



MARKET ABUSE DIRECTIVE

BBA / ICMA / LIBA JOINT RESPONSE TO CESR CONSULTATION PAPER (CESR / 08-274)

LEVEL 3 – THIRD SET OF CESR GUIDANCE AND INFORMATION ON THE COMMON OPERATION OF THE DIRECTIVE TO THE MARKET

The BBA is the leading association for the UK banking and financial services sector, speaking for 223 banking members from 60 countries on the full range of UK or international banking issues and engaging with 37 associated professional firms. Collectively providing the full range of services, our member banks make up the world's largest international banking centre, operating some 150 million accounts and contributing £50 billion annually to the UK economy. The BBA welcomes the opportunity to comment on the third set of CESR Level 3 guidance on the Market Abuse Directive to the market.

ICMA is a unique self regulatory organisation and an influential voice for the global capital market. It represents a broad range of capital market interests including global investment banks and smaller regional banks, as well as asset managers, exchanges, central banks, law firms and other professional advisers amongst its 400 member firms across almost 50 countries. ICMA's market conventions and standards have been the pillars of the international debt market for 40 years, providing the self regulatory framework of rules governing market practice which have facilitated the orderly functioning and impressive growth of the market. ICMA actively promotes the efficiency and cost effectiveness of the capital markets by bringing together market participants including regulatory authorities and governments.

LIBA is the principal trade association in the United Kingdom for firms active in the investment banking and securities industry. The Association represents the interests of its Members on all aspects of their business – both international and domestic – and promotes their views to the authorities in the United Kingdom, the European Union and elsewhere.

I. Introduction

As stated within the BBA's response to CESR's Call for Evidence on the 'Evaluation of the Supervisory Functioning of the EU Market Abuse Regime'

(CESR / 06-078), we are supportive of consultation on any guidance issued by CESR to regulators on the implementation and application of MAD. We acknowledge and welcome CESR's continuing efforts in facilitating the convergent implementation and application of the Market Abuse Regime throughout the EU. The current consultation in question will only serve to aid this process and ultimately encourage member states in establishing a pan-European common approach to the operation of the Directive.

Please refer to our responses to CESR's earlier Call for Evidence (CESR / 06-078) and CESR's consultation on the second set of guidance to the Market (CESR / 06-562) – which forms a relevant preface for the BBA's response to this current consultation.

The memberships of our associations largely view the Market Abuse Directive in a positive light, which for the most part, appears to be working well. However, there continues to be insufficient harmonisation amongst the competent authorities of the EU in certain areas of the directive. We present our comments on specific areas of the Consultation Paper below.

II. Insiders' Lists

The BBA agrees with the view that CESR members are generally satisfied with the quality of information they receive through insider lists, and that the lists are utilised as a 'first instance' tool in market abuse inquiries, where the member state regulator in question can then, without prejudice, request additional information from the issuer if necessary at a later stage. Competent Authorities should continue to view insider lists as such, and not as a replacement for a forensic enforcement investigation.

With regards to insider lists, we consider there to be a sufficient level of clarity throughout Europe (amongst both competent authorities and regulated entities) as to when an individual is required to be included in a specific insiders' list. We also consider the current insider list criteria to be appropriate.

The BBA has in the past, supported CESR's proposals for a system of mutual recognition of Member States' insider list requirements. We welcome CESR's proposed guidance as set out in the current public consultation, in that CESR recommends that "for issuers subject to the jurisdiction of more than one EU or EEA Member State with respect to insider list requirements, it is recommended that the relevant competent authorities recognise insider lists prepared according to the requirements of the Member State where the issuer in question has its registered office". This has gone some way to reducing the administrative burden of the insider list requirement imposed upon our members.

However, the BBA has remained concerned about the apparently uneven playing field that has developed across Europe in respect of the content of insider lists. From a UK perspective, institutions are only required to include the first name and surname of each individual included in an insider list, except in the case where more than one individual on the same list have the exact same name. This

approach is consistent with CESR's notion of insiders' lists as a 'first instance' tool in market abuse investigations. Further details of individuals on the insider list can then be gathered at a later stage, should a regulator submit a request.

There is a divergence amongst the competent authorities of the EU as to what constitutes evidence of identity. For example, certain supervisors require that the data to be entered on an insider list must include the individual's first and family names, date and place of birth, and their private and business addresses. We fail to see how this additional data will go to enhance insider lists as a tool used to supervise the circulation of insider information. Nor do we consider it will significantly aid competent authorities in the process of investigating a potential case of market abuse. We would also like to highlight issues related to these inconsistencies from the point of view of an individual who is placed on several insider lists in different EU jurisdictions. If an individual insider is on an insiders' list in two countries at the same time, one having an overall list with full personal details and the other having just first and last name, it could not be said the individual in question is being treated in a consistent manner by the two different jurisdictions. Furthermore, too extensive insider lists can be questionable in respect of privacy protection. We therefore consider that information gathering on individuals in the context of insider lists should be subject to reasonable limits.

In light of this uneven playing field, our members believe that the competent authorities throughout the EU should apply a consistent approach in respect of what information is included within insider lists. CESR should propose a standard harmonised format for insider lists, which specifies the level of information required in line with the relevant articles of the Directive. This would go some way to reducing the significant and costly duplication of time and effort for those issuers with listings in multiple jurisdictions. This would in turn, go to enhance the European single market.

Whilst the BBA acknowledges CESR's recommendation that competent authorities recognise insider lists prepared by an issuer that is regulated in another EU jurisdiction, the differential requirements in member states about what constitutes evidence of identity still remains unhelpful for those firms who operate on a cross-border basis. This is because firms operating in several jurisdictions are likely to want a single harmonized Europe-wide approach to producing insider lists – and consequently they tend to produce their lists in accordance with the most detailed requirements imposed on them as a single institution-wide solution, even if such a solution is not required by the majority of regulators whose supervision they are under.

III. Suspicious Transaction Reports (STRs)

Whilst suspicious transaction reporting requirements do not apply for orders to trade, the BBA supports CESR's recommendation that when an unexecuted order to trade gives rise to suspicion of market abuse, and where the suspicion is based on sufficient grounds, the competent authority should be notified of the unexecuted order. We are not of the view that CESR should prescribe the specific steps with which those persons subject to this expectation should follow,

and nor do we consider that this should constitute a legal obligation. Banks operating within Europe are principally concerned that the business they engage in, or potentially engage in, is both legal and within the scope of the rules. Our members want clean markets within which to operate, and are the FSA's - or indeed any other relevant competent authority's - greatest partners in the prevention and detection of market abuse.

We appreciate the rationale behind CESR's recommendation that firms should report suspicious, yet unexecuted orders [paragraph 27 of the consultation document]. However, confidentiality issues remain that would need to be carefully considered. Indeed, there are circumstances when the reporting party could potentially breach a confidentiality agreement they hold with their client. We would therefore encourage CESR to amend its recommendation accordingly.

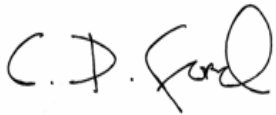
We have noted that paragraph 34 of the CESR consultation document encourages institutions to maintain a record of potentially suspicious transactions that have been examined, but ultimately deemed innocent, and thus not reported to the appropriate competent authority. Financial institutions can sometimes face a difficult task in deciding whether a transaction should qualify as '*suspicious*'. On one hand, CESR has explicitly stated that CESR members are "interested in quality not quantity of reporting, and will pursue vigorously cases where firms are notifying transactions without seriously considering whether they meet the test of reasonable suspicion". However, this approach seems to question the merit of a system whereby firms are required to keep a record of all those transactions that have been examined, but ultimately been deemed innocuous.

CESR's recommendation seemingly creates a 'third category' of transactions, which sit in between those deemed as suspicious and those which are not suspicious. Currently, the responsibility of reporting suspicious transactions rests solely with the intermediary. Were a competent authority to ask firms for a record of all those transactions examined (on the premise of potential suspicion) and ultimately deemed innocuous, the role and responsibilities of both the intermediary and the regulator are muddled. If the competent authorities of Europe were to retrospectively review transactions that firms have included in this 'third category', they should be mindful that they possess the benefit of hindsight, and will be surveying the transaction in circumstances that may be significantly different to those experienced by the firm at the time it initially categorised the trade.

It is important that CESR remains conscious of the resources required for a firm to keep a comprehensive record of all transactions that are examined, but ultimately deemed 'ordinary' [and thus not suspicious]. In certain situations it may be appropriate for a firm to keep a record of a transaction that does not necessarily require a suspicious transaction report, but may carry a suspicious aspect to it. However, we do not consider there to be a need for further CESR guidance in this area. A risk-based approach should be applied, whereby the firm in question is able to apply its own set of firm specific rules and use its own discretion. CESR should bear in mind the high volumes of trading, especially in an algorithmic trading environment that is seeking to arbitrage small differences

in price. Any obligations placed upon firms must be able to be coded into a system that can report trades in a similarly automated fashion.

If you would like to discuss any of the points raised in this paper in further detail, please contact either myself, or Annina Niskanen



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