers that the suspicion about the transaction is serious, the authority transmits all details about the transaction to the compliance officer of the issuer, as soon as possible in order to enable the issuer to take efficient corrective actions.
- Persons subject to the obligation to notify the competent authority shall decide on a case-by-case basis whether a transaction is suspicious. These persons need not have any evidence. The notification obligation has to be fulfilled if the person arranging transactions has sufficient indications that the transaction might be abusive. A transaction means the execution of an order on a regulated market.
- ~~— Certain transactions can seem completely void of anything suspicious when considered separately, but can take on a more suspicious aspect when seen in perspective with other transactions, a certain conduct or other information (e.g. information to the effect that the third party for whose account the transaction is executed could be an insider). In such case, the whole group of transactions should be notified.~~

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

Medef considers that the technical advice is ambiguous and may lead to some contradictions :

- ☞ "immediately after the suspicious transaction has been carried out" : CESR's technical advice contains a contradiction when using the immediacy criteria but, in the same time, asking the person professionally arranging transactions to include all details set out in § 99 (e.g. nature of transaction, passport number, etc.). Medef considers that a brief procedure, even less detailed would be preferable to a more detailed one, which would never be applied because it would be unworkable. That is the reason why, Medef recommends CESR to privilege the immediacy notion instead of a very detailed procedure.
- ☞ Furthermore, the criteria for determining when a suspicious transaction triggers the duty of notification need some precisions. Medef remarks that the expression "carried out transaction" is a criterion, which could refer to different moments of the transaction (trading, clearing and settlement) and could raise some translation difficulties. This ambiguity is especially embarrassing when the different operations are not executed by the same company. The moment when a suspicious transaction triggers the duty of notification has thus some incidence on determining the person responsible for the notification of the transaction.

Consequently, we propose the following amendments :

96. As regards the time of notification, CESR proposes the following :

In relation to a transaction ~~or a group of transactions~~, notification without delay shall mean :

- immediately after the suspicious transaction has been carried out ;
- after completing a transaction, immediately after a party under obligation to notify becomes aware of any fact, as a result of which the transaction seems to be suspicious.

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

Medef has two comments :

- ☞ At first, CESR's requirements (e.g. the reasons why the person professionally arranging transactions suspects that this transaction, or series of transactions, might constitute insider dealing or market manipulation, the passport number, ...) are incompatible with the need for a brief procedure as set out in § 96 (notification without delay).
- ☞ Secondly, CESR's requirement for " any information and documents which may have significance in reviewing the case " is inappropriate as it asks the person professionally arranging transactions to take the place of competent authorities (when those persons are not equipped to deal with that kind of issues) and as it could be interpreted as contrary to the fact that the person arranging the transaction doesn't need any evidence (see § 94, second indent).

Consequently, we propose the following amendments :

99. The following details shall be included in the notification to the competent authority :

Nature of the transaction and mode of execution (e.g. acquisition through a stock exchange order, through subscription to an IPO, etc.)

~~Reason(s) why the person professionally arranging transactions suspects that this transaction, or series of transactions, might constitute insider dealing or market manipulation ;~~

Name and any other means of identification (e.g. investment account number, passport number, etc.), address of the person on behalf of whom the transaction has been executed;

Names and any other means of identification, addresses of other parties involved;

Name and nature of the financial instrument concerned;

Capacity in which the person subject to the notification obligation operates (for own account, on behalf of a third party, etc.);

Whether the transaction(s) is (are) carried out on or outside a regulated market;

In the case of reception, transmission and/or execution of a stock exchange order :

- the market in which it was executed (e.g. ASE parallel market) ;
- the type of order executed (limit order, market order, other characteristics of the order);
- the type of trading market (block trade, retail trade, etc.).
- Date and time of the transaction;

- Size of the transaction (volume/number of financial instruments concerned and value/price);

~~— Any information and documents which may have significance in reviewing the case.~~

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

Medef agrees with the proposed advice and has no particular comment.

103. (no change)

