



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

F- 75008 Paris

February 2, 2007/SN

CESR Public Consultation – MAD Level 3 – second set of CESR guidance and information on the common operation of the Directive to the market

Dear Madam, dear Sir,

The Association of Foreign Banks in Germany appreciates the possibility to respond to the CESR Consultation on the second set of CESR guidance and information on the common operation of the Market Abuse Directive (MAD) to the market (hereinafter referred to as “the Consultation Paper”).

We represent more than 150 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 give guidance and information on the common operation of the MAD throughout the EU.

In the following, we would like to restrict ourselves to comments on Chapter IV of the Consultation Paper which deals with the issue of insider lists.

We very much welcome the recommendation in Chapter IV No. 4.5 of the Consultation Paper. Recognition of insider lists prepared by an issuer that has its registered office in another Member State according to the requirements of that other Member State’s jurisdiction would constitute a great achievement. Mutual recognition of insider lists set up according to the national laws of the Member States implementing the MAD and its implementing measures will further promote supervisory convergence and foster the creation of a truly single market.



In view of this, we are surprised of and strongly object to CESR's suggested guidance in Chapter IV No. 4.7, according to which persons acting on behalf or for the account of the issuer would have to follow the rules of the jurisdiction applicable to the issuer when establishing insider lists, regardless of their nationality or their location or place of incorporation. The consequences of such an obligation would not only be contrary to international law since the scope of application of national law is confined to the territory of the respective jurisdiction. It would also put in place practical barriers to the cross-border use by issuers of third parties since compliance with foreign laws constitutes per se an additional effort both in terms of time (e.g. information) and costs (e.g. legal advice).

The supposed intention of CESR to enhance the conformity of insider lists of the issuer and of persons acting on his behalf or for his account irrespective of their location can be reached through other means:

As set out in our response to the CESR Call for Evidence on the evaluation of the supervisory functioning of the MAD, guidance by CESR on Art. 5 (2) (a) of Directive 2004/72/EC 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, thereby reaching uniform requirements in all Member States, would be more suitable. It would abolish the differences in Member States' jurisdictions as regards the type of data required pursuant to Art. 5 (2) (a) of Directive 2004/72/EC, greatly facilitate the use of group-wide insider lists throughout the EU and moreover allow for higher conformity of the insider lists of the issuer and of the persons acting on his behalf or for his account, even if these are domiciled in another Member State.

Another approach, which would have the additional benefit of being consistent with the guidance proposed in Chapter IV No. 4.5, is the concept of mutual recognition. This concept is applied for issuers' insiders lists, so it should be applied for third parties' insiders lists accordingly. If competent authorities recognise insider lists prepared by an issuer that has its registered office in another Member State, according to this Member State's requirements, we cannot understand why insider lists prepared by a person located in another Member State than the issuer and acting on this issuer's behalf or for his account should not be recognised.

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

Best regards,

Wolfgang Vahldiek

Sabine Nachtsheim