VERBAND DER AUSLANDSBANKEN IN DEUTSCHLAND E. V.
ASSOCIATION OF FOREIGN BANKS IN GERMANY

INTERESSENVERTRETUNG AUSLÄNDISCHER BANKEN, KAPITALANLAGEGESELLSCHAFTEN, FINANZDIENSTLEISTUNGSINSTITUTE UND REPRÄSENTANZEN
REPRESENTATION OF INTERESTS OF FOREIGN BANKS, INVESTMENT MANAGEMENT COMPANIES, FINANCIAL SERVICES INSTITUTIONS AND REPRESENTATIVE OFFICES

Committee of European Securities Regulators
11-13 avenue de Friedland

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October 31, 2006/SN

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

Dear Madam, dear Sir,

The Association of Foreign Banks in Germany greatly appreciates the possibility to respond to the CESR Call for Evidence on the Evaluation of the Supervisory Functioning of the EU Market Abuse Regime (hereinafter referred to as "Call for Evidence").

We represent more than 145 foreign banks, investment management companies, financial services institutions and representative offices in Germany, among them several entities belonging to the leading institutions world-wide. The activities of our members involve to a large extent the provision of banking and financial services in Germany, but due to their international structure they are also facing the typical cross-border problems that arise when being integrated in the actions of a globally positioned group.

In view of this, our members welcome harmonisation of the regulatory regime of financial markets and very much support the attempts of CESR to prepare ground for a convergent implementation and application of the market abuse regime.

In Germany, the Market Abuse Directive (hereinafter referred to as "MAD") and its implementing directives have been transposed into national law through the Act on the Enhancement of Investor Protection (Anlegerschutzverbesserungsgesetz) which, amongst others, introduced several changes to the German Securities Trading Act, as well as through several regulations addressing in particular the regulation of financial analysis, market manipulation, insider lists and notification duties. These provisions have, in turn, been clarified by letters and guidelines of the competent German supervisory authority, the Bundesanstalt für Finanzdienstleistungsaufsicht (BaFin).

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Despite these clarifications, several questions have remained open or unclear and the supervisory practise evolving in the course of the application of the new provisions has shown that in some instances there are significant differences in comparison to the application of the market abuse regime in other Member States.

In the following, we would like to raise some general points which, from our perspective, would facilitate the assessment of whether further guidance by CESR is needed and then point out some specific problems where a more common approach by supervisors would be helpful.

I. General Measures

Market participants and affected institutions subject to the market abuse regime in more than one Member State often experience differing approaches of national supervisors to issues regulated by the MAD and its implementing directives. In view of the fact that transposition into national law will have taken place in a different way in each Member State and since transposition might involve numerous provisions, regulations and guidelines in each Member State, the reasons for such differing approaches are difficult to assess. It might be that they are due to a different, an incorrect or an incomplete transposition of the EU provisions in the respective Member States, just as it might be possible that they arise from a differing interpretation of the European provisions by the respective national supervisors. A comprehensive answer to the question whether further guidance by CESR would be helpful consequently turns out to be very difficult.

We would therefore like to suggest that CESR undertakes efforts to increase the transparency of national implementation in the first place. Every Member State should provide information on the changes introduced to its respective national legislation in the course of the implementation of the MAD and its implementing directives. The national provisions should be filed with CESR or another appropriate place (e.g. the European Commission) together with lists containing reference as to which provision of the MAD or its implementing directives have been transposed by which national provision and whether additional guidance has been provided for its interpretation. The availability of such concordance lists and the accessability of the national provisions would allow market participants to compare the transposition in the Member States more easily and to assess the reason for eventual different application and enforcement of provisions deduced from the MAD – either due to different transposition (resulting from gold-plating, omissions, implementation of optional provisions etc.) or due to different interpretation by the competent authorities.

We are confident that once such transparency exists, stakeholders will be able to realise what differences exist in the different national legislations, what the reasons for such differences are and which instance should be addressed in order to find adequate solutions. This would also greatly facilitate the assessment of whether further guidance by CESR would be helpful or not.

II. Specific Issues

1. Disclosure of Conflicts of Interest

We suggest CESR guidance on the extent of disclosure and, in particular, on the need to disclose interests and conflicts of interest which are effectively managed.

Articles 5 and 6 of Directive 2003/125/EC require extensive disclosure of interests and conflicts of interest. These disclosure requirements seem to be regardless of whether the producers and disseminators of financial analysis have adopted policies allowing them to effectively manage such conflicts or not.

In contrast to these very wide disclosure requirements under the MAD-regime, the MiFID Implementing Directive 2006/73/EC suggests a rather limited recourse to the disclosure of conflicts of interest. As set out in its Recital 27, “an over-reliance on disclosure without adequate consideration as to how conflicts may appropriately be managed is not permitted”. Under the MiFID-regime, investment firms should in the first place identify and manage their conflicts of interests. They should only disclose them if their arrangements to manage conflicts of interests are not sufficient to ensure that risks of damage to client interests will be prevented.

We feel that the approach taken under MiFID is reasonable. Only those facts which might impair objectivity or result in a conflict of interest should be disclosed. In all other instances in which arrangements allow an effective management of potential conflicts of interests or avoid circumstances which might impair the objectivity of a financial analysis, there is no need for disclosure since the interests of investors or possible investors receiving the financial analysis are not and cannot be affected.

2. Clarification of the Meaning of Disproportionality

Articles 4 (2), 5 (3) and 6 (5) of Directive 2003/125/EC state that instead of having to provide information required pursuant to these provisions in the financial analysis itself, it may be sufficient to make reference to another place where said information can be obtained. The permissibility of the use of such reference depends on whether the inclusion of such information is disproportionate in relation to the length of a financial analysis.

The question of what is disproportionate, however, has not been addressed in the MAD and its implementing measures. Clarification on this undefined term would be helpful (disproportionality if the information makes up more than 2%, 5%, 10%, 50% of the financial analysis?).

Moreover, it would be of great value to know what information has to be taken into account when assessing its possible disproportionality. Is it the sum of all information pursuant to Artt. 4, 5 and 6 of Directive 2003/125/EC which has to be put in relation to the length of the financial analysis or does disproportionality have to be assessed individually with regard to each set of information according to the respective Articles?

3. Clarification of what Constitutes a Place Where the Required Information can be Directly and Easily Accessed by the Public

Articles 4 (2), 5 (3) and 6 (5) of Directive 2003/125/EC stipulate that in the case of disproportionality, reference can be made to a place where the required information can be directly and easily accessed by the public. These provisions also contain an example as to what may constitute such place. However, we have heard that supervisory authorities are reluctant to accept reference to other ways of information than internet sites, such as e.g. hotlines.

4. Content of Insider Lists

Guidance by CESR on Art. 5 (2) (a) of Directive 2004/72/EC would be helpful, detailing which data has to be included in lists of insiders in order to determine the identity of the person having access to inside information. To our knowledge, the data required varies from Member State to Member State, being particularly extensive under German law. According to Section 14 of the Insider List Regulation (Wertpapierhandels-Insiderverzeichnis-Verordnung), not only the name and surname of the person have to be listed but also its birth date and birth place, its private address and its business address, whereas other jurisdictions require less data.

Especially with view to the use of group-wide insider lists throughout the EU, it would be helpful if all Member States required the same level of detail as regards the data requested.

Should you have any queries or wish a personal discussion, please do not hesitate to contact us.

Best regards,

Wolfgang Vahldiek Sabine Nachtsheim