

Response

CESR's Public Consultation on the Market Abuse Directive

Level 3 – Third set of CESR guidance and information on the common operation of the Directive to the market (Ref: CESR/08-274)

1. The European Banking Federation (EBF)¹ welcomes the opportunity to comment on CESR's third set of guidance at Level 3 of the Market Abuse Directive (MAD) and on the information on the common operation of the Directive to the market. We also welcome CESR's continuing efforts to facilitate convergent implementation and application of the market abuse regime ('the Regime') by establishing a common approach to the operation of the Directive throughout the EU.² This current consultation is an important contribution to this welcome process.

I. General remarks

2. Although some delays in transposition of the MAD into national legislation still exist, the process is now by and large complete across Europe. **The EBF reports that banks' experience of the Regime has been broadly positive to date and appears to be working well.** That said, in specific areas there is room for improvement and now would be an opportune time to tweak the Regime to bring about such improvements by developing common guidance at Level 3 of the Directive.
3. The EBF has remained concerned about the apparently unlevel playing field that has developed across Europe in respect of the content of insider lists and this issue is usefully picked up in the present public consultation. Not only do our members regret that European supervisors do not appear to have applied a consistent approach to the information that is required for the insider list to date, but we are also concerned that the cross-border reporting obligations of internationally active banking groups have not been adequately taken into account. We have therefore previously **welcomed CESR's confirmation that it proposes a system of mutual recognition for insider lists, and welcome in general terms, CESR's proposed guidance as set out in the current public consultation.**

¹ Set up in 1960, the European Banking Federation is the voice of the European banking sector, with over €30,000 billion assets and 2.4 million employees in 31 European countries. The EBF represents the interests of some 5,000 European banks: large and small, wholesale and retail, local and cross-border financial institutions. Since the vast majority of securities business in Europe is carried out by banks, the EBF is an authoritative voice on the evolution of financial markets in general and securities business in particular.

² Please refer to our responses to CESR's earlier Call for Evidence (CESR/06-078) and CESR's consultation on the second set of guidance to the market (CESR/06-562), which are relevant points of departure into this current response.

II. Specific comments on insider lists

4. Given the uneven implementation of the Directive, insider lists were established in practice in different jurisdictions and at different times. Whilst there does not appear to be an obvious issue to resolve with respect to the efficacy of the insider lists, *per se*, there is room for harmonisation of approaches across the EU. The EBF would place a good deal of importance on the **continuing possibility for banks to draw up their own insider lists within a framework of common European guidance, for example with respect to the level of information within insider lists**. This would go some way to reducing the significant and costly process of drawing up insider lists according to different local requirements that is typically faced by institutions operating in multiple jurisdictions.
5. Specifically, with respect to the proposed guidance, **CESR sets out a preference for a small number of registered employees to appear on the insider list which is as appealing in theory as it is problematic to implement in practice**, especially so for intermediaries who might have information pertaining to many issuers. CESR's preference for a small number of persons to appear on the list would imply a significant revision of how institutions constitute insider lists. Furthermore, if a smaller number of people are to appear on the insider lists compliance with the rules around the transmission and receipt of information could be quite difficult to adhere to in practice, especially where offices are open plan and there is generally more fluid interaction between employees. **Therefore, the EBF would urge CESR not to provide guidance in this specific area, but to leave this important consideration as a high level principle that institutions have an obligation to fulfil according to the specificities of their particular business model and corresponding office configuration.**

III. Specific comments on suspicious transactions reports

6. The EBF reports that by and large rules relating to suspicious transaction reports have been implemented effectively across the EU. Typically, the transposed MAD requires that those transactions that have been carried out are reported as being suspicious to compliance. However, where there is a high likelihood of execution of a transaction that could be deemed as 'suspicious' there is also typically the possibility to notify this transaction to the regulator. Banks' compliance functions also typically record which measures have been taken to note all possible doubts surrounding a transaction. **Given the apparently smooth operation of this area of the MAD, the EBF would not advocate for further regulation in this area.**
7. The EBF questions the importance of new technologies to assess potential cases of market abuse since in practice new additional technical controls at the level of individual intermediaries could always be circumvented in practice as banks have only a partial view of market activity, being able to monitor their employees but not that of their counterparties. However, it may be useful to consider the collection of

information related to suspicious transactions at central points, such as trading venues. **The choice as to whether or not to establish new IT systems to facilitate compliance with the MAD should remain with the institution** to be best aligned to the particular business model in question.

IV. Conclusion

8. The EBF welcomes the public consultation from CESR on important issues to facilitate the smooth functioning of the MAD. **The balance CESR has struck between common approaches and the capacity for the private sector to find solutions is broadly appropriate.** We report a generally positive picture of implementation of the MAD and would therefore endorse the continuation of its smooth operation of the regime without the introduction of additional regulation in the specific areas CESR has highlighted.