Launched in 1960, the European Banking Federation is the voice of the European banking sector from the European Union and European Free Trade Association countries. The EBF represents the interests of some 4,500 banks, large and small, wholesale and retail, local and cross-border financial institutions. Together, these banks account for over 80% of the total assets and deposits and some 80% of all bank loans in the EU alone.

Ref.:EBF_006261
Brussels, 27 January 2014

General remarks

- The European Banking Federation (EBF) welcomes the opportunity to comment on the ESMA's Discussion Paper on possible implementing measures under the Market Abuse Regulation.

- The EBF supports the fight against market abuse. Insider dealing and market manipulation are detrimental for investors and undermine confidence in the markets. In this respect, European Banks share ESMA's objective of minimising the risks of market abuse.

- The European Banking Federation believes that market soundings are key for the proper functioning of capital markets. While ESMA's proposals are generally sensible, the EBF considers that the hours of soundings should not be restricted.

- The EBF agrees with ESMA that Market Sounding should minimize the risks that leaks of inside information prejudice the market. However, the arrangements and procedures covering wall- crossing should remain feasible so as to allow investors' relations between the issuer and its investors even in cases where no disclosure of inside information is involved.

- Concerning public disclosure of inside information and delays, the EBF believes that the competent authority in the member state where the market participant has its registered office should lead the process on the reporting side in order to avoid double reporting.

- The required minimum procedures and arrangements for delays of public disclosure of inside information may turn out to be disproportionate. The EBF agrees that delays should be avoided as much as possible, but calls on ESMA to allow the possibility of delays provided that the relevant Competent Authority is duly informed.

EBF a.i.s.b.l
ETI Registration number: 4722660838-23
Avenue des Arts 56, B-1000 Brussels
+32 (0)2 508 37 11 Phone
+32 (0)2 511 23 28 Fax
www.ebf-fbe.eu

Buyback programmes (Article 3)

Q1: Do you agree that the mechanism used in the Transparency Directive or comparable mechanism should be used for public disclosure regarding buy-backs?

Yes.

Q2: Do you agree that aggregated figures on a daily basis would be sufficient for the public disclosure of buy-back measures? If so, should then the details of the transactions be disclosed on the issuer's web site?

Yes, disclosure of aggregated figures on a daily basis is sufficient. The details of the aggregated transactions could be disclosed on the issuer's web site.

Q3: Do you agree to keep the deadline of 7 market sessions for public disclosure or to reduce it?

As rightly explained by ESMA, the current system works well without any major complain from market participants. The EBF therefore firmly supports to keep the deadline of 7 market sessions for public disclosure.

Q4: Do you agree to use the same deadline as the one chosen for public disclosure for disclosure towards competent authorities?

Yes, we agree.

Q5: Do you think that a single competent authority should be determined for the purpose of buy-back transactions reporting when the concerned share is traded on trading venues in different Member States? If so, what are your views on the proposed options?

Yes, the EBF believes that a single competent authority should be determined for reporting when the concerned shares is traded on a different member state for the following reasons:

- This system will avoid double reporting;
- A single authority will also be useful as a point of contact for authorities in other Member States where the shares are also traded

In EBF's perspective, it is more practical and efficient to do disclosure to the home competent authority of where the issuer is registered or the primary listing, according to the Prospectus Directive. The competent authority of the most relevant liquid market could be fluctuating and can be confusing, while the competent authority of trading venue where the share was first admitted to trading may have nothing to do with the current trading of the share.

Q7: Do you agree that during the last third of the regular (fixed) time of an auction the issuer must not enter any orders to purchase shares?

Yes, the EBF agrees.

Q11: Do you agree with the approach suggested to maintain the trading and selling restrictions during the buy-back and the related exemptions? If not, please explain.

The EBF supports this proposal.

Market soundings (Article 7c of MAR)

Q23: Do you agree with ESMA's proposals for the standards that should apply prior to conducting a market sounding?

In general, the EBF agrees on the proposed standards. However, The EBF encourages ESMA to provide further guidance on criteria to determine the type and number of investors the disclosing market participant intends to question (paragraph 74). This clarification is very important as failing to fulfill this requirement will lead to sanction if disclosure is considered inadequate.

Q24: Do you have any view on the above?

As rightly mentioned by ESMA, the EBF supports that the hours in which market sounding takes place should not be restricted. While disclosing market participants will always try to reduce the time lag between the market sounding and the transaction, there always will be cases where a strict limitation of the time period that the market sounding might take place would have a negative impact on the whole exercise. For instance, strategic investors may require a longer time to consider their potential involvement in an investment. Depending on the size and nature of a transaction, it may be critical reaching out to this type of investors and therefore more time will be needed.

Q25: Which of the 3 options described above in paragraph 82 do you think should apply? Should any other options be considered?

The EBF believes Option 1 should apply.

Q26: Do you agree with these proposals for scripts? Are there any other elements that you think should be included?

With regard to the wall-crossed sounding scripts, the EBF proposes to include a clarification stating that the disclosing market participant ensures that the script is being communicated to the appropriate receiver so as to avoid disclosing inside information to people not intended as receivers

both within the relevant organization and at organization level. This provision will avoid cases of mistaken identity.

Q27: Do you agree with these proposals regarding sounding lists?

Yes, the EBF agrees.

Q28: Do you agree with the requirement for disclosing market participants set out in paragraph 89?

The EBF generally agrees with this paragraph provided that the buy-side firm precisely provides for such details. Nevertheless, the buy-side disclosing party should not be under an automatic obligation to keep updated all the records or to search for such details if the information has not been provided because it would imply an unjustified burden for the disclosing party.

Q29: Do you agree with these proposals regarding recorded lines?

Yes, the EBF agrees that all market sounding conversations should be conducted on recorded lines. The Federation understands that record retention requirements should only apply to conversations taking place over a recorded line. Nevertheless, the EBF is concerned about the record retention requirements on the recorded tapes. It is unclear from paragraph 90 on whether record retention requirements for 5 years are applied to recorded telephone conversations as well as other records such as documents and emails. If that was the case keeping record of tapes for a period of at least 5 years would be beyond the current requirements under Directive 2004/39/EC (where retention rules should be in conformity with national law).

Q30: Are you in favour of an ex post confirmation procedure? If so, do you agree with its proposed form and contents?

The EBF favors an ex post confirmation procedure, provided that e-mail communication is sufficient and appropriate to ensure that the ex post confirmation is carried in a timely and effective manner.

Additionally, the EBF proposes that the requirement on the disclosing market participant to confirm the arrangement with the buy side firm to participate in a wall crossing market sounding may include: (i) if the disclosing market participant has a cleansing strategy and (ii) if so the basic content (expected time frame for the transaction or publication of inside information).

Q31: Do you agree with the approach described above in paragraph 96 with regard to confirmation by investors of their prior agreement to be wall-crossed?

The EBF agrees on the potential problems presented if the disclosing market participant is required to obtain written confirmation. However, the EBF would suggests clarifying that verbal confirmation during a phone conversation recorded by the disclosing market participant would fulfill the confirmation procedure requirements.

Q32: Do you agree with these proposals regarding disclosing market participants' internal processes and controls?

Yes, the EBF agrees.

Q35: Do you think that the buy-side should or should not also inform the disclosing market participant when it thinks it has been given inside information by the disclosing market participant but the disclosing market participant has not indicated that it is inside information?

Whilst, in principle it would be helpful to all parties to have an open dialogue regarding the nature and assessment of the information that has been disclosed the EBF notes the risk that the buy-side should be mindful of not tipping off the disclosing sell-side firm that information is more sensitive than as presented.

Q37: Do you have any views on the proposals in paragraphs 113 to 115 above?

The proposal seems to be acceptable.

Q38: Do you think there are any other issues that should be included in ESMA guidelines for the buy-side?

No.

Q39: What are your views on these options?

The EBF has reservations on the two proposed options as they may be unworkable. In particular, defining a methodical cleansing strategy appears unlikely to work in all possible cases. Moreover, a discussion or agreement on the cleansing strategy on a case-by-case basis does not appear realistic for the following two reasons:

- Time is essential when doing transactions with prior wall crossing so that there is hardly any room for discussions on the cleansing strategy and
- In cases where several investors are approached there is a high risk that different buy side contacts prefer different strategies that are difficult to combine and therefore nearly impossible to implement.

As an alternative approach, the disclosing market participant could present a cleansing strategy (with basic information) to the buy side contact before the buy side contact is asked for its consent to be wall crossed.

Suspicious Transaction and Order Reports (Article 11 of MAR)

Q60: Do you agree with this analysis? Do you have any additional views on reporting suspicious orders which have not been executed?

Contrary to what is stated under 193, the reporting obligation should not be applicable to own account trading of investment firms. Investment firms are - just as is the case under the current MAD – required to report pursuant to article 11 paragraph 1 orders and transactions executed on behalf of a client that might constitute (an attempt to) insider dealing or market manipulation. Besides, the wording of article 11 paragraph 2 (any person professionally arranging or executing transactions) does not indicate at own account trading. Any other interpretation would result in self-incrimination.

Q61: Do you agree that the above approach to timing of STR reporting strikes the right balance in practice?

The EBF agrees with ESMA that the STR should be submitted as soon as practicable. However, the EBF does not believe an absolute deadline of two weeks should be introduced as there would be cases as noted by ESMA in paragraph 192 were more time may be needed for internal investigations.

Q62: Do you agree that institutions should generally base their decision on what they see and not make unreasonable presumption unless there is good reason to do so?

Yes, the EBF generally agrees. However, the EBF would like to emphasise that institutions can make a decision on suspicious transactions and orders based **only** on the facts and information available to them in each case. Until now they have to take into account a certain suspicion threshold in their decision making, namely the existence of reasonable suspicion (cf. Art. 6 para. 9 MAD – "…*who reasonably suspects that a transaction might constitute insider dealing or market manipulation shall notify the competent authority without delay*."). The apparent deviation from the existence of reasonable suspicion in section 201 is not evident.

Q64: Do you have a view on whether entities subject to the reporting obligation of Article 11 should or shouldn't be subject to a requirement to establish automated surveillance systems and, if so, which firms? What features as a minimum should such systems cover?

The EBF supports reinforcing the principle of proportionality presented by ESMA in paragraph 205. However, the EBF disagrees with the statement in section 206. Acquiring and implementing an automated system covering the full range of trading activities of the firm would require significant investment and especially for small firms be disproportionate to the inherent risks of receiving suspicious transactions. The obligation to monitor order flows must be possible to meet by implementing manual processes.

Q66: Do you have views on the level of training that should be provided to staff to effectively detect and report suspicious orders and transactions?

The level of training should also be determined on a proportionate basis. In case STRs are generated mainly on the basis of professional judgment of front office staff in the interaction with its clients the required level of training should be higher compared to the situation that STRs are mainly generated by a surveillance system.

Q67: Do you agree with the proposed information to be included in, and the overall layout of the STRs? N/A

Q68: Do you agree that ESMA should substantially revise existing STR templates and develop a common electronic template? Do you have any views on what ESMA should consider when developing these templates?

While the EBF believes that a common STR template could be helpful, the EBF would welcome clarity as to which (sub) sections are optional and which (sub) sections are compulsory. The Federation understands that sections 5 and 6 are optional.

Finally, parties reporting STRs should not be obliged to make use of an electronic template.

Q69: Do you agree with ESMA's view for a five year record-keeping requirement, and that this should also apply to decisions regarding "near misses"?

While the EBF agrees with the five year record-keeping requirement as required under the current MAD regime. The requirement to document and store "near misses" is of great importance for the EBF. However, it is not clear which actions qualify as "near misses". The identification of "near misses" is thus proving difficult. In case of doubt, a large number of transactions would be affected and large amounts of data expected, which would be difficult to manage. The EBF believes certain degree of proportionality should be introduced in the definition of "near misses" and clearer guidance from ESMA would be welcomed.

Public disclosure of inside information and delays (Article 12 of MAR)

Q73: Do you agree with the suggested criteria applicable to the website where the issuer is posting inside information? Should other criteria be considered?

The EBF generally agrees with the suggested criteria. However, **t**he requirement to post for 5 years publicly disclosed information on the website of the issuer may not be entirely compatible with the requirement that the information should be easy to find.

Q77: Do you agree with the approach to require issuers to have minimum procedures and arrangements in place to ensure a sound and proper management of delays in disclosure of inside information? If not, please explain.

The required minimum procedures and arrangements may turn out to be disproportionate especially in case of a limited delay that will in practice always occur due to the requirement to disclose inside information as soon as possible.

Q81: Do you agree with the approach suggested in relation to the notification of intent to delay disclosure to preserve financial stability?

The EBF agrees with ESMA's that delaying the publication should be avoid as much as possible. However, there will always be cases where delay is necessary and therefore the EBF would welcome that ESMA clarifies that the issuer must be allowed to defer the disclosure of the inside information at least during the period in which the competent regulatory authority decides on the issuer's application.

Q83: Do you agree with the main categories of situations identified? Should there be other to consider?

The EBF fears that if the principle developed by ESMA would be applied too strictly this would effectively remove the right to delay any disclosure of inside information. In many circumstances the undisclosed inside information may contradict market expectations (cf. section 307). The EBF thinks the imbalance of information does not mislead per se. However, in our opinion, issuers must not, while delaying the disclosure of inside information, actively provide any indication in contradiction to the undisclosed inside information. We therefore reject section 307.

Insider list (Article 13 of MAR)

Q84: Do you agree with the information about the relevant person in the insider list?

The European Banking Federation believes that insider lists should ensure a unique identification of the person/persons recorded on the list. A possible efficient and workable approach is that an investment firm assigns a unique employee identification number to all employees that should be in the list. When requesting the insider list, the competent authority should be able to request all relevant information about the individual persons on the list (also in order to contact that person),, but firms should not be required to record all this information at the time of updating or creating the list.

The EBF believes that disclosing a person's private phone and mobile numbers as well as e-mail addresses is not necessary for that purpose. Rather such requirement appears to have a severe impact on such individuals' privacy and should therefore not automatically be required to be included in an insider list. An identification number per employee or a first name or surname (where there are several with the same name a distinguisher will be included) is therefore sufficient until the competent authority requests additional information.

Q85: Do you agree on the proposed harmonised format in Annex V?

While the EBF agrees that a harmonised format is a good idea, the EBF does not believe that all information listed in Annex V should be required (see also response Q 84).

Q86: Do you agree on the proposal on the language of the insider list?

The EBF stresses that not all firms (in particular small ones) will have the internal capability to translate the insider list to the official language of the relevant Competent Authority. The EBF calls on ESMA to clarify which languages are covered by the term "languages which is customary in the sphere of international finance".

Q87: Do you agree on the standards for submission? What kind of acceptable electronic formats should be incorporated?

The EBF agrees with the standards of submissions proposed by ESMA which are already exiting market practices.

Q88: Should ESMA provide a technical format for the insider list including the necessary technical details about the information to be provided (e.g. standards to use, length of the information fields…)?

See response Q84 and Q85.

Investment recommendations (Article 15 of MAR)

Q97: Do you have suggestions on how to determine when an investment recommendation is "intended for distribution channels or for the public"?

The EBF believes that the directive 2003/125/EC provides adequate guidelines to determine when an investment recommendation is intended for distribution channels or for the public.

Moreover, it is not only essential to strike a clear distinction between an investment recommendation and investment advice, but also between an investment recommendation and marketing material and other information with regard to a financial instrument. An essential part of investment recommendation is that it pretends to be objective and independent and is non-

personal. Furthermore, an alignment between MAR and MiFID with regard to investment recommendations would be desirable.

The EBF would stress the importance of recognising the existence of non-independent research under the current MAD research definition. ESMA does not take into account the carve-out for personal recommendations emanating from sales and trading derived from recital (3) of directive 2003/125//EC which is currently being applied.

Q99: Do you agree that the existing requirements on the identity of producers of recommendations should be maintained?

Yes, the EBF agrees.

Q100 Do you agree that, as a starting point, ESMA should keep the approach adopted in the existing level 2 rules, with respect to objective presentation of investment recommendations?

Yes, the EBF agrees.

Q101: Do you agree with the suggested approach aiming at increasing transparency on the methodologies used to evaluate a financial instrument or issuer compared to the current situation?

The EBF believes that the current transparency requirement under Article 4, letter b of Directive 2003/125/EC is adequate. Nevertheless, the EBF is not entirely convinced that additional requirements are necessary, if any additional requirement were to be introduced it would need to be principles-based.

Q102 Do you agree that, as a starting point, ESMA should keep the approach adopted in the existing level 2 rules with respect to disclosure of particular interests or indications of conflicts of interest?

Yes, the EBF agrees.

Q103 Should the thresholds for disclosure of major shareholdings be reduced to 2-3% of the total issued share capital, or is the current threshold of 5% sufficient where the firm can choose to disclose significant shareholdings above a lower threshold (for example 1%) than is required? Or, do you have suggestions for alternative approaches to the disclosure of conflict of interests (e.g. any holdings should be disclosed)?

The EBF believes that the current threshold of 5% is sufficient.

Q109 Do you agree with the suggested approach to the content of the disclaimer in relation to the disclosure of conflicts of interest?

As a consequence of continuing changes in positions in financial instruments hold by investment firms, a clearer and precise disclosure will not be practicable at the risk of being incorrect.

Q110: Do you think that the rules on recommendations produced by third parties set forth in implementing Directive 2003/125/EC should be updated?

No, there is no need to change the rules for the dissemination of recommendations produced by third parties.

Reporting of violations (Article 29 of MAR)

Q112: Do you agree on the proposed approach and the suggested procedures for the receipt of reports of breaches and their follow-up? Do you see other topics to be addressed?

The procedures seem sensible. However, the data of legal persons on behalf of whom reporting should also be protected.

Q113: Do you agree on the proposed approach to the protection of the reporting and reported persons? Do you see other topics to be considered?

The EBF suggests to include specific rules providing robust and comprehensive protections for whistleblowers from being sanctioned for reporting breaches. Inter alia, it is essential that (former) employees first report potential breaches internally making use of the relevant internal procedures.

Additionally, protection mechanisms to avoid defamation such as libel and/or slander should be introduced.