

BME comments on the CESR document “*Level 3 – preliminary CESR guidance and information on the common operation of the Directive*” (CESR/04-505) referred to the Market Abuse Legislation

I. Introduction

Bolsas y Mercados Españoles (BME) integrates the companies that direct and manage the securities markets and financial systems in Spain. It brings together, under a single activity, decision-taking and coordination unit, the Spanish equity, fixed-income and derivatives markets and their clearing and settlement systems.

We would like to share with CESR our views on the document “*Level 3 – preliminary CESR guidance and information on the common operation of the Directive*”.

CESR puts forward in the paper its advice regarding level 3 with respect to accepted market practices, market manipulation and suspicious operations reporting.

In general terms CESR advice seems to be rather descriptive and useful for the proposed aim.

II. Accepted market practices

CESR proposes a common format for assessing accepted market practices based on the factors described in article 2 of the Directive 2004/72/EC. This seems to be a very useful pattern which follows the list of non-exhaustive factors of the Directive.

CESR refers in point 2.8 to the duty of the relevant regulators to consult, both nationally and with other competent authorities, the market practice concerned, according to the article 3 (2) of the mentioned Directive. Nevertheless, when proposing the factors assessment, CESR does not include either any allusion to such consultation process or any conclusion or input based on the consultation.

That leads to consider the consultation process foreseen in the Directive as a global one that would, at least implicitly, include and make it unnecessary any further and more specific consultation on the particular factors enumerated. However, the positions or opinions referred to such factors, when coming from players closely linked to the field where the practices take place, especially from market operators, would provide valuable information to be taken into account.

In fact, most of the detailed information required by the regulator in the consultation process, will have to be rendered by the market operator.

We would then ask for a more open model where the consultation with market forces might be produced and taken into account in any single step towards the practice evaluation. This should occur not only once but as many times as required by the nature of the questions considered.

III. Market manipulation

CESR seeks to give examples of what are to be considered manipulative practices with the aim to help the development of a common understanding of what constitutes market manipulation.

We find that the way in which many of those practices are described makes their wording closer, in a practical approach, to the possible signals more than being, in fact, examples of types of practices. This happens mostly with the description of practices that refer to false/misleading signals. In general, we miss a more detailed description of the practice or conduct that may reflect more accurately the precise manipulative conduct, and particularly in these descriptions.

In some of the practices described it is not clear that there happens to be a manipulative conduct, for instance in point 4.12 d), "creation of a floor in the price pattern". In fact this may be done by other market participants besides issuers, as it is frequent that investors buy at a certain level, what may keep a stock in that level. We wonder if this could affect to the pattern of an institutional investor to buy at a given price.

IV. Possible signals

In general terms, it has to be underlined that CESR indications of possible signals are descriptive and well oriented.

We find that in some of them it should be given a more detailed description in order to allow a better identification of what is meant to be the distinctive factor.

This happens in point 5.9 b), as a signal of insider dealing: the investment behaviour is significantly out of character with the client's previous investment behaviour (type of security, size of order ...).

Probably, the key factor for notification would be in those cases the subsequent events or information.

The same could be said in point 5.9 c), specific request of immediate execution of an order regardless of the price.

Given that level 1 refers to transactions, it seems that signals that refer only to orders should be left out of the advice. This would affect point 5.10 j), entering and cancelling orders.

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