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Response to CESR's Call for Evidence on the Evaluation of the Supervisory Functioning of the Market Abuse Regime

I. Introduction

1. The Federation of European Securities Exchanges (FESE) represents operators of the European regulated markets and other market segments, comprising the markets for not only securities, but also financial, energy and commodity derivatives. Established in 1974 as a small forum of stock exchanges in Europe, FESE today has 24 full members representing close to 40 securities exchanges from all the countries of the European Union (EU) and Iceland, Norway, and Switzerland, as well as several corresponding members from other non-EU countries.

2. This response takes into account three subjects that our Members believe to be important.

3. We provide comments on the scope of the Directive (the concept of "admission to trading"), on the Accepted Market Practices (AMPs) and inside information. For each topic we provide a specific example that reflects a difficulty with the functioning of the supervisory regime.

II. Detailed remarks

1. Scope of the Directive - Admission to Trading

4. Article 9 of the MAD states that the provisions of this Directive apply not only to listed financial instruments, but also to financial instruments "for which a request for admission to trading on [a regulated market in at least one Member State] has been made".

5. This article could be interpreted in the sense that even companies that are not listed should be subject to the obligations of MAD, in particular with reference to price sensitive information and market abuses. Should this be the case, it becomes important to define precisely the moment from which such obligations start, which is defined by "the request for admission to trading". However, it must be noted that the concept of "a request for admission" widely varies across the different Member States.

6. In some cases, the procedures for admission to listing and admission to trading are merged and between the presentation of the request for admission to listing and the effective admission to trading a period of two months or more could elapse.

7. If – in order to identify the moment of the request for admission – the filing for listing is considered as the reference point, this could lead to the possibility that all information disclosure duties for a company would start from this preliminary phase of the admission procedure, independently from its final outcome. Therefore, such obligations could apply even in the case of a company that in the end is not listed. This is clearly not a rational outcome given that there is no risk of market abuse in such a case.

8. Should such an interpretation be allowed, an additional element of concern would then be given by the fact that – in those cases where there is an overlap of the request for admission to listing and to trading – price sensitive information would be distributed to the public in the absence of an official prospectus. This could result in the submission of a set of information to the investors that is incomplete and therefore could be misleading.

9. Moreover, we observe that an inappropriately narrow interpretation of the Directive's provisions could oblige the companies to communicate to the public their request for admission to listing on a regulated market (RM). The communication to the public of such a request could then be considered as the first application of the duty of communicating price sensitive information.

10. However, if the request for admission to listing has to be made public, this could discourage IPOs, due to the potential negative effects in the event of a possible refusal by the regulator and/or by the regulated market, especially as for big international placements the issuer waits until the very last moment to announce the offering, depending on market conditions.

11. Finally, from the point of view of the time period, the link with the implementation of the Prospectus Directive must also be taken into account. In particular, in Italy the request to the regulated market for admission to listing/trading is linked to the request for the authorisation by the competent authority to publish the draft prospectus of a company. The regulated market has 60 days of time to take its decision; the 20 days foreseen for the review by the national authority of the draft prospectus start then from the date of the decision taken by the regulated market concerning the admission to listing/trading. Therefore, in practice, the period of time elapsing between the presentation of the request for admission to listing/trading – which coincides with the request for the authorisation to publish the draft prospectus – and the actual admission to trading would then add up to 80 days.

12. In other European countries the processes of admission to listing and of admission to trading are clearly separated and the competence is divided respectively between the national regulator and the exchange. As a result, in the majority of EU Member States the submission of a request for admission to trading is not disseminated to the public – either by the issuer or by the exchange – but it is made available when the outcome of the admission procedure is nearly certain (e.g. in increasing numerical order: LSE 1 day before the admission, Euronext 2 days and Deutsche Boerse not less than 3 days).

13. In brief, if the obligations of the MAD run not from the request for admission to listing, but from the request for admission to trading – as literally stated in Article 9 of the Directive – the scope of the Directive becomes extremely narrow. We would welcome further clarification on this issue, with a view to reaching effective harmonisation throughout the EU.

14. Moreover, we believe that it would be useful to be more precise on the concept of "request for admission" as well as to indicate which provisions of the MAD are applicable during the period between the request for admission and the effective first trading day.

2. Accepted Market Practices

15. In its "Level 3 - first set of guidance and information on the common operation of the Market Abuse Directive" (CESR/04-505b), CESR has acknowledged that "in most of the cases considered, conduct of the practice in conformity with the rules of the relevant regulated market would be sufficient in itself to promote market integrity and therefore the question of giving the practice accepted market practice (AMP) status would not arise".

16. As a consequence, and in order to ensure legal certainty, FESE believes that CESR – in its future work of guidance for the correct implementation of the MAD – should go further and clearly state the substantial equivalence between rules that have been defined by a regulated market and therefore have (already) been approved by the relevant competent authority and those practices that have been recognised by the same competent authority as AMPs. FESE believes that acting under the rules of a regulated market should provide the function of acting according to AMPs.

17. An example of a RM rule that should qualify as an AMP is the "liquidity provision rules". These rules have been adopted by all RMs in one way or another and are designed specifically to prevent

market abuse while providing the necessary liquidity for a security. We feel that the protection provided by AMPs should be extended to RM rules in general and therefore practices in line with RMs' liquidity provision rules should also be recognized.

18. Moreover, FESE believes that if an AMP is accepted in one Member State that should be a strong indication that such AMP could be accepted in another Member State.

3. Inside Information

19. An important area where supervisory approaches need to converge further relates to the (delay) procedures concerning the publication of inside information.

20. The Directive provides for the possibility for issuers, under certain conditions, to delay the public disclosure of inside information. The Directive also enables Member States to require issuers to inform the competent authority of the decision to delay. In some Member States, the requirement to notify the competent authority of such a delay has not been transposed, while others require such notification.

21. For multi-listed companies the divergence in national transpositions can be problematic. Such companies generally provide to all competent authorities of the Member States where they are admitted to trading the same level of information. This means that when the issuer informs one of its competent authorities, it has to inform all of them. Within the framework of the notification of the decision to delay disclosure of inside information, this means that the issuer would have to notify even the competent authorities that do not want to be notified, in order to ensure that all competent authorities have the same level of information.

22. This is problematic since, in some Member States, competent authorities that receive any information from an issuer disclose this information to the public or require that such information be disclosed by the issuer. This will result in the public disclosure of the decision taken by the issuer to delay, which is not acceptable. Indeed, such disclosure would lead to speculation on the financial instruments of the issuer, which could then be considered as market manipulation. It would therefore become impossible for such issuers to delay the disclosure of inside information.

23. A separate, but related, issue arises in relation to whether the issuer needs to inform the supervisor of updates to the list of insiders on an ongoing basis or upon the request of the supervisor. We believe it should be interpreted as the latter in all jurisdictions.

III. Conclusion

24. In summary, the issues that we have detected are as follows:

25. The scope of application of the Directive needs to be clarified. For example, Article 9 of the MAD could lead to the possibility that even companies that are never listed might be subject to the obligations of the Directive. This is clearly not a rational outcome given that there is no risk of market abuse in such a case.

26. Moreover, an inappropriately narrow interpretation of the Directive's provisions could oblige the companies to communicate to the public their request for admission to listing on a RM. If such a request has to be made public, this could discourage IPOs, due to the **potential negative effects** in the event of a possible refusal by the regulator and/or by the regulated market.

27. As a solution for both problems, we believe that it would be useful to be more precise on the concept of "request for admission" as well as to indicate which provisions of the MAD are applicable during the period between the request for admission and the effective first trading day.

28. As CESR has acknowledged in its Level 3 first set of guidance, conduct of the practice in conformity with the rules of the relevant RM would be sufficient in itself to promote market integrity. In order to ensure legal certainty, CESR should go further and clearly state the **substantial equivalence** between rules that have been defined by a RM and those practices that have been recognised by the competent authority as AMPs.

29. If an AMP is accepted in one Member State, competent authorities should consider it automatically to be a **strong indication** that such AMP could be accepted in another Member State.

30. In some countries, the decision to delay the disclosure of inside information that is transmitted to the competent authority is made public immediately, even if the information qualifies for a delay in publication pursuant to the Directive and is interpreted as such by other authorities. This is a problem that needs to be resolved, in particular to **facilitate cross-border and multiple listings** in Europe.

31. It should be made clear that the issuer needs to inform the supervisor of updates to the list of insiders upon the request of the supervisor itself, and not on an ongoing basis.