

CESR

CESR Preliminary Guidance and Information on the Common Operation of the Market Abuse Directive

The Danish Bankers Association and the Danish Securities Dealers Association welcome the opportunity to respond to the CESR Consultation Paper on level 3 aspects of the Market Abuse Directive. As the Market Abuse Directive creates new mechanisms for the regulation of market abuse in Europe, we find it very important with due consultation on CESR's Level 3 Guidance on the operation of the Directive since the Guidance will effect the application of the rules in the Member States.

Section II – Accepted Market Practices

We think that CESR should reconsider drawing up a list over accepted market practices since a list might have the effect in the member states of being exhaustive even though the list should only constitute examples of practices. Furthermore, it is very difficult to define common practices for all European markets which are also reflected in the fact there are only four examples in the consultation paper. Therefore, it should be left to the competent authorities in the member states to make lists of examples of accepted market practices for the relevant markets.

Section IV – Market Manipulation

In Section IV in the consultation paper CESR suggests a list of examples on various types of practices, which would constitute market manipulation and therefore cannot be categorized as "accepted market practice". The types of practices on the list can be described as a number of "deeds of crime", which as a minimum should be regarded as market manipulation.

In our opinion there are a number of substantial problems in operating with a list of "deeds of a crime". One major problem is that the types of practices are very broadly formulated, which probably is due to the idea of ensuring sufficient legal ground for applying the rules to intentional market abuse. However, a serious consequence of such broad formulated "deeds of crime" would be that a number of borderline cases, which do not per se constitute market manipulation, could fall under the objective criteria in the description of "deeds of a crime". In practice, this will have the effect that a number of legitimate behaviors of the market participants would be regarded as market manipulation even though the market participants do not have the intention of market manipulation.

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With the broad descriptions of “deeds of a crime”, which may also potentially include some legitimate acts in the market, there is a risk of lack of legal certainty as it becomes unclear to market participants when and when not the act would constitute market manipulation. Furthermore, in some cases it may be difficult for the market participants to prove or render probable that the intention with an act was not to constitute market manipulation but solely the usual and legitimate acting in the market. The unsure legal position will be more outspoken the broader the “deeds of a crime” are described.

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“Marking the close” is a problematic example in the listed types of practices, which would constitute market manipulation. Orders are executed at the close of the market due to the customers' wish to execute the orders at the closing price. The execution of the customers' orders may as any other order of course have an effect on the closing price. It is very difficult – if not impossible – to define types of transactions in general and at the same time be sure that it is only the intentional market manipulation that would be included.

Therefore, we suggest that instead of making a list of examples of types of practices that should constitute market manipulation, CESR lists criteria for discretion, which are aimed at identifying the dishonest behaviors that of course should be forbidden.

If CESR should decide to maintain a list of types of practices, which should constitute market manipulation, the list should be combined with some criteria for discretion within the specific types of practices on the list. This would help the competent authorities in the Member States to distinguish usual and legitimate acts in the market from the dishonest behaviors. Furthermore, such criteria of discretion would enhance the transparency in the authorities' decisions.

Finally, even though the level 3 recommendations would merely constitute guidance to the competent authorities in the Member States and as the competent authorities are not obligated to use the list of practices that would constitute market manipulation, the Guidance would be an expression of a common understanding in the Member States. This would constitute a risk that the list would have the character of best practice in the Member States.

Section V – Possible signals of suspected Insider dealing or market manipulation

We do agree with CESR's point of view on the need for relevant and not only pro forma notifications to the authorities. However, to achieve this it is very important that the possible signals that CESR draws up of suspected insider dealing or market manipulation are relevant and not defines too broad. We find the proposed possible signals are too broad and will contain many situations that are not related to market manipulation or insider dealing. As an example one can mention paragraph 5.9 a): *“The client opens an ac-*

count and immediately gives an order to conduct a significant transaction in a particular security – especially if the client is insistent that the order is carried out very urgently or must be conducted before a particular time specified by the client.” This is a normal event and cannot be considered suspicious.

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As regards the format of suspicious transaction reporting, we support the unification of the format. However, it should be emphasized that the contents should be limited to the information that the firm already has and there should be no obligation on the firm to do additional research in this regard.

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Kind regards

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