

RESPONSE

Market Abuse Directive Level 3 – second set of CESR guidance and information on the common operation of the Directive to the market

CESR Public Consultation – Ref: CESR/06-562

1. The European Banking Federation (EBF)¹ welcomes the opportunity to submit views on CESR's second set of draft guidance on the operation of the Market Abuse Directive (MAD).
2. We also welcome CESR's continuing efforts to prepare ground for convergent implementation and application of the new regime by ensuring that a common approach to the operation of the Directive takes place throughout the EU amongst supervisors. This current consultation strengthens this welcome process.

I. General remarks

3. By way of general principle the EBF **welcomes the concept of reviewing directives** as foreseen by the better regulation agenda and enabled under the Lamfalussy Process. The preparation of specific guidance by CESR in support of the European Commission's wider review of the Market Abuse Directive (just as for the Prospectus Directive) is helpful and an important process in the view of the EBF's members.
4. The general remarks from our response to CESR's consultation on evaluation of the supervisory functioning of the EU Market Abuse Regime remain a valid preface to the response to this current consultation. There we stated that while some delays in transposition of the MAD into national legislation still exist, transposition and implementation is now by and large complete across Europe. The time Member States have taken to complete this process has varied significantly. Therefore, at this stage our **members' experiences of the regime differ** and the collective experience of European banks varies according to the jurisdiction of the institution.
5. However, where there has been experience of the MAD regime, the EBF reports that this experience has been broadly positive and that **by and large the regime appears to be working well.**
6. However, the EBF is indeed concerned about the apparently "uneven" playing field that has developed across Europe in respect of the **content of insider lists**. Not only do our members regret that European supervisors do not appear to apply a consistent approach to the information that is required for the insider list, but we are

¹ The European Banking Federation (EBF) is the voice of the European banking sector representing the vast majority of investment business carried out in Europe. It represents the interests of over 5,000 European banks, large and small, from 29 national banking associations, with assets of more than €20,000 billion and over 2.3 million employees.

also concerned that the cross-border reporting obligations of internationally active banking groups have not been taken into account.

7. We therefore 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 its public consultation.

II. Specific remarks

What constitutes inside information?

Information of a precise nature

8. The EBF supports CESR's assessment that precise nature of information is to be assessed on a case-by-case basis and depends on what the information is and the surrounding context (paragraph 1.5). We believe that it would be particularly important for Europe's supervisors to adopt CESR's proposed recommendation for guidance which states that **in general issuers are under no obligation to respond to market rumours which are without substance.**

Made public

9. In our response to CESR's first consultation at Level 3 of the MAD we noted that there is not currently a consistent European interpretation on what would constitute "publicly available information" for the purposes of the Directive. The EBF believes that "publicly available" should accommodate information that is free of charge and in the public domain as well as information for which a fee is charged but is generally available (i.e. market data provided by Reuters or Bloomberg). Therefore, **CESR's clarification on what could be deemed as "public" would be helpful.**
10. We also call on CESR to align its guidance with the provisions of the Transparency Directive, where **the rules of the issuer's home state should be complied with for announcements**, except for when wider publication is warranted. Flowing from this, **it would be logical if Member States mutually recognise each others' major data distributors** as being sufficient for adequate public disclosure. This is a practical way in which firms could arrive at some degree of certainty as to how to fulfil their obligations on a pan-European basis.
11. We ask CESR to consider drafting its guidance in a broad way that would **accommodate additional ways to make information public.** We consider that information related to the more esoteric instruments and specialist structured products, (such as Asset Backed Securities (ABS) and Collateralised Debt Obligations (CDO)) should also be treated as being "made public" when information is posted on the client website of a firm acting as an execution venue for specialised instruments. This reflects the way in which the markets in specialised instruments operate in practice.

Significant price effect

12. The EBF welcomes the introduction of the “reasonable investor test” (paragraphs 1.10 and 1.11). The concept of “reasonable” under these circumstances implies that the factors to be taken into account as part of that “test” would not be the same in all circumstances (i.e. the factors vary according to the instrument and timing in question) and logically **not all factors would be relevant in all circumstances**.
13. We recommend that CESR widens the definition as set out in paragraph 1.14 of the draft guidance, especially with reference to the requirement to consider **pre-existing analyst reports** that indicate the type of information in question is price sensitive. Relevant and trusted media reports could also be used to arrive at a judgement on whether information is likely to have a significant price effect.

Examples of possible inside information directly concerning the issuer

14. We note that the list CESR provides in paragraph 1.15 is non-exhaustive and purely indicative of events of the type which might constitute inside information. We consider it important to stress that **consideration of the situations set out in the list ought not to mean that the information is presumed to be inside information**. Moreover, it is important to clarify that the burden of proof would not be on the issuer to conclude whether it was in possession of inside information or not.
15. Whilst it is correct that the Directive definition of inside information also encompasses information which relates indirectly to issuers or financial instruments, CESR should be aware that **the market has serious concerns about the potential to be unknowingly in possession of inside information**. Therefore, **a distinction ought to be made between the information in the control of an issuer and the information over which the issuer does not have control**. We call on CESR in light of these comments to reflect on the drafting of paragraph 1.16 since anything other than very carefully drafted guidance in this area could have very serious and unintended consequences on the day to day operation of firms’ trading and the efficiency of the capital markets as a whole.

When is it legitimate to delay the disclosure of inside information?

16. Typically a **legitimate delay could be not publishing insider information with price effect until due internal process has been followed**. For example, in jurisdictions with corporate governance codes that distinguish between management and supervisory bodies, it would be legitimate to delay the disclosure of insider information until after the information in question has been reviewed by the supervisory body.
17. In response to CESR’s guidance, the EBF argues that the **issuer’s legitimate interests need to be evaluated against the interests of the capital markets as a whole**. The consequence of an unjustified exemption could be the delayed

publication of insider information. We believe that the assessment must be restricted to the issuer's legitimate interests only. Reasons why third parties may be interested in such a delay ought to remain outside the scope.

18. Significantly, the EBF notes that currently **the supervisory community does not employ a common approach when it would be legitimate to delay the disclosure of inside information**. We also note that certain supervisors have been seen to adopt an **unduly restrictive approach** in this area. We therefore look to CESR to facilitate supervisory convergence around appropriately flexible and accommodating guidance that reflects market practice.

When are client orders inside information?

"Client's pending order" as inside information guidance

19. Whilst we are supportive of CESR's guidance in the area of client orders in general, members call on CESR to formulate its guidance in such a way to be **sensitive to current market practice** across Europe since it is common practice for firms to enquire about pricing certain, typically complex and more unusual, financial instruments without the firm intention to purchase it. These price enquiries should not be treated as pending orders.

Insider lists in multiple jurisdictions

20. The EBF confirms CESR's analysis that the same issuer has to currently comply with the requirement to draw up and maintain insider lists in accordance with the legal framework applicable in each of the jurisdictions in which it operates. This implies a significant and costly duplication of time and effort and is therefore as CESR describes **"burdensome" on issuers**. Moreover, it has a negative impact on doing business on a cross-border basis with eventual implications for single market integration as a whole.
21. As we state in our general remarks the EBF has long favoured relevant competent authorities recognising each others' insider lists. The current Level 3 work on the MAD reduces but does not eliminate the band of divergence between supervisory practices, so **the mutual recognition solution is a welcome one**.
22. However, **this would be beneficial only insofar as the bank is the issuer** and the situation would be little changed if a bank were to be in the position of an agent for a client-issuer.
23. It is understood that the effect of CESR's guidance would mean that banks acting as agents for issuers have to follow the rules applying to that issuer. This would result in **banks having to follow a multitude of different interpretations of the law**. For example, banks in this situation would have to apply the law relating to:

- issuers of securities in their own right;

- agents for client *a* applying the law of Member State *a*;
- agents for client *b* applying the law of Member State *b*, and so forth.

24. For the sake of consistency and to avoid unduly penalising banks in this situation, we call on **CESR to extend the approach taken towards issuers to cover banks in all respects and in all circumstances.**