BRITISH BANKERS' ASSOCIATION

International
Capital
Market
Association Ltd

ICMA

JOINT BBA - ICMA RESPONSE TO CESR CONSULTATION ON THE MARKET ABUSE DIRECTIVE LEVEL 3 SECOND SET OF GUIDANCE AND INFORMATION ON THE COMMON OPERATION OF THE DIRECTIVE TO THE MARKET

The British Bankers' Association represents more than 260 banks carrying on business in the United Kingdom. The majority of these banks come from outside the United Kingdom and our members cover the whole range of investment services. They are particularly active in the bond markets. The BBA is the principal banking association in the UK and speaks for banks representing 95% of the banking assets held in the UK.

The International Capital Market Association (ICMA) is the self-regulatory organisation representing the financial institutions active in the international capital market worldwide. ICMA's members are located in some 50 countries across the globe, including all the world's main financial centres, and currently number over 400 firms.

The BBA and ICMA welcome the opportunity to submit views on CESR's set of Level 3 guidance in the area of the Market Abuse Directive (MAD). We support the overarching review of the operation of the Market Abuse Directive under the Lamfalussy system and consider it a vital part of the process. We welcome this CESR guidance as a step toward tackling the lack of harmonisation amongst EU competent authorities in their interpretation of the Directive; differing interpretations of when Member States regulators have jurisdiction in cross border situations and insufficient guidance in practical issues for firms to comply with the Directive. We present our comments on specific areas of the Consultation Paper below.

Inside Information and Information of a Precise Nature

1.5 We are supportive of the drafting in paragraph 1.5, relating to market rumours. It is both helpful and practical for firms in their interpretation of the Directive's requirements.

1.13 (iv) This is a particularly wide provision. We would suggest that the drafting is amended to include a concept of those variables that a reasonable investor would consider pertinent. Extending this provision to 'all variables' leaves firms open to significant regulatory and counterparty risk.

1.14 Taking pre-existing analyst reports into consideration is one of the factors for analysis, but making this a requirement might prove too onerous and would not be meaningful and practical for a reasonable investor if such materials are clearly out of date. Although it is clearly useful to have information from analysts' reports in order to make investment decisions, analysts' reports are not the sine qua non in order to make such decisions, and therefore we believe that it is essential not to overestimate their

importance within CESR's guidance. Analysts' reports should be treated simply as part of the universe of available guidance to inform investment decisions. Current market expectations will be relevant to assessing price sensitivity and these market expectations may be evident from analysts reports but not exclusively. This is, in our view, a good example of why the "indicators" in 1.14 should be no more than that. To avoid undue emphasis on their list, we suggest that their introduction is modified to say, e.g., *"Some useful indicators…that, depending on circumstances, could be taken into account…"*

1.15 Similarly, we find the indicative list of factors which might constitute inside information helpful, but believe that more prominence should be given to the fact that the inside information regime should not be applied to them automatically. Instead, all elements of the definition of inside information should always be considered in the circumstances of the case. Otherwise, there is a real risk of misinterpretation of the list by the market participants and, possibly, competent authorities which would unnecessarily increase regulatory burden on issuer and frustrate legitimate market conduct. "Decisions concerning buy-back programmes" are a good example of this risk. Immediate public disclosure of all decisions concerning all share buy-backs (namely decisions to execute a buy-back trade) would cut across the disclosure regime provided for in Regulation (EC) No 2273/2003 (before-the-fact disclosure of the terms of the programme and after-the-fact disclosure of the executed trades) and seriously prejudice the interests of the issuer (who, unlike other buyers, would have to advertise its demand, allowing the sellers to increase the price against him). Similar considerations apply to buy-backs of debt securities even though their disclosure regime is not harmonised at an EC level. Equally our members are concerned by the use of the term 'market sentiment about the company'. This is an ephemeral concept and not one susceptible to consistent interpretation.

1.16 Our members are concerned regarding the nature of the consequences of 'indirect' information. Perhaps it would be helpful if CESR could modify the wording by differentiating the 1.15 list and the 1.16 list more clearly as in some circumstances under 1.16, a person/firm with inside information simply cannot disclose such information. In the event that a firm were to come into possession of information that indirectly relates to the market, this potentially could be 'inside information' that would impact every single financial instrument or firm they are dealing with. e.g. if a firm were aware of future central bank decisions on interest rates this would impact extremely widely and would therefore potentially paralyse the firm's trading without the firm having an ability to disclose this information. It is also important to recognise that some of these issues are simply not under the control of either the issuer or the investment firm that is advising it.

The problem lies not with the indirect information concept, which comes from the Directive, but with the suggestion to disclose the consequences. In most cases, analysts and other market participants with sufficient knowledge and experience will be able to work out for themselves what the implications of indirect information will be for issuers and that unless the issuer has possession of some additional piece of non-public information that is crucial to understand the impact of a (for example) government decision, the "consequences" for an issuer are "generally available" because they can be identified by analysing or developing other information which is generally available- ref. MAD Recital 31. We believe that 1.16 was intended to recognise this fact but we suggest it is made clearer.

A more technical point regarding the CESR drafting on rating agencies – it would be unusual for Credit Rating Agencies to comment on the value of any listed instrument directly, although this is often done by stock/research analysts.

Delay to Publication on Inside Information

In the penultimate bullet in 2.8, it should be made clear that the "premature disclosure" referred to is premature disclosure of the decision to sell the holding/the impending development - and not of any other unrelated inside information that might compromise the transaction.

We support the broad language of the last bullet 2.8 which, in our view, appropriately reflects the guiding principle when assessing legitimacy of the delay with disclosure – both in case of “negotiations in course” and any other similar circumstances where the issue may arise.

2.9 should be balanced with some reference to the need for issuers to have efficient processes for making decisions. There is no guidance on the need to avoid misleading the market, which is an issue with the guidance and limits its usefulness. It should also be made clear that announcements that are too vague or too early should not be construed as good market practice.

Client Orders Constituting Inside Information

We are supportive of CESR’s draft guidance in this area. However, firms’ main concern is in the area of defining what is a ‘client’s pending order’. This is an amorphous concept which is by its nature indeterminate. In the wholesale markets many firms are polled for potential prices, especially in more esoteric financial instruments, but without a firm intention by the counterparty to make an order. Polling for a price should not constitute an order, and we believe that CESR’s guidance should make it clear that such an exercise should not be considered to be a “pending client order”. Any conflict of interest issues that may arise in relation to pre-order information should properly be dealt with under the MIFID requirements in relation to front-running and conflicts of interest and should not be considered an insider dealing issue. In line with Recital 18 of MAD, the guidance should make clear that possession of information related to a pending order should not affect the ability of the firm to act as a market-maker or a counterparty or to dutifully carry out other orders.

We also believe that a general derogation would be more useful in practical terms than a list of illustrative examples, helpful though such a list is. As market practices change and develop, such a list would require frequent updating, rendering it a cumbersome regulatory tool.

Insider Lists

This issue is of significant practical importance and potential cost to institutions, especially those who operate in more than one jurisdiction. Firms operating in many jurisdictions are likely to want one harmonised Europe-wide approach to producing insider lists – and consequently they tend to produce their lists in accordance with the

most detailed requirements imposed as a single institution-wide solution even if most of such a list is not required by other competent authorities. Therefore there is a need for a pragmatic and sensible common approach among CESR members. There is also a divergence of approach among the EU countries on what constitutes evidence of identity.

Many of our members operate on a cross border basis and are facing differential requirements for insider lists. We welcome CESR's confirmation that it is to propose a system of mutual recognition of Member States' insider list requirements, which will go some way to reducing the current administrative burden of this requirement on our members. The mutual recognition of each Member States' insider lists, however, would not go as far as a harmonised "common" approach to each regulator's requirements. The remaining differential implementation of this requirement across Member States, would remain unhelpful and the difficulties for firms would not be completely resolved.

Rather than requiring compliance with the Member State of the registered office, we suggest that the home / host Member State concept of the Transparency Directive is adopted for this purpose. This would enable those issuers with multiple listings to look to the laws and regulations of the same Member State for the disclosure of all of their "regulated information" (which encompasses information disclosed under both directives) and therefore ease their regulatory burden, without affecting the substance of the proposal for mutual recognition of insider lists. It would also help bed down a consistent concept for an issuer, that is based outside the EEA and which has securities admitted to trading on an EEA regulated market.

In addition to compiling "their own" insider lists as issuers, investment firms are often required to compile additional lists for situations where they act as agents of other issuers. Even if mutual recognition is accepted, firms will still have to comply with the laws and regulations of the Member States of the various issuers they act for. We would therefore suggest that CESR consider whether in these cases the mutual recognition should go further and allow such investment firms (as regulated entities subject to supervision) to compile insider lists in accordance with the laws and regulations of their Transparency Directive Member State only.

Method of Making Information Public

Our members consider that the guidance adopted by CESR should include a non-exhaustive list of potential methods of making inside information public. Following the implementation of the Transparency Directive (TD), there is no longer a separate MAD disclosure method but the disclosure of inside information is governed by the new rules of the TD (in addition to which only the publication on the issuer's website is required). This means that the disclosure should be made from the TD home Member State of the issuer (and in accordance with its rules) in a manner ensuring pan-EEA dissemination of the information. This should be reflected in the implementing legislation of the Member States and the rules of competent authorities. We would encourage the TD and MAD workstreams within CESR and competent authorities to work together to ensure effective alignment of the two formerly separate regimes.

From a practical perspective, there needs to be greater flexibility towards mutual recognition of information systems. CESR's clarification will be helpful on the definition of "public." For example, information disseminated through a service which has to be

paid for (e.g. Reuters, Bloomberg, newspaper), should still be regarded as public. If this were not the case, it would leave significant uncertainty about when information can be considered public and the means of transmitting that information quickly.

As part of this, Member States Regulators should mutually recognise major data distributors in each Member State as being sufficient for adequate public disclosure including for the purposes of a stabilisation announcements and issuer disclosure of insider information. In this way markets would be aware of how to fulfil their obligations on a pan-EU basis. Currently there is Regulatory Information Service, (RIS) in the UK, a similar list in France with different media etc. CESR should lead this mutual recognition process rather than member states publishing unsynchronised channels for making information public.

Making Information Public by SPV Issuers

CESR guidance dealing with making inside information public should also focus on the atypical features of Special Purpose Vehicle (SPV) issuers. When the issuer is a special purpose vehicle with limited or no resources for analysis and administration, it may delegate the tasks related to public disclosure of inside information. The responsibility for issuer disclosure, however, is still with the issuer SPV. Industry guidelines to help market participants have recently been published by the ESF and CMSA in relation to Asset Backed Securities ("ABS") and Commercial Mortgage Backed Securities ("CMBS") transactions.

The proposed guidelines are helpful, however CESR should consider that the issues facing an SPV issuer impact across structured finance markets, e.g. CDOs, ABCP, SIVs. Each transaction structure is bespoke, which makes it difficult to apply one set of guidelines. The ESF will work on similar guidelines for CDOs in 2007.

There are some potential conflicts between US and EU laws and rules. The SPV issuer usually communicates with investors via post-issuance reporting. This is compiled by the servicer and is available together with other key information on the issuer website. The website is often password-protected, only allowing access for existing bond holders. After the implementation of MAD, this practice has become problematic as the current website based dissemination of information might be considered to be short of "public disclosure", unless password-protection is removed. The 144a rule in the US requires that issuer information is communicated only with Qualified Institutional Buyers (QIB), but the issuer website could be accessed by non-QIB retail investors if it were lacking password-protection. We do not consider issuer website information constitutes "marketing information" or an "offering", therefore it should not be viewed as deliberate violation of SEC rules, but there are still some uncertainties for firms.

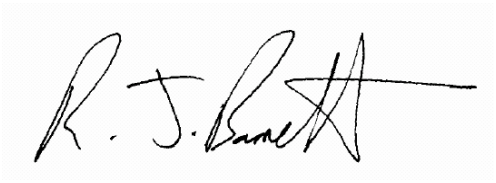
Removing the password-protection from these websites has further implications, particularly in the area of Collateralised Debt Obligations (CDOs) where the manager can inform the existing CDO investors of the trading strategy on the restricted website. Disclosure of such trading strategies to the general public beyond the existing noteholders - before the execution - could potentially compromise the execution of such trades, thus creating issues in meeting best execution criteria.

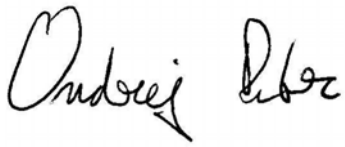
We would suggest that CESR and Member States' competent authorities take into account the distinguishing features of SPV issuers and interpret the disclosure requirements more flexibly.

The BBA and ICMA are supportive of this CESR guidance, that is focused on practical and helpful suggestions. The illustrative examples are the most useful, e.g. in the way CESR has given guidance by giving examples which could be regarded as inside information. The industry would support ongoing consultation on the guidance issued by CESR to regulators on implementation of MAD within the context of a better regulation environment. We encourage CESR to take a flexible approach to the Member States regulators' views on implementing the Market Abuse Directive.

The BBA and ICMA look forward to working with CESR going forwards. Please contact Ross Barrett (ross.barrett@bba.org.uk), or Ondrej Petr (Ondrej.Petr@icma-group.co.uk) if you would like to discuss any of the aspects of this response.

Yours faithfully,





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