



EFFAS THE EUROPEAN FEDERATION OF FINANCIAL ANALYSTS SOCIETIES

Mr. Fabrice Demarigny
CESR
Secretary General

via Email/Internet

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Call for evidence evaluation of the supervisory functioning of the EU Market Abuse Regime

Response by EFFAS European Federation of Financial Analysts Societies

Dear Mr Demarigny,

The European Federation of Financial Analysts Societies, EFFAS, is the European umbrella organisation of national analysts societies. It comprises 24 members representing more than 14,000 investment professionals in the areas of Equity and Bond Research, Asset and Portfolio Management, Investment Advice.

Integrity and transparency of, and confidence in, the financial markets and financial sectors are prerequisites for our profession to flourish and for the market to explore the full benefits of high-quality financial analysis. The views and experiences from our profession are important to take into consideration when defining or revising rules, recommendations and the like. EFFAS would like to remain at the forefront of any discussion and development of high EU standards of care in the context of financial analysis, market integrity and market abuse. We very much appreciate the openness of the institutions and the CESR, enabling us to get our expert view across.

The following response to the call for evidence will concentrate on those provisions of the Market Abuse Directive (MAD) legislation which most affect the investment professionals organised in EFFAS' national member societies.

1. Harmonization of the regime of market abuse required

We support the EU Market Abuse Regime as it leads to limited variations in legal requirements in different Member States. As market abuse cannot be comprehensively defined, detected and prosecuted at domestic level only, this is a major breakthrough. Furthermore, we need to ensure that technical provisions can be kept up to date with market and supervisory developments. By applying the Lamfalussy structure, this has been ensured. We therefore fully support this approach.

At the same time, we would like to point out that it is fairly early to evaluate the Market Abuse rules in full. In many Member States implementation had been delayed. Experience and

results from possible supervising and penal actions are not yet sufficiently available. Furthermore, parallel initiatives are currently taking place in the context of the 'read across' of the Financial Services Action Plan. This important exercise is one of the practical measures announced in the White Paper on Financial Services Policy (2005-2010). The so-called ESME group, consisting of practitioners and market experts, is currently assisting the European Commission in carrying out a sectoral consistency check in order to ensure coherence of terminology and effect in EU securities rules. Hence, the ESME group is engaged in a similar analysis of the main problems and also will include in their analysis the Market Abuse Directive and level-2 measures. We would like to point out that we would consider that the results from the work within the ESME group should get priority over this call for evidence, to prevent any contradictory results.

2. Recommendations on television and in other media

MAD and the implementing directive (2003/125/EC) distinguish in their definitions between financial research or financial analysis, and other information. This distinction between these two categories of "recommendations" is of no consequence in the provisions applying to recommendations. Rather the implementing directive allows different methods of disclosure to both types of recommendations, depending on the size and circumstances of the presentation.

Recommendations on television are a particular case in point. In a short recommendation statement on television it is hardly possible to fulfil all the disclosure required by the implementing directive. The implementing directive permits replacing a direct disclosure by a reference to other disclosure sources (e.g. web-site of the producer or disseminator of the recommendation).

In practice, such references are occasionally made in connection with televised recommendations. In most cases of short statements containing recommendations, however, no such disclosure by reference is found. The requirements of the implementing directive and implementing national laws are not being taken into consideration.

Enforcement is, if at all, haphazard. A systematic monitoring of such statements is not possible.

We recommend revisiting the implementing directive in this point. In practically all cases, the identity, position and the employer of the person making whatever recommendation in the visual media are indicated either by the moderator or by the recommending person. These facts are usually sufficient for an average investor interested in the information, so that he can go to the relevant web-site and also find relevant disclosure information there. An explicit reference to the web-site or URL of the researcher or the employer is unnecessary.

The implementing directive exempts journalists from several provisions applicable to other relevant persons, provided those journalists be subject to equivalent appropriate regulation or self-regulation. For the practice of financial analysts and journalists, it would be helpful if CESR developed criteria for the distinction of financial analysts proper and journalist.

This distinction is particularly needed by those persons presenting recommendations regularly in the media. Journalists in many jurisdictions can rely on the "freedom of the press" or similar constitutionally guaranteed freedom rights whereas other groups making recommendations cannot rely on this freedom privilege. A clear definition of journalists' statements and a criteria distinction from financial analysts' recommendations would help to specify the persons and actions that may or may not benefit from the press privilege.

Closely connected with this question is the determination of regulation or self regulation of journalists as "appropriate" and "equivalent" with "similar effects". The rationale of the

exemptions is based on the freedom of press privilege. To which extent may this privilege be reflected in journalists' regulation or self regulation? A catalogue of criteria established by CESR as a guideline for these determinations would be helpful in the practice of recommendations.

3. MAD and MiFID

Financial Research is covered by the Markets in Financial Instruments Directive (MiFID) not as a core business, but as an ancillary service (Annex I Section B Nr.5). Nonetheless, investment firms providing ancillary services besides their core activities are also regulated in the performance of those ancillary services. In the processing of drafting implementing provisions on Level 2 for MiFID, the Commission has issued the implementing directive 2006/73/EC of 10 August 2006 containing a definition of investment research which differs from the definition given in the implementing directive under MAD.

The definition in the Directive 2006/73/EC Art. 24 distinguishes investment research which is labelled as such or as an objective and independent recommendation from marketing communications, which do not intrinsically claim objectivity and independence.

This definition of investment research and other objective information is more restrictive than the MAD implementing definition inasmuch as it requires that investment research be labelled explicitly or implicitly as such, claiming the standards of independence and objectivity, whereas all other recommendations may be treated as marketing statements.

Statements by non-relevant persons are usually not perceived as objective and independent but rather as personal opinions and could stay outside the scope of MAD as long as they do not claim the standard of research or objectivity and independence and do not amount to manipulation. Statements on the visual media could remain outside the scope of explicit detailed disclosure, if they do not claim, explicitly or implicitly, the standard of objectivity and independence.

Adding the labelling requirement to the definition of investment research in the MAD implementation would eliminate many of the problems which are encountered in the enforcement of the MAD implementing directive (see, for instance, our points 1. and 2. above). We suggest that the level 2 legislation under MAD adopt this labelling approach for investment research. This would restore the systematic methodical approach of investment research as an objective and independent evaluation of a financial instrument or its issuer to its proper place and distinguish it from so-called other recommendations, which are in many, if not, most cases actually marketing statements.

Yours sincerely,



Fritz H. Rau
Chairman of EFFAS