

**EUROPEANISSUERS REPLY TO
THE PUBLIC CONSULTATION ON THE MARKET ABUSE DIRECTIVE: LEVEL 3 – THIRD SET OF CESR GUIDANCE
AND INFORMATION ON THE COMMON OPERATION OF THE DIRECTIVE TO THE MARKET**

Position
30 September 2008

Europeanissuers refers to CESR's consultation paper CESR/08-274 dated May 2008 concerning possible Level 3 measures on the common operation of the Market Abuse Directive (hereinafter MAD).

CESR is considering the clarification of the requirements on insiders' lists and suspicious transaction reporting and is enquiring whether and to what extent the requirements provided in the Market Abuse Directive should be further specified.

Article 6 paragraph 3 of MAD obliges Member States to require issuers, or persons acting on their behalf or for their account, to draw up insider lists, to update them regularly and to transmit them to the competent authority upon request.

Article 5 of the implementing directive 2004/72/EC provides that insider lists shall include "all persons who have access to inside information relating, directly or indirectly, to the issuer, whether on a regular or occasional basis". The list shall at least contain: (a) the identity of the persons having access to inside information; (b) the reason why any such person is on the list; (c) the date at which the list of insiders was created and updated. The list shall be kept for at least five years after being drawn up or updated. In addition, issuers shall take the necessary measures to ensure that any person on such a list that has access to inside information acknowledges the legal and regulatory duties entailed.

CESR second set of guidance on the common operation of the MAD published in July 2007 (CESR/06-562b) proposed applying mutual recognition to insiders lists and suggested that, for issuers subject to the jurisdiction of more than one Member state, competent authorities acknowledge the list prepared in accordance with the requirements of the Member state where the issuer is seated. In the above mentioned guidance CESR also stated that, with respect to the persons acting on behalf of or for the account of the issuer, regardless of their nationality or their location or place of incorporation, the rules to follow have to be the rules of the jurisdiction applicable to the issuer.

With the current draft third set of guidance, CESR is considering a further step, namely to give guidance on **how insider lists should be set up and who should be included**.

EuropeanIssuers is fully supportive of CESR's endeavours to ensure a coherent

implementation of insiders lists requirements and which are in keeping with already widespread market practices. However EuropeanIssuers would like to stress the need to confine the current draft to interpretative guidance only, leaving issuers free to consider it depending on their internal organisation and not to burden issuers with additional requirements not foreseen by MAD.

On the other hand, EuropeanIssuers encourages CESR to seize this opportunity to extend the scope of the proposed guidance to other important parts of MAD that gave rise to divergent implementations as indicated hereinafter.

(1) Who should be included?

CESR recommends that emphasis be laid on the criterion of access to inside information related directly or indirectly to issuers rather than on a legal distinction between regular and occasional insiders.

While in agreement with the fact that access to inside information about the issuer should be the overriding criterion for inclusion in the list, EuropeanIssuers takes the view that maximum flexibility should be left to issuers either in drawing up a single list of persons with regular or occasional access to inside information or in establishing separate lists of permanent insiders and occasional insiders. Experience gathered so far suggests for example that, in practice, updating of separate lists might prove easier.

Permanent insiders

It should be clearly stated that permanent insiders are persons with regular access to inside information about the issuer by virtue of their duties and belonging to one of the following two categories:

- i) persons working at the issuer, including members of the administrative, management or supervisory bodies, as well as other employees where such persons have regular access to inside information about the issuer;
- ii) third parties acting on behalf of the issuer including professionals that have regular access to inside information about the issuer, such as statutory auditors, advisers, etc.

Likewise, third parties acting on behalf of the issuer should draw up and update their own insider lists. Investment analysts and journalists are not concerned, in theory, unless they come into possession of inside information through their professional relations with the issuer.

The range of persons covered by the insider list could include, depending on the issuer's internal organisation, members of the accounting department, secretarial support, etc., as individuals working in areas where they are likely to have access to inside information. Maximum flexibility should be left to the issuer to decide inclusion or not in the list.

Occasional insiders

Occasional insiders are persons with intermittent access to inside information about the issuer, as a result of their involvement in preparing a specific transaction. Just as in the case of permanent insiders, occasional insiders may belong either to the persons working

at the issuer (by virtue for example of their special skills as regards a planned acquisition) or third parties acting on behalf of the issuer, when preparing a specific transaction.

(2). When should an occasional insider list be drawn up?

No specific guidance is suggested as to the moment such a list should be established.

It should be recalled that an occasional insider list should be drawn up and updated as soon as inside information is constituted, which implies that this information should be of a precise nature. Evidence of such information may result, for example, from a gentlemen agreement between companies involved in the planned transaction, a letter of agreement by the bank selected for financing the planned project, etc.

The uncertainty that surrounds the notion of “inside information” could also reflect on the insiders’ list. As clearly stated by the ESME group in its Report¹, the directive 2003/6/CE adopts a single definition of “inside information” which applies both to the prohibition of insider trading and to the duty of publication by the issuer. The consequence is that the moment when the relevant person should be included in the list is not clear. If the inside information should be disclosed to the public as soon as possible (MAD, art. 6, par. 1), it is unclear during which time period the relevant information may be at disposal of persons working for the issuer but not to the public. Does the list of insiders cover only the very short time period between the moment when information has reached the status of inside information to be disclosed until the moment of actual dissemination? Or does the rule on insider’s lists refer only to a delay in the disclosure? The answer to these questions depends on the definition of inside information. Considering the responsibility borne by issuers in this area, it would be of paramount importance to bring more clarity.

(3). How to inform persons having access to inside information of their legal duties?

In addition to the obligation to maintain the list, there is an obligation on the issuer to make sure that it takes all necessary measures to ensure that employees that have access to inside information are aware of and acknowledge any legal and regulatory duties placed on them and the possible sanctions.

In this respect, the issuer could for instance consider to spread an explanatory memorandum to employees with access to inside information, who must acknowledge the legal and regulatory duties and be aware of the sanctions for misuse.

¹ See the Report “Market Abuse UE legal framework and its implementation by Member States: a first evaluation”, Brussels, July, 6th, 2007. The Report is available at http://ec.europa.eu/internal_market/securities/esme/index_en.htm.

(4). Language regime applicable to insider lists.

EuropeanIssuers agrees with the proposed recommendation that insider lists may be submitted by a multi-listed issuer to supervisory authorities in a foreign language other than its official language, provided that this language is customary in the international sphere of finance.

(5). Third parties

We would also like to draw CESR's attention to the fact that some Member States lay the obligation of drawing up an insiders' list not only with listed issuers but also with persons that are in a controlling relationship with them and are not listed. This obligation that is not imposed by MAD can raise problems in cross-border groups and must therefore be well examined.

(6). Smaller issuers

Regulatory requirements for insider lists alongside with the requirement for immediate dissemination of inside information to the market, represent a serious administrative burden for issuers in general, but even more so for small and mid cap listed companies. Smaller firms have fewer resources than bigger companies to control the application of MAD rules. It is imperative that CESR also looks at the administrative burdens and costs that it imposes compared to the actual positive impact on the markets.

Smaller companies have a simpler organizational structure. In their case excess regulatory and compliance costs weigh more on their competitiveness and profitability, compared to larger companies. Therefore a simplified set of rules for them regarding the management and dissemination of inside information should be seriously considered.

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