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ASSONIME comments on the CESR 2nd set of Level 3 Guidance on the Operation of the Market Abuse Directive

General Comments

We welcome this open consultation, carried out in accordance with the recommendations of the Lamfalussy Report. The publication of Level 3 guidance represents a valuable tool for stakeholders and regulators in order to achieve a further harmonisation in the day-by-day activity.

A general remark deals with the structure of the document. It would be advisable to deal all the topics related to issuers' disclosure obligations in a separate document.

In fact, the actual implementation of the market abuse directive ("MAD" in the following) and the effective behaviour of the different competent authorities are quite different in the EU Member States: the document does not deal with the situation while the proposition of Level 3 guidelines should start from the difficulties and diversity in the implementation of the rules relating issuers disclosure.

In particular, in some countries, issuers are not required to disclose information until they have clear confidence in it. In other countries, the competent authorities widely consent to delay the disclosure; in those cases, issuers are allowed not to communicate a financial transaction that is being prepared, if they are able to ensure confidentiality and if such confidentiality is temporarily necessary to carry out the transaction. In some countries a formal authorization, not allowed by the directive, is requested for the delay. Finally, other jurisdictions make a distinction between "inside information" relevant for insider trading purposes and "inside information" to be communicated by issuers (which requires a higher level of completion of the relevant set of circumstances).

Therefore, it might be advisable to further reflect on the topic of issuers' duty to disclose, as discussed in the consultation paper. At this stage, Level 3 guidance could limit its scope to the concept of "inside information" with a view to insider trading prevention: an explicit sentence should be added, in any case, at the beginning of paragraph I, in this respect. In this case, the issues under paragraphs II ("When are there legitimate reasons to delay the publication of inside information") and IV ("Insider list") could be eliminated and remain subject to further discussion at CESR level in a specific document referring to issuers' disclosure obligation.

In the following we detail specific comments, following the order of the CESR document.

I. WHAT CONSTITUTES INSIDE INFORMATION

Information of a Precise Nature

As correctly recognised by CESR in paragraph 1.5, issuers are required to disseminate information only on events (or sets of circumstances) that either have

occurred or are expected to occur on a reasonable ground. Coherently, CESR states that "*in general, other than in exceptional circumstances or unless requested to comment by the competent regulator pursuant to Art. 6(7) of Directive 2003/6/EC, issuers are under no obligation to respond to market rumours which are without substance*".

We share this approach. A general obligation to disclose information in response to rumours could jeopardize the feasibility of planned operations: listed companies should be generally required to disclose information only if the rumours provide "evidence" of a "breach of confidentiality" under Article 6.3 of MAD. In order to reach a further level of confidence on this issue across the EU, it would be advisable to clarify what is meant by "exceptional circumstances" as well as by "rumours without substance". A homogeneous behaviour among competent authorities regarding the use of a "no comment" by a listed company in case of rumours could be useful.

MAD adopts a single definition of "inside information". This definition is used for two purposes, namely insider trading repression and issuers' disclosure duties. However, it is difficult to assess when information can be considered to be "of a precise nature" against this dual background.

The disclosure of corporate information is meant to i) prevent market abuse and ii) allow investors to take well-informed investment decisions on the assumption that market information works efficiently. Preventing insider trading and allowing investors to take decisions may, in some circumstances, result in a trade-off. E.g., consider the case of a planned take-over where the due diligence process has been completed to the satisfaction of all parties, so that insiders know it will lead to an offer, although the price of the offer still has to be decided. Such information could be "precise" enough for an insider to take an investment decision (stock prices of the target company are likely to rise, stock prices of the bidder company are likely to fall), but not precise enough to allow a non-insider to take a well informed decision, and therefore not precise enough to be publicly disclosed: it is not possible to know when prices will have reached the "right" level, as long as the bidder's offer for the target's shares is unknown. As a consequence, the disclosure of information on such future transactions may be detrimental (and somehow manipulative). Indeed, while preventing insider trading, dissemination will increase stock-prices volatility, because investors will speculate on the expected prices. As a result, in some countries an inside information will not be published, even in the absence of a formal procedure for delay under Art. 6, § 2, of MAD, until the competent body has formally identified it as inside information that needs to be disclosed.

In its consultation document, CESR (par. 1.7) states, "*an approach to a target company about a takeover bid can be considered as precise information even though the bidder had not yet decided the price*". It also states, "*a piece of information could be considered as precise even if it refers to matters or events that could be alternatives*". This wide concept of "inside information" reflects the need to prevent insider-trading practices on the market. However, it does not appear to be in line with the level 2 provision according to which "Member States shall ensure that issuers are deemed to have complied with the first subparagraph of Article 6(1) of Directive 2003/6/EC where, upon the *coming into existence* of a set of circumstances or the *occurrence* of an

event, albeit not yet formalised, the issuers have promptly informed the public thereof" (dir. 2003/124/EC; emphasis added). Under this provision, issuers are required to disseminate inside information if the relevant event or the set of circumstances have reached a higher level of completion, thus allowing for a distinction between the inside information relevant for insider-trading practices and the inside information to be disclosed to the public.

The consultation document correctly states that the example quoted above "*assumes that the bidding company cannot take advantage of Article 6.2 of MAD*". The delay in disseminating the information could indeed provide an effective solution to the problems above. In order for the delay to solve the problem of a premature disclosure, it is however necessary to provide further Level 3 guidance on certain relevant aspects that are likely to affect market confidence on Article 6.2 of MAD (see below).

The consultation document states that a piece of information should be deemed to be "specific" under art. 1.1 of directive 2003/124/EC in two circumstances (par. 1.8): *either* when the information would allow a reasonable investor to take a decision to invest or divest, *or* when the information is likely to be immediately exploited on the market. However, under the relevant directives, in order to be "inside information", a piece of information has to meet two conditions: it has to be precise, and it has to be likely to have a significant impact on stock prices. While the "specific" nature of the information is meant to clarify the meaning of the "precision", the "reasonable investor test" aims to provide guidance for the forecasts on the market impact the information will have. Under paragraph 1.8 of the consultation document, the distinction between the "specificity" and the "significant effect" on stock prices would fail. On the one hand, should the information fulfil the "reasonable investor test", it would be at the same time both "precise"[1] and "likely to have a significant effect" on market price. On the other hand, should the information not fulfil such test, it would become irrelevant to assess whether it is likely to be immediately exploited on the market. Therefore, it would be advisable to delete the "reasonable investor tests" from par. 1.8 of the consultation document.

Examples of Possible Inside Information Directly Concerning the Issuer

According to Article 6.1 of the MAD, an issuer has to disclose inside information "*which directly concerns the same issuer*". Under this rule, the inside information to be disclosed by the issuer differs from the inside information relevant for insider trading practices when the information refers to the issuer (and not to financial instruments) and the connection is direct.

With respect to the need for the information to be "directly" connected to the issuer, it should be clarified if (or under which conditions) an event occurred outside the issuer can be regarded as directly referring to it. Moreover, CESR could state clearly that whenever an event produced outside the scope of issuer's activity – e.g. a judicial sentence – is deemed to "directly" concern the issuer, the duty of dissemination only

[1] Provided that the event or set of circumstances may reasonably be expected to come into existence. CESR itself recognised the need to maintain such distinction in its Level 2 Advice of December 2002 (par. 18).

arises when the issuer itself has knowledge of it according to the relevant corporate governance rules.

In any case, we suggest to clarify that each of the events listed in the first set of examples needs to be relevant in order to be disclosed by the issuer. Paragraph 1.15 of the consultation document should be consequently amended clarifying that the list makes reference to "events of the type which might constitute, *where relevant*, inside information".

As far as the second list of events (events indirectly related to the issuer) is concerned, CESR states that "nevertheless, the disclosure requirement in Article 6 applies to the disclosure of the consequences, which directly concern the issuer (…), provided that these consequences constitute inside information". In order to avoid a general duty to comment, for example, macroeconomic events, par. 1.16 should explicitly stress that the consequences stemming from indirect events "directly concern the issuer" when they are not likely to affect all the issuers of the same category in the same manner. Only information which, even indirect, has a substantial impact on issuer's stock prices should be considered under this respect.

II. WHEN ARE THERE LEGITIMATE REASONS TO DELAY THE PUBLICATION OF INSIDE INFORMATION

Legitimate Interests and Illustrative Examples of Legitimate Interests for Delay

The delay in the disclosure of information whenever the event (or the set of circumstances) has not reached a sufficient degree of completion may provide a solution to some of the problems above (see: Information of a Precise Nature). However, the way this remedy has been devised in the MAD creates some uncertainties.

A condition to delay a dissemination is that the "omission would not be likely to mislead the public" (see par. 2.10 of the consultation document). However, the definition of "inside information" *per se* implies that a reasonable investor would use it as a basis for his decisions: thus, any delay in the dissemination is, by literal definition, misleading. This is the more relevant since a disciplinary consequence could be attached to the delay. Complications could arise since there is a wide field open to interpretation (whether the omission is likely or not to mislead the public) by the issuer. We suggest CESR to provide guidance on the criteria to adopt when determining if a delay is "likely to mislead the public", for instance by clarifying that a delay has to be regarded as lawful whenever the undisclosed information is not likely to go against market expectations.

Moreover, when the competent authorities chose to be informed of the "decision to delay", it is not clear which kind of information should be transmitted by the issuer: the mere decision to delay, the inside information delayed or also the motivations for the delay could fall into the scope of the provision. A further level of harmonisation under this respect would benefit the market. We suggest CESR to state that the decision to delay is the only information to be transmitted to the competent supervisor.

Some of the examples listed in paragraph 2.8 of the consultation document should be regarded as information not precise enough to be communicated, rather than examples of legitimate interests for the delay. The example reported under the first hyphen, for instance, states that the dissemination can be delayed "where a contract was being negotiated but had not finalised and the disclosure *that negotiations were taking place* would jeopardize the conclusion of the contract" (emphasis added). However, it is questionable if "negotiations taking place" represent an event or a set of circumstances to be disclosed under the general disclosure obligation (Art. 6.1 of MAD as integrated by Art. 2.2 of dir. 2003/124/EC as explained above). As a matter of fact, Article 3.1 of Directive 2003/124/EC does not address the issue of what information may be delayed: it rather states which kind of interest legitimate such delay. Thus, the existence of negotiations cannot be considered inside information to be communicated – being understood that it could be inside information for insider trading purposes. For instance, an issuer should be allowed to delay the publication of a reached agreement that could affect, where publicly known, the outcome of an ongoing negotiation.

Moreover, we suggest CESR to specify, in paragraph 2.9 of the draft guidance, that the multiple hierarchical layers could justify a delay also when a decision-making process involves the controlling companies of the listed issuer.

III. INSIDER LISTS

We agree with CESR's suggestion that the relevant competent authorities recognise insiders lists held by an issuer that has a registered office in another EU or EEA Member State, according to this Member State's requirements. CESR draft guidelines provide a clear solution to the problems stemming from overlapping requirements of different jurisdictions. We hope this position will be taken into account by courts in case criminal sanctions are involved: a more precise allocation of powers among competent authorities in the directives would have been helpful in this respect.

A topic which could be addressed in CESR guidelines is that of the moment when a person has to be registered in the insider list. It is not clear if a potential access to inside information may be a condition for a person to be registered, even if that person has no actual access to any piece of inside information. For instance, in case a new project is planned but no detail has yet been defined – so that the information is not yet "precise" – the question arises as to whether the staff that is likely to be involved in the future development of the project should already be registered in the insider list.

OTHER TOPICS

CESR's Level 3 Guidelines are a useful tool for market participants in that they provide clarity on the relevant rules as well as on supervisory practice by the competent

authorities. However, the procedure for their approval does not always allow a prompt answer to doubts arising on a day-by-day basis. CESR itself has recognised the benefits of a flexible relationship with market participants with the publication of a "Question and Answer" document on its website addressing uncertainties of interpretation in the Prospectus Regulation. A similar tool could be usefully foreseen for the Market Abuse Regulation.

An item to be addressed in a future "Q and A" document would be, for instance, the meaning of the word "employees" under Art. 3 of Regulation (EC) No 2273/2003. According to this provision, one of the purposes that a buy-back programme must respect in order for the issuer to benefit of the safe-harbour, is "to meet obligations arising from employee share option programmes or other allocation of shares to employees of the issuer or of an associate company". However, it is unclear whether directors, and in particular non-executive directors, can be regarded as employees in the light of these specific provisions of the MAD and the Regulation.