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EBF RESPONSE TO CESR CONSULTATION ON MARKET ABUSE DIRECTIVE – THIRD SET OF CESR LEVEL 3 GUIDANCE

Ref.: CESR/08-717

General remarks

1. The European Banking Federation (EBF)[1] welcomes the opportunity to now also comment on the second part of CESR's third set of guidance at Level 3 of the Market Abuse Directive (MAD). On a general note, we reiterate that banks' experience with the MAD regime has to date been overall positive. Although there were a number of questions of interpretation around the MAD, appropriate responses have been found for most of them through work at national level, complemented with helpful cooperation at CESR level. Specifically on the questions of stabilisation and buy back programmes and on the definition of inside information, we would add that no major difficulties have been brought to our attention in the first place.

Stabilisation and buy-back programmes

Safe harbour principle - Do you have any comments on CESR's view that stabilisation outside of the exemption in Article 8 should not be regarded as abusive solely because it occurs outside of the safe harbour?

2. We much welcome CESR's clarification in this respect, which does respond to the concerns within our membership.

One member state's regime - What do you regard as the most serious inconsistency that you have identified?

3. No major concerns in this respect have been brought to our attention. However, we do wish to support CESR's ongoing work in CESR-Pol intended to reduce the number of inconsistencies between Member States.

Sell side trading during stabilisation periods - Do you have any comments on CESR's views that sell side transactions are not subject to the exemption provided by Article 8?

4. We would tend to concur with the interpretation of some market participants that trading for the purpose of "stabilisation of a financial instruments" could be read to also include sell transactions. However, we welcome CESR's important clarification that sell transactions will not necessarily be considered abusive.

[1] Set up in in 1960, the European Banking Federation is the voice of the European banking sector, with over 30 000 billion EUR assets and 2.4 million employees in 31 European countries. The EBF represents the interests of some 5000 European banks: large and small, wholesale and retail, local and cross-border financial institutions.

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Refreshing the greenshoe – Do you have any comments on CESR's clarification that selling securities that have been acquired through stabilising purchases, including selling them to facilitate subsequent stabilising activity, is not behaviour that is covered by Article 8?

5. Although we believe that Article 8 could be interpreted to also include sell side transactions, again we welcome CESR's clarification that sell side transactions will not automatically be regarded as abusive, solely because they fall outside the scope of the safe harbour.

Third country stabilisation regimes – What would you regard as the difference in approach that gives rise to the most significant practical problem?

6. No major inconsistencies between the EU stabilisation regime and the stabilisation regimes in third country jurisdictions have been brought to our attention.

Reporting mechanisms – Do you support the proposal that all competent authorities should publish the mechanism by which reports of stabilisation and buy-back programmes transactions should be submitted and that ideally this should be a dedicated email address?

7. We would find it helpful that competent authorities publish the mechanism by which such reports should be submitted, and that there be a dedicated email address for that purpose. We underline however that from a practical point of view, the most important concern is to ensure a process that allows the protection of the identity of the person who submits the report.

Mechanism for public disclosure – Do you support the proposal that adequate public disclosure is made through the mechanism used to implement the TD and gives rise to the obligation for this information to also be stored under the TD provisions? Do you agree that only public disclosure of buy-back transactions is required?

8. We can support CESR's tentative view that adequate public disclosure would entail the use of the information dissemination and storage mechanism(s) set up as part of Member States' implementation of the Transparency Directive, meaning that details of the buy-back and stabilisation programmes would be made available and stored for later examination as desired. We furthermore support the clarification that the public disclosure of buy back transactions could alternatively be made through other means than the dissemination mechanism under the TD.

General – Are there any other substantive issues that you consider should be dealt with by CESR relating to these issues? If so, what are these issues and why do you consider them to be important?

9. We do not have any other issues around the issue of share buy-backs and stabilisation programmes to bring to CESR's attention.

The two-fold notion of inside information

Rumours – Do you have any comments in relation to this draft guidance on the issue of rumours?

10. We do not have any specific comments on this draft guidance, but wish to generally support CESR's thinking. With regard to the exceptional case that a rumour relates to information that is indeed inside information within the issuer, which would require the latter to react, we would nonetheless encourage CESR to establish, by way of practical cooperation and case studies, a common understanding between its members as regards the question in which case information would be considered to be of a "sufficiently precise" nature. We would also welcome that the exceptional nature of such a case be made more explicit.

11. Furthermore, we would point to a proportionality issue with regard to CESR's understanding of publications, which according to CESR also includes e.g. internet postings. We request CESR to consider that it would not be possible, in practice, for issuers to monitor all kinds of such publications in the widest sense that might refer to it. Instead, the obligation to respond should only apply when a rumour has to all appearance been given a certain amount of attention, and to the extent that it can reasonably be assumed it has also come to the attention of the issuer.

Concluding remarks

12. Within the EBF's membership, relatively few difficulties have been encountered with the MAD regulations. Where uncertainties were encountered, they have by now been resolved through practical implementation work. We do therefore not see a need for legislative action, which would involve the risk of conflicting with established solutions, but wish to welcome the work undertaken by CESR to enhance national regulators' interpretation and practices in applying the MAD. The clarifications provided by CESR in the current draft guidance are a further welcome contribution to this work.