FEDERATION OF EUROPEAN SECURITIES EXCHANGES

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FESE Response to CESR's Consultation Paper – Level 3 – Second set of CESR Guidance and Information on the Common Operation of the Directive to the Market. Ref.: CESR 06-562

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 provides FESE Members' comments on the four areas which CESR identified in the Second set of Guidance and Information on the Common Operation of the MAD Directive to the Market. In the FESE Response to CESR's Call for Evidence on the Evaluation of the Supervisory Functioning of the Market Abuse Regime (which was submitted on October 31, 2006) we have provided comments on a number of subjects that are not part of the present Consultation Paper. Nonetheless, we regret to notice that in the section that provides guidance on insider lists (a theme already treated by CESR in its previous set of guidance) there is no reference to the problems that we have raised in our previous response i.e. a) the fact that, 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 and b) the issue of 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. Both issues still remain to be addressed.

3. As for the present response, we express our views on a) what constitutes inside information, b) when it is legitimate to delay the disclosure of inside information, c) when client orders constitute inside information and d) on insider lists in multiple jurisdictions.

II. Executive Summary

4. FESE believes that a number of aspects of the Level 3 are not functioning effectively because of the lack of a clear designation of the competent authority. We believe that implementing a clear competent authority regime would diminish uncertainties with regard to which jurisdiction is relevant – especially in the case of a multi-listed companies environment – for numerous situations including:

- Which competent authority should be responsible for specifying the mechanisms to disclose inside information;
- Which competent authority should be informed by the issuer about the decision to delay inside information;
- Which competent authority should recognise the insider lists prepared by an issuer that has its registered office in another Member State.

Although we recognise that this lack of clarity comes from Level 1 and Level 2, we ask for CESR's support to address this subject to the relevant authority. We nonetheless remain convinced that CESR's Level 3 guidance is beneficial and helpful to the industry.

5. Separate from the competent authority regime subject is the lack of consistency in the implementation of a number of areas of the market abuse regime where CESR could provide guidance and clarifications like when to disclose inside information (e.g. how an issuer should behave during the period of time elapsing from the moment in which inside information arises and the moment in which it is disclosed or situations in which inside information arises during non-business days), when client orders constitute inside information (the concepts of "client's pending order" and "front running") and insider lists in multiple jurisdictions (e.g. whether the issuer should inform the supervisor of updates to the list of insiders on an ongoing basis or upon the request of the supervisor).

III. Detailed Remarks

a) What constitutes "inside information"

6. As regards disclosure requirements (Paragraph 1.9), we share CESR's interpretation that companies with inside information to disclose should use the disclosure mechanisms specified by their competent authority. Nonetheless, the Market Abuse Directive foresees a regime based on the multi-competence of all involved Authorities, unlike the Prospectus and the Transparency Obligations Directives which - as a general principle - are characterised by the Home Competent Authority approach. Therefore, we believe that in its guidelines CESR, especially in the case of multi-listed companies, should specify the relevant competent authority, also taking into account the general philosophy of the FSAP that it is for the issuer's Home Member State Competent Authority to take the lead. Other than the disclosure requirements, there are other aspects of the Level 3 which do not function well because of the lack of a clear designation of the competent authority. To mention a few: the obligation for issuers to inform the competent authority of the decision to delay, the problem of "when" to publish inside information and cases of insider lists in multiple jurisdictions.

7. In determining whether a significant effect is likely to occur (Paragraph 1.13), CESR indicates "the reliability of the source" as one of the factors that should be taken into consideration. We find that, in order to avoid misinterpretations, further clarification on what is meant by that is needed.

8. For what concerns the examples of possible inside information directly concerning the issuer (Paragraph .15), we would like to stress that the concept of relevance has a general value and should not be referred to specific types of information. Therefore, it should be recalled at the beginning of the paragraph as a general criterion and deleted from the specific items in the list. However, we believe that some of the examples mentioned - e.g.: "new licenses, patents, registered trade marks" or "reduction of real properties' values" - would lead to an excessively vast array of responsibilities for the issuer.

9. Paragraph 1.16 of CESR's Consultation Paper states that "the disclosure requirement in Article 6 applies to the disclosure of the consequences, which directly concern the issuer, resulting from the examples like the ones listed below, provided these consequences constitute inside information". Although we agree that in some cases the consequences of external events might have a significant impact on issuers, we believe that it would not be acceptable to oblige the

issuer to always assess all the factors listed in CESR's examples. We consider that the disclosure of these consequences should remain in CESR's guidance as a general rule, without implying a systematisation of such events as proposed in the consultation paper. Moreover, whether a factor is "directly" or "indirectly" related to the issuer is questionable. Besides, using terms such as "consequences", which can not be found in the Directive itself, means overstepping Level 1 and obliging issuers to go beyond their tasks and assess macroeconomic events (i.e., as CESR makes reference to, central bank decisions concerning interest rate or Government's decisions concerning taxation, industry regulation, etc.).

b) When to disclose inside information (delay of disclosure and interpretation of "as soon as possible")

10. When discussing situations in which there are legitimate interests for an issuer to delay the publication of inside information, Article 6 (2) of the Directive foresees two conditions which must be met when delaying such information: a) the delay would not be likely to mislead the public and b) that the issuer is able to ensure the confidentiality of the information. We invite CESR to provide further guidance on the concept of "misleading the public" or, perhaps, to consider the possibility of deleting such a reference from the official text.

11. A second issue related to the delay of the disclosure of inside information is the obligation for issuers to inform the competent authority of the decision to delay. Generally, multi-listed companies provide the same level of information to all the competent authorities of the Member States where they are admitted to trading. 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.

12. 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 a 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. Yet this is a situation that is faced by several issuers listed in multiple jurisdictions. These issuers are thus unable to benefit from the right to delay the disclosure of the information and are, as a result, put at a disadvantage.

13. A third issue regards the problem of "when" to publish inside information. CESR could provide guidance and clarifications on how an issuer should behave during the period of time elapsing from the moment in which inside information arises and the moment in which it is disclosed. We ask CESR to take into consideration situations in which issuers are listed on markets belonging to different time zones and to focus on which competent authority's jurisdiction should prevail. The exercise of delaying inside information for issuers listed in multiple jurisdictions constitutes another example of the need of full harmonisation. We believe that implementing a clear competent authority regime would considerably diminish situations of conflict.

14. Finally, we would like to bring to CESR's attention the need to consider situations in which inside information arises during non-business days (weekends, public holydays, etc.). Article 6,

Paragraph 1 of the Market Abuse Directive states that "Member States shall ensure that issuers of financial instruments inform the public as soon as possible of inside information which directly concerns the said issuers". The topic of whether to disclose the inside information on, for instance, Monday morning, prior to the opening of the markets, or to disclose it during the weekend seems not to be addressed at EU level and the question of whether the mechanism of delay of disclosure of inside information may be used is debatable.

c) When client orders constitute inside information

15. As for the section providing guidance on when a client's pending order is inside information, we find that there might be confusion between the concepts of "client's pending order" and "front running". We would like CESR to be clearer about this distinction..

16. Indeed, the Market Abuse Directive has expressly included the practice known as front running in the market abuse regime. We share such a framework since in both cases there is substantially a management of inside information for the purposes of abusing taking advantage of a situation of information asymmetry. As CESR is aware, the persons typically involved in the above situations are employees of intermediaries. The intermediary behaviour has been strictly regulated by MiFID in terms of organizational arrangements, management of conflicts of interest, conduct of business obligations when providing investment services to client, etc.

17. In accordance with MiFID, intermediaries should find behavioural arrangements to prevent market abuses: in this perspective, the proposed CESR's guidance would be a very useful tool. We share all the contents of paragraphs 3.1-3.16. In any case, considering that in the proposed guidance on "when do client orders constitute inside information" CESR is referring to price sensitive orders, we suggest to clarify that this guidance should not lead to a separation between cases dealt with exclusively under conduct of business rules (MiFID) and cases dealt with exclusively under market abuse rules (MAD). These considerations also apply to client orders other than "sensitive orders", which could be subject to both directives.

d) Insider lists in multiple jurisdictions

18. We agree with CESR's recommendation that the relevant competent authorities recognise insider lists prepared by an issuer that has its registered office in another Member State. This, however, takes us back to the question of the identification of the relevant competent authority in the situation of a multi-listed issuer.

19. Moreover, another 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. FESE believes that it should be interpreted as the latter in all jurisdictions.

IV. Conclusion

20. We would like to thank CESR for the opportunity to comment on its second set of Level 3 guidance. We look forward to contributing to CESR's new initiatives and we remain at CESR's disposal for any explanation or clarification related to the points we have raised in this paper.