bankenverband
BUNDESVERBAND DEUTSCHER BANKEN

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Response
Call for Evidence
Evaluation of the Supervisory Functioning of the EU Market Abuse Regime

We welcome the opportunity to comment under the Call for Evidence on the experience made so far with the Market Abuse Directive (MAD).

It should be pointed out in general that the time divergence in implementation of the MAD in many member states causes problems. Once legal practice has been developed in a member state, subsequent harmonisation at European level leads to further adaptation costs. These additional and unnecessary costs could be avoided by synchronised implementation within a narrower timeframe.

Notwithstanding this, experience with the new legislation in Germany has been largely positive. The revised insider and market abuse rules work, as a whole, in practice. At the same time, the rules on financial analyses and on the disclaimers that may be required in this connection, which are seen by both many banks and many customers as excessive, have met with less acceptance. We welcome it that the relationship of financial analyses under the MAD to those under the Markets in Financial Instruments Directive (MiFID) is to be clarified at European level in the near future.

However, we do not see any need at present for a general revision of the new rules.

On the other hand, we should like to draw attention to two aspects at supervisory practice level:

As far as the rules on insider lists are concerned, a substantial divergence in the implementation of these rules has developed in different member states, especially as concerns the persons regarded as affected by the rules and the time when potential insiders are put on the lists. Given the trans-European nature of many transactions, the respective rules of different countries frequently need to be complied with. A divergence in the rules then effectively means that lists kept by the same bank in different countries would show different persons for the same transaction, which could lead to practical problems once several regulators jointly examine a transaction. In addition, the creation of a single Europe-wide list, which should be within the spirit of the Level 1 and Level 2 rules, is effectively made impossible by such divergence. In view of the fact that many banks have since implemented

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national rules, and thus to avoid additional costs caused by a second wave of implementation, effective mutual recognition of the supervisory practice of all supervisors would be desirable.

The other area is that of market manipulation. At least some elements of the respective definition in Article 1 of the MAD have already proved to be very difficult to handle in practice, despite the integration of legal examples into the definition and the reference to "signals" for market manipulation defined in the Level 2 rules. This is namely the case for the actions described under a), "*transactions or orders to trade, which give ... false or misleading signals ... or which secure ... the price ... at an abnormal or artificial level*". The practical difficulties resulting from this definition can best be demonstrated in regard to the formulation "*abnormal or artificial level*", as the application thereof requires clarity about the conditions under which the price of a financial instrument is at a "*normal*" and non-artificial level, i.e. it refers to the concept of a regular and undisturbed price-building mechanism. As there is no clarity in practice about what belongs to such a mechanism, and what kind of actions, even if in breach of market practice or trading rules, do not render prices "*abnormal*", the definition could currently enable regulators to regard any transactions which differ from standard market behaviour as market manipulation, even if the objectives pursued with a transaction and the means used for it are absolutely legitimate a such.

The existence of a special defence for this part of the definition in the form of accepted market practices does not help in practice. Authorities have defined very few accepted market practices, as they appear to fear these would provide scope for misuse (the decision only to recognise market practices at national level compounds the problem, as this could render the same transaction legal in one member state and illegal in others). In addition, the concept of defining positive practices regarded as not covered by the definition is, by its very nature, unsuited to removing the almost unlimited range of (this part of) the definition - it would not be possible to define enough market practices to cover the whole of this range.

Against this background, we believe that the only way to provide clarity about what constitutes market manipulation is to provide additional guidance on the interpretation of the terms used. In particular, the notion of what constitutes a normal price-building mechanism should be clarified (e.g. in a white list), at least by describing practical scenarios which CESR regards as cases of market manipulation or not. As a first step, it could also already be helpful if the authorities were to gather amongst themselves the considerations

that have already been made with respect to the interpretation of these terms, either abstractly or as part of actions or decisions already taken, and were to jointly publish such considerations/decisions.

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