



RESPONSE

Call for Evidence

Evaluation of the Supervisory Functioning of the EU Market Abuse Regime

1. The European Banking Federation (EBF)¹ welcomes the opportunity to submit views on what CESR should consider in its further work in the area of the Market Abuse Directive (MAD).
2. We also welcome CESR's continuing efforts to prepare ground for convergent implementation and application of the new regime by ensuring that a common approach to the operation of the Directive takes place throughout the EU amongst supervisors.

General Remarks

3. The Market Abuse Directive (MAD), as the first European directive to follow the Lamfalussy procedure was very much a pioneer piece of legislation. It has been possible to draw conclusions and apply the experience from the MAD to subsequent pieces of legislation following the Lamfalussy procedure.
4. While some delays in transposition of the MAD into national legislation still exist, transposition and implementation is now by and large complete across Europe. The time Member States have taken to complete this process has varied significantly. Therefore, at this stage our **members' experiences of the regime differ** and the collective experience of European banks varies according to the jurisdiction of the institution.
5. However, where there has been experience of the MAD regime, the EBF reports that this experience has been broadly positive and that **by and large the regime appears to be working well**.
6. With this in mind, the EBF calls on CESR to allow for **further experience of the regime to be gained before taking definitive policy action**. We believe that a better decision on which areas could be in need of review should be taken with the benefit of greater experience and towards the end of 2007.

Specific Remarks

7. As we stated at the Open Hearing of 17 October 2006, the EBF believes that practical experience of the market abuse regime is still developing and the discussions at Level 1 took place only in the recent past. Consequently, it is **not our intention at this juncture to propose changes to the Level 1 framework**

¹ The European Banking Federation (EBF) is the voice of the European banking sector representing the vast majority of investment business carried out in Europe. It represents the interests of over 5,000 European banks, large and small, from 29 national banking associations, with assets of more than €20,000 billion and over 2.3 million employees.

directive, nor do we suggested concrete changes to the Level 2 implementing measures.

8. However, **inevitably some practical issues have arisen** and CESR-Pol is right to consider seeking to identify further market facing work that may merit further guidance to achieve a harmonised application of the Directive. The issues we highlight below are of a practical nature and can best be resolved by increased supervisory co-operation and co-ordination of practices.

Proposed CESR guidance on inside information

9. In response to CESR's planned work on inside information to be released for consultation in November 2006, **the EBF welcomes CESR-Pol working on this area** and looks forward to presenting more specific feedback on the detailed proposals.
10. The EBF is indeed concerned about the apparently unlevel playing field that has developed across Europe in respect of the **content of insider lists**. Not only do our members regret that European supervisors do not appear to apply a consistent approach to the information that is required for the insider list, but we are also concerned that the cross-border reporting obligations of internationally active banking groups have not been taken into account.
11. We therefore welcomed CESR's confirmation that it proposes a system of **mutual recognition for insider lists** and will return to CESR with more detailed comments on its proposal in full view of the proposed guidance.

Other practical issues

12. In its Call for Evidence of 19 June 2006 CESR states that it is eager to receive any recommendations on what issues relating to MAD would need further guidance and proposals on how to tackle any obstacles to efficient functioning of the markets in accordance with the legal environment.
13. During the Open Hearing of 17 October 2006 we expressed a number of areas where CESR could usefully consider guidance based on our members' feedback of the practical operation of the regime. By way of recap, the issues where we feel CESR could usefully clarify through guidance or improve supervisory co-operation are the following:
 - **Transaction reporting:** We very much welcome CESR assigning the MiFID Level 3 work on transaction reporting a higher priority which has been reflected by the Committee setting out to work on this issue sooner than it had originally planned. We remind CESR to keep in mind the interaction between transaction reporting under MiFID and the MAD and call on the Committee to provide a clear and common direction on where institutions are obliged to file reports and under which specific circumstances.
 - **Stabilisation safe-harbour:** Members have identified that practices in one major European jurisdiction are out of line with that adopted in the major European debt markets as regards the recognition of the over allotment as a stabilisation technique. This lack of consistency in approach could lead to there being a disincentive for those issuers who would ordinarily use this

method, such as those of high yield emerging market debt, to operate on Europe's markets.

- **Publicly available information:** We note that there is not currently a consistent European interpretation on what would constitute “publicly available information” for the purposes of the MAD. We believe that “publicly available” should accommodate information that is free of charge and in the public domain as well as information for which a fee is charged but is generally available (i.e. market data provided by Reuters or Bloomberg).

14. Finally, we note a general inconsistency between jurisdictions in the way **administrative sanctions** are levied on firms that are deemed to be in non-compliance with the market abuse regime of that particular jurisdiction. We fully appreciate that the ability of respective authorities to sanction firms that do not comply with the market abuse regime is (rightly) a Member States competence. However, in the short term we call on CESR to facilitate dialogue between its members in respect of fines so that a general consensus can be found regarding levels of sanctions as far as this is possible. For the longer term the EBF supports the direction of the FSC Report on Financial Supervision's in respect of moving towards a greater equivalence of supervisory powers (where the ability to fine firms is one such power) over time.