

**Response to CESR's public consultation
Market Abuse Directive**

**“Level 3 – second set of CESR guidance and information on the common operation of
the Directive to the market”**

AFEP appreciates CESR's invitation to all interested parties to submit comments to the draft guidance set out in this public consultation which intends to complement the first set of CESR guidance issued in March 2005.

AFEP currently represents the top eighty five private sector companies in France, with a combined market capitalization in 2005 of approximately Eur 1000 billion, combined sales of over Eur 1100 billion and more than 4,8 million employees. The Association seeks to improve the French and European legislative framework in which companies operate by promoting initiatives that contribute to the growth of companies in the world market economy.

AFEP's comments will focus on section I of the guidance, covering what constitutes '**inside information**'. Its members consider that section III '**When do client orders constitute inside information**' concerns more specifically financial institutions. They do not wish to make any general remarks on this point as issuers.

They **agree** with guidance set out in section II concerning the **legitimate reasons to delay the publication of inside information**, and section IV concerning **insider lists**.

I. WHAT CONSTITUTES 'INSIDE INFORMATION' UNDER THE MARKET ABUSE DIRECTIVE ?

1.14 Price significance of inside information

CESR lists some indicators of whether information is likely to have a significant price effect that should be taken into consideration. The examples that are given refer to information that has in the past had a significant effect on prices; pre-existing analysts research indicating the price sensitivity of information; and treatment by the company itself of similar events as inside information.

AFEP's member companies are concerned that this would lead to a situation where **events occurred in the past would create precedents** opposable to them, and thus reversing **the burden of proof**. Indeed, similar events may not always produce the same effects on prices, depending on the variety of other factors mentioned (recent developments etc.). In order to comply with this guidance, companies would be obliged to keep detailed records of elements justifying why in one case information was considered price sensitive and not in another which would constitute considerable additional administrative burden.

Companies should be in a position to judge, without compulsory reference to precedents, whether information is likely to have a significant price effect. **AFEP therefore suggests deleting the three indicators listed in paragraph 1.14.**

In addition, the last paragraph should specify that not only companies, **but also regulators**, should take into account the variety of factors mentioned.

1.15 Examples of Possible Inside Information Directly Concerning the Issuer

For reasons of clarity and legibility, AFEP suggests the non-exhaustive and purely indicative list to be organised by different themes, such as **financial information** (e.g. relevant changes in the assets' value; insolvency of relevant creditors), **operational events** (e.g. mergers, splits and spin-offs; restructurings) or **structural events** (e.g. changes in management and supervisory boards).

In addition, it should be stated that among the criteria typically leading to the classification of an event as inside information are the **exceptional and unexpected character of the event** as opposed to events that occur in the ordinary course of business.

For example, a **change in the statutory auditor** may be considered inside information if it is the consequence of an adversarial relationship between the issuer and the auditor, by contrast to the mandatory rotation of key auditor partners as imposed by the 8th Company Law Directive on Statutory Audit.

Likewise, **changes in the management or supervisory board** may not be considered inside information if this change is due to the expiry of the director's term of office. The same applies to **operations involving the capital or the issue of debt securities** or warrants to buy or subscribe securities if this is done in the course of a financial institution's daily activities.

1.16 Examples of Inside Information Relating Indirectly to Issuer

The guidance gives examples of information relating **indirectly** to issuers or financial instruments and which may require disclosure if the consequences resulting from these examples constitute inside information.

AFEP's member companies consider that the examples given are not helpful because they do not in any case constitute *per se* inside information as they are available to the public and markets. They propose to delete the entire paragraph for the following reasons:

- **The effects these examples may produce can constitute inside information only if these effects are known by issuer before the public** (e.g. the withdrawal of a broadcast license).
- According to minimum disclosure requirements for the debt and derivatives securities **registration document**, issuers have to **prominently disclose risk factors** that may affect the issuer's ability to fulfil its obligations under the securities to investors. These risks include legal, industrial, environmental, liquidity and market risks, such as interest rates and exchange rates.

The indicative and non-exhaustive examples, which are listed by CESR, refer precisely to such data. AFEP's member companies consider that **it would be extremely burdensome for issuers to permanently evaluate possible consequences of such public information**, which they have already clearly classified as risk factor in their registration document, and would require them to set up proper monitoring services especially to this effect.

- If in certain cases, such publicly available information were to produce price sensitive effects, **it should be left to the issuer to appreciate case by case whether such publicly available data relating indirectly to him constitutes inside information.**

IV. INSIDER LISTS

As regards insider lists in multiple jurisdictions, AFEP considers CESR's proposal for a mutual recognition system as set out in paragraph 4.5 particularly useful. Indeed, the **recommendation that relevant competent authorities should recognise insider lists prepared by an issuer that has its registered office in another EU or EEA Member State**, according to this Member State's requirement, would contribute to resolve the problems resulting from diverging requirements in different jurisdictions.

This problem had already been raised by AFEP on the occasion of CESR's previous consultation and we enclose a reminder of our comments calling for the harmonisation of insiders' lists in the different Member States of the EU. Companies operating in different Member States need to be able to refer to harmonised procedures when they establish and update permanent or occasional insiders' lists (see enclosure 1).

Response to CESR's call for evidence
"Evaluation of the supervisory functioning of the EU market abuse regime"

Extracts

II. INSIDERS' LISTS

A. Insiders' identity

There should be harmonisation of what is understood by the "**identity**" of any person having access to inside information (Art. 5 § 2a of Directive 2004/72/EC) in order to allow companies operating in different Member States to be able to refer to harmonised procedures when they establish and up-date permanent or occasional insiders' lists.

Indeed, some Member States require even the personal address of the person to be included in the list.

AFEP suggests the following to be clarified:

- **identity of natural persons** means: name, first name, professional address, name of the relevant issuer, professional telephone and e-mail address;
- **identity of legal persons** means: corporate name, type of company, activity, professional and e-mail address, contact person, telephone number.

B. Third parties

Art. 6 § 3 of Directive 2003/6/EC obliges issuers, or persons acting on their behalf or for their account, to draw up a list of those persons working for them, under a contract of employment or otherwise, who have access to inside information, and to regularly update this list.

It should be clarified at European level that the **issuer is obliged to include only the corporate name** of this third party (in most cases indeed the latter is a legal person) **and not the names of all the natural persons** possibly having access to the insider information within this third party. This is the solution adopted by the French regulator.

C. Security measures

It is also advisable to provide for European harmonisation on the **necessity (or not) to protect insiders' lists against falsification**. Indeed, the French agency entrusted with enforcement of rules on privacy and personal data protection (CNIL), ruled that insiders' lists must be protected against any falsification of the data they contain by appropriate security measures.

D. Conservation

According to Art. 5 § 4 of Directive 2004/72/EC, Member States shall ensure that insider lists be kept for at least **five years** after being drawn up or updated. The length of the conservation period is particularly burdensome in most cases. Indeed, any updating of the list triggers the beginning of another five year conservation period, leading to multiple and often voluminous lists being conserved at the same time.

AFEP suggests **making conservation periods coincide with prescription periods** in the different Member States. It seems illogical to be obliged to conserve an insider list for a five year period when the prescription for insider trading is only **three years**.