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Dear Fabrice,

Second Commission Mandate on Market Abuse

The British Bankers Association is well known to CESR and has often made submissions to you in the past.

We are writing to you with brief comments on the new mandate given to CESR by the European Commission.

We would comment on the five different aspects of the mandate as follows:

Accepted Market Practices

We would encourage CESR to adopt a fairly high level approach to this part of the mandate and focus on the general factors to be taken into account in deciding whether a practice is accepted or not. We consider that it would not be appropriate to attempt to make detailed rules at EU level on specific practices in different markets.

Our own experience, in the UK regime, has been that it has often been easier to obtain a sense of what is acceptable by giving clear guidance about what is not acceptable.

We agree with the Commission that the focus should be on factors – and it may be that some of the indicative factors relevant to market manipulation identified in CESR's first technical advice on market abuse may be relevant here. These factors should be clearly identified as indicative factors to which the competent authority in each member state should have regard in determining what is accepted market practice, rather than market participants (as is the case with the market manipulation factors).

Application to Commodity Derivatives

It seems to us to be premature to do much work on commodity derivatives since these financial instruments will not be covered by the EU Market Abuse regime until the new ISD is implemented. We would suggest that any work in this area should be high level.

We would encourage CESR to take into account the fact that there are no “issuers” of commodity derivatives and consequently no one on which to impose obligations to produce regular financial information and other announcements in relation to these instruments (in contrast to equity markets). Consequently only certain types of information which are either required under a legal or regulatory disclosure requirement or are regularly announced to the market (or expected to be announced) are price sensitive. Typically these announcements are either information which the exchange itself collects and announces or government statistics or information relevant to a particular commodity. We would suggest that CESR should ensure that the definition of “inside information” in the commodity markets should be tied to the fact that such announcements are made. In the UK it is by linking relevant information to the concept of “announceable” information that the UK market abuse regime was made to work for commodity markets.

The UK is, to the best of our knowledge, the only European jurisdiction which has had to apply a market abuse regime to the commodity markets and we would suggest that its precedent and experience should be carefully considered by CESR in formulating its advice.

List of Insiders

The focus of this work should be on issuers rather than on their advisers and the responsibility of maintaining such lists should lie with the issuer.

It should be borne in mind that the sort of information which becomes “inside information” can vary considerably. Some of this information can be easily predicted (e.g. unpublished results information) and the people holding it can be easily identified in advance. Other types of information become “inside information” on a more ad hoc, or occasional, basis e.g. a decision to take over a company results in a range of people becoming insiders who would not necessarily be involved in the production of the routine financial results.

Careful thought needs to be given to the balance between creating insider lists and not imposing too burdensome an obligation on issuers.

Persons subject to a duty to disclose own dealing

Financial services firms in Europe and elsewhere are generally used to imposing personal account dealing obligations on certain of their employees who may have access to inside information. We would suggest that insofar as the requirements will also apply to issuers they should not be under any lower obligation than financial services firms.

We understand that the rules are intended to apply to the personal account dealing of private individuals. This should be made clear.

Suspicious Trades

The regulatory emphasis should be to encourage individuals to report suspicious trades. The more burdensome is the procedure for reporting suspicions the less likely that a good flow of reporting will take place.

We do not consider that the approach taken for money laundering reporting is the best model to follow. It has proved to be expensive and paper heavy and there is little evidence that it has led to significant improvement in the number and quality of criminal prosecutions.

We would encourage CESR to seek for solutions which are straightforward to implement and not document heavy.

We also are concerned that no protection has been included in the Directive for those who may in good faith report a suspicious trade which subsequently proves to be legitimate. As matters stand there must be significant risks of civil liability to our members and their staff in making such reports. In order to encourage reporting Level 2 measures should include a rule that reports of suspicious trades made in good faith are protected from civil claims.

If you wish to discuss this letter further with the BBA please contact me on 7216 8858.

Yours Sincerely

Michael McKee
Director
Wholesale & Regulation