OUTDATED

COMMISSION de SURVEILLANCE du SECTEUR FINANCIER

In case of discrepancies between the French and the English text, the French text shall prevail

Luxembourg, 5 February 2007

To all the persons concerned

CIRCULAR CSSF 07/280

as amended by Circular CSSF 07/323

Re: **Implementation rules of the law of 9 May 2006 on market abuse**

Ladies and Gentlemen,

We are pleased to follow-up on Circular CSSF 06/257 of 17 August 2006 informing on the entry into force of the law on market abuse, (referred to as "the Law"). The purpose of this circular is to provide explanations and guidelines concerning (i) the elements that could be indications of market manipulation, (ii) the arrangements and format for suspicious transaction reports, (iii) the lists to be drawn up by issuers, or persons acting on their behalf or for their account, including those persons having regular or occasional access to inside information, and (iv) the notifications relating to transactions conducted by persons discharging managerial responsibilities within an issuer and persons closely associated with them, as well as the modalities for public disclosure of such transactions. This circular also details buy-back and stabilisation activities falling under the safe harbour exemptions as established by Commission Regulation (EC) No 2273/2003 of 23 December 2003 implementing Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse) (hereinafter referred to as "**Market Abuse Directive**") as regards exemptions for buy-back programmes and stabilisation of financial instruments (hereinafter referred to as "**Regulation (EC) No 2273/2003**"). Finally, this circular clarifies certain elements relating to obligations imposed by the law on UCIs in their role as issuers, or, as the case may be, on their management.

This circular repeals, with immediate effect, Circular CAB 91/2 of 1 July 1991 relating to the law of 3 May 1991 on insider dealing.

1. General comments on the elements that could be indications of market manipulation

Article 1(2) of the Law reproduces the definition of "market manipulation" as included in Article 1(2) of the Market Abuse Directive. Moreover, the Market Abuse Directive provides in this same article a non-exhaustive list of practices that shall be constitutive of market manipulation. Considering that this list only includes examples of market manipulation, it has not been taken over into Article 1(2) of the Law.

On 11 May 2005, the Committee of European Securities Regulators (CESR) published "Level 3" guidance for the implementation of the Market Abuse Directive (Ref. CESR/04-505b). CESR tends to provide for a common interpretation of the Market Abuse Directive by all European regulators. We invite you to take account of the document "Market Abuse Directive, Level 3 – first set of CESR guidance and information on the common operation of the Directive, Ref: CESR/04-505b" included in Annexe A of this circular, and in particular of Chapter IV (Market Manipulation: Types of practice that CESR members would consider to constitute Market Manipulation) for more practical examples of elements constituting market manipulation.

On 12 July 2007, the Committee of European Securities Regulators published a second set of Level 3 guidance and information for the implementation of the Market Abuse Directive ("Level 3 – second set of CESR guidance and information on the common operation of the Directive to the market" Ref. CESR/06-562b). Please also refer to this document, annexed to this circular as ANNEXE F, and in particular to the details relating to the definition of "inside information" (please refer to Part I "What constitutes "inside information" under the Market Abuse Directive?" and Part III "When does information relating to a client's pending orders constitute inside information").

Article 1(2)(a) of the Law defines certain types of practice that could constitute "market manipulation". Nevertheless, the Law specifies that these practices shall not be considered as "market manipulation" if "the person who entered into the transactions or issued the concerned orders to trade [establishes] that his reasons for entering into such transactions or issuing such orders to trade were legitimate and that the transactions or orders to trade were in conformity with accepted market practices on the regulated market concerned". Indeed, the regulators may accept market practices which exclude operations in conformity with market practices on the concerned regulated market from the relevant prohibition if they are executed for legitimate reasons. In this context, the persons concerned shall refer to Chapter II and III of the above indicated CESR document on accepted market practices, as well as to CESR document "Accepted Market Practices (AMP) – FAQ" dated 3 June 2005 (Ref. CESR/05-365). Moreover, the persons concerned may submit to the CSSF a request including the detailed description of a market practice that they intend to use on a Luxembourg regulated market (for instance,

at present, the regulated market of the Luxembourg Stock Exchange) and which they would like to have accepted as such by the CSSF. The same principles apply in relation to Luxembourg MTFs (such as, currently, the Euro MTF market of the Luxembourg Stock Exchange).

Moreover, the fact that an issuer trades in its own securities may be considered as market abuse. In this context, it is important to remember that Regulation (EC) No 2273/2003 defines, under certain conditions, a safe harbour exemption for specific cases described therein. It should be underlined, however, that activities of trading in own shares not benefiting from the safe harbour exemption do not automatically and by themselves constitute market abuses.

For cross-border transactions and multi-listings, market participants shall respect the market rules of the markets concerned, and, in particular, verify the territorial scope of the foreign provisions as regards market abuse, and, where applicable, their interpretations and any applicable exemptions. As regards the territorial scope of the new Luxembourg framework on insider dealing and market manipulation, reference should be made to point 2 of Circular CSSF 06/257.

2. Arrangements and format for suspicious transactions reporting

Pursuant to article 12 of the Law, any credit institution and other professional of the financial sector established in Luxembourg shall notify the CSSF without delay, without prejudice to article 27(3) of the Law[1], if they reasonably suspect that a transaction might constitute insider dealing or market manipulation. As indicated, credit institutions and other professionals of the financial sector shall decide by reviewing on case-by-case basis if there are reasonable grounds for suspecting that a transaction constitutes insider dealing or market manipulation (taking into account the elements constituting insider dealing or market manipulation). This obligation requires thus that the professional makes the necessary arrangements in order to proceed with a specific analysis of the relevant transaction each time he reasonably suspects it could constitute a market abuse. However, there is no obligation for a systematic *a posteriori* review of all transactions previously executed by the person concerned, nor is there any obligation to adopt structural provisions similar to those covered by article 27 of the Law applicable to MTF operators. Despite the fact that the professional is not obliged by the Law to detect and prevent all market abuses deriving from transactions in which he intervenes, he shall nevertheless take all necessary measures in order to fulfil his new obligations.

When notifying, the persons subject to the notification obligation shall use and transmit the form in ANNEXE B duly completed to the CSSF. The notification to the CSSF can be done by mail, electronic mail (to the address: maf@cssf.lu), telecopy (+352 26251-

[1] Reference is made to the article of the Law relating to the regulated markets established in Luxembourg, as well as to the credit institutions, investment firms and MTF market operators in Luxembourg.

606) or telephone. When the notification is done by telephone, a written confirmation must be provided as soon as possible.

In this context, it should be borne in mind that, except by virtue of contrary provisions laid down by law, the persons notifying the CSSF shall refrain from informing any third party, including the persons on behalf of whom the transactions have been carried out or the parties related to those persons.

The notification shall not involve the notifying person in liability of any kind, providing the notifying person acts in good faith. The notification to the CSSF shall neither constitute a violation of professional secrecy, nor a breach of any restriction on disclosure of information as imposed by contract or by any legislative, regulatory or administrative provision.

The compliance officer (whose function is described in Circular CSSF 04/155) shall, in principle, also be responsible for compliance with the obligations deriving from article 12 of the Law.

3. Lists to be drawn up by issuers or persons acting on their behalf or for their account, including those persons having regular or occasional access to inside information

Pursuant to article 16 of the Law, issuers, or persons acting on their behalf or for their account, shall draw up a list of those persons working for them, under a contract of employment or otherwise, having access, on a regular or occasional basis, to inside information relating, directly or indirectly, to the issuer, and shall notify the registration on this list to the persons concerned. As regards the obligation to draw up such a list, article 13 of the Law specifies that article 16 only applies to issuers whose financial instruments are admitted to trading on a regulated market situated or operating in Luxembourg or where a request for admission to trading of these financial instruments has been made on such market, independently of the issuers' registered office being in Luxembourg or abroad. Article 16 shall thus not apply to issuers who have not requested or approved admission of their financial instruments to trading on a regulated market situated or operating in Luxembourg.

The list of insiders shall include in particular the persons who, due to their involvement at management decision level, have regular access to inside information and the power to make managerial decisions affecting the future developments and business prospects of the issuer. Moreover, this list shall include those persons working regularly on sensitive issues (i.e. permanent insiders such as persons involved at a certain level in the preparation of annual, quarterly or semi-annual results) and, where applicable, those persons working on an occasional basis on files containing inside information. The list of insiders shall not include persons that might have access to inside information by accident. Where it has been confirmed however that those persons have indeed had access to such information, those persons shall of course be included in the list.

The list of insiders shall indicate: (i) the identity of any person having access to inside information (name, first name and residence)[2], (ii) the reason why any such person is on the list (e.g. function and/or position with the employer) and (iii) the date at which the list was created and updated. Issuers, or persons acting on their behalf or for their account shall update the list of insiders under the conditions specified in the Law and notify the changes made to the persons concerned. Issuers, or persons acting on their behalf or for their account, shall maintain records of the initial list of insiders and its updated versions for at least five years after being drawn up or updated. These provisions aim at ensuring that competent authorities can have access to updated lists in their investigations on market abuse. Issuers are not required to transmit the lists of insiders to the CSSF on their own initiative, but only upon request.

For issuers which requested the admission of their financial instruments to trading on a regulated market situated or operating in Luxembourg and whose financial instruments are also admitted to trading on a stock exchange situated or operating in a country other than Luxembourg, the CSSF accepts that the lists of insiders to be drawn up in accordance with article 16 of the Law be drawn up under the form prescribed, where applicable, by the regulation applicable on this other stock exchange provided that they include the information mentioned in the previous paragraphs.

4. Notifications relating to transactions conducted by persons discharging managerial responsibilities ("managers' transactions") within an issuer and persons closely associated with them, and modalities for public disclosure of such transactions

Pursuant to article 17 of the Law, persons discharging managerial responsibilities within an issuer having its registered office in Luxembourg and, where applicable, persons closely associated with them, shall notify to the CSSF and to the issuer any transactions conducted on their own account related to the issuer's shares admitted to trading on a regulated market, or to derivatives or other financial instruments linked to these shares. The notification shall be made within five working days after the conclusion of every single transaction. Issuers incorporated in a third country shall notify to the CSSF, as soon as they become aware, all transactions that persons discharging managerial responsibilities within their group, and where applicable, persons closely associated with them, have conducted on their own account and on the issuer's shares admitted to trading on a regulated market, or on derivatives or other financial instruments linked to these shares, provided that the CSSF be the authority in which those issuers are required to file

[2] For practical reasons, the addresses of the issuer's employees may be set up and updated on a separate list, held by another department of the issuer (for instance Human Resources department), but shall mandatorily be indicated on the unique and exhaustive list to be transmitted to the CSSF upon request.

the annual information in relation to their shares in accordance with article 10 of Prospectus Directive (2003/71/EC)[3].

The Law clarifies the information that notifications shall contain and the notifying persons are requested to use for this purpose the form annexed to this circular under ANNEXE C. The issuers shall ensure that public access to the information referred to in article 17(1) and (2) of the Law is readily available and, as soon as possible, at least in French, German or English[4].

With respect to the notification obligation, it should be noted that in particular acquisitions by inheritance, by donation, in application of an employment contract or as part of a remuneration do not fall under the notification obligation as set out in article 17 of the Law.

It should be noted as well that article 1(13) of the Law includes within the meaning of persons closely associated with a manager any "legal person, fiduciary trust or other partnership, or any legally dependent association whose managerial responsibilities are discharged by [a manager or one of the persons closely associated with him] (…) or which is directly or indirectly controlled by [such a] person or that is set up for the benefit [of such a] person, or whose economic interests are substantially equivalent to those [of such] person". Concerning the first type of person associated (as referred to under the fourth indent of article 1(13)), i.e. any legal person of which a manager is as well administrator or other senior executive of the listed issuer, or a relative of this administrator or other senior executive, the notification obligation will nevertheless only be triggered in relation to the manager concerned and to such legal person, if the legal person acts in the interests of this manager.

5. Buy-back and stabilisation activities and Regulation (EC) No 2273/2003

Pursuant to article 4 of Regulation (EC) No 2273/2003 relating to the conditions for "buy-back" programmes and disclosure, the "buy-back" programme must comply with the conditions set out in article 19(1) of Directive 77/91/EEC (Second Directive on the formation of public limited liability companies, the maintenance and alteration of their capital)[5]. The details of the programme approved in accordance with this article 19 must

[3] "2. The document shall be filed with the competent authority of the home Member State after publication of the annual results." Please refer to article 2(1)(h) of the Prospectus law (implementing article 2(1)(m) of the Prospectus Directive) and to Circular CSSF 05/224.

[4] In all the cases where an issuer must publicly disclose information, a post of this information on their Internet site will be sufficient. In all the cases where an issuer must actively disclose information, or, pursuant to the Law, publicly disclose "through distribution channels which enable efficient disclosure of this information to the public", reference should be made to point 3 of Circular CSSF 06/257 describing the means of disclosure of information.

[5] "(…) (a) authorisation shall be given by the general meeting, which shall determine the terms and conditions of such acquisitions, and in particular the maximum number of shares to be acquired, the duration of the period for which the authorisation is given and which may not exceed 18 months, and, in the case of acquisition for value, the maximum and minimum consideration. Members of the administrative or management body shall be required to satisfy themselves that at the time when each authorised acquisition is effected the conditions referred to in subparagraphs (b), (c) and (d) are respected;

be adequately disclosed to the public in Member States in which the issuer has requested admission of its shares to trading on a regulated market prior to the start of trading. Concerning adequate means for an active disclosure of information to the Luxembourg public, the persons concerned are invited to refer to point 3 of Circular CSSF 06/257.

These details include in particular the objective as referred to in article 3 of Regulation (EC) No 2273/2003 (i.e. the capital reduction of an issuer (in value or in number of shares) or the possibility to meet obligations arising from (i) debt financial instruments exchangeable into equity instruments; or (ii) employee share option programmes or other allocations of shares to the employees of the issuer or of an associate company), the maximum consideration, the maximum number of shares to be acquired and the duration of the period for which authorisation for the programme has been given. Subsequent changes to the programme must again be subject to adequate public disclosure in the relevant Member States.

In addition, the issuer must have in place the mechanisms ensuring that it fulfils trade reporting obligations to the competent authority of the regulated market on which the shares have been admitted to trading. These mechanisms must allow the recording of each transaction related to "buy-back" programmes, including any related relevant information and data (i.e. in particular the name and number of securities bought or sold, the date and time of the transaction, the price of the transaction and the possibility to identify the investment firm). Moreover, the details of all transactions referred to above are publicly disclosed by the issuer (for instance, by publishing them on its website) no later than the end of the seventh daily market session following the date of execution of such transactions. For the notification to the CSSF and the disclosure of information the form in ANNEXE D of this circular shall be used.

In the context of article 8(2)(2) of Regulation (EC) No 2273/2003, it shall be clarified that Luxembourg is a Member State that permits stabilisation transactions prior to the commencement of trading on a regulated market.

Pursuant to article 9 of Regulation (EC) No 2273/2003 on disclosure and reporting conditions for stabilisation, issuers or offerors[6], or entities undertaking the stabilisation, acting, or not, on behalf of such persons, publicly disclose the following information before the opening of the offer period of the relevant securities:

(a) the fact that stabilisation may be undertaken, that there is no assurance that it will be undertaken and that it may be stopped at any time;
(b) the fact that stabilisation transactions are aimed to support the market price of the relevant securities;

(b) the nominal value or, in the absence thereof, the accountable par of the acquired shares, including shares previously acquired by the company and held by it, and shares acquired by a person acting on his own name but on the company's behalf, may not exceed 10% of the subscribed capital;
(c) the acquisitions may not have the effect of reducing the net assets below the amount mentioned in article 15(1)(a) (subscribed capital, increased by reserves that the law or articles of association do not allow to distribute);
(d) only fully paid-up shares may be included in the transaction."

6 "Offeror" as defined in Regulation (EC) No 2273/2003 means the prior holders of, or the entity issuing, the relevant securities.

(c) the beginning and end of the period during which stabilisation may occur;
(d) the identity of the stabilisation manager, unless this is not known at the time of publication in which case it must be publicly disclosed before any stabilisation activity begins;
(e) the existence and maximum size of any overallotment facility or greenshoe option, the exercise period of the greenshoe option and any conditions for the use of the overallotment facility or exercise of the greenshoe option.

These provisions shall however not apply to offers under the scope of application of the measures implementing the Prospectus Directive (2003/71/EC), i.e. they do not apply to offers for which a prospectus shall be drawn up in accordance with the Prospectus Regulation (EC) No 808/2004. For some of these offers, the Prospectus Regulation (EC) No 808/2004 provides expressly the inclusion of information relating to stabilisation transactions in the prospectus.

Without prejudice to Article 12(1)(c)[7] of the Market Abuse Directive, issuers, offerors, or entities undertaking the stabilisation, acting, or not, on behalf of such persons, shall notify the details of all stabilisation transactions to the CSSF for transactions on financial instruments admitted to trading on a regulated market in Luxembourg, or for which a request for admission to trading on such a market has been made, no later than the end of the seventh daily market session following the date of execution of such transactions. The form in ANNEXE E of this circular shall be used for the notification. (The form can be sent *via* electronic mail to the following address: maf@cssf.lu).

Within one week of the end of the stabilisation period, the following information must be adequately disclosed to the public by issuers, offerors, or entities undertaking the stabilisation, acting, or not, on behalf of such persons:
(a) whether or not stabilisation was undertaken;
(b) the date at which stabilisation started;
(c) the date at which stabilisation last occurred;
(d) the price range within which stabilisation was carried out, for each of the dates during which stabilisation transactions were carried out.

Issuers, offerors, or entities undertaking the stabilisation, acting or not, on behalf of such persons, must record each stabilisation order or transaction with - as a minimum - all related relevant information and data (i.e. in particular the name and number of securities bought or sold, the date and time of the transaction, the price of the transaction and the possibility to identify the investment firm) extended to financial instruments other than those admitted or going to be admitted to the regulated market.

[7] "The competent authority shall be given all supervisory and investigatory powers that are necessary for the exercise of its functions. It shall exercise such powers:
(…) (c) under its responsibility by delegation to such authorities or to the market undertakings."

6. Elements relating to the requirements imposed on UCIs in their role as issuers of financial instruments

The elements indicated below only apply to requirements imposed by the Law on UCIs in their role as issuers of financial instruments, or, as the case may be, on their management. Other provisions of the Law which apply to UCIs as well, in particular the prohibition from engaging in insider dealing and market manipulation, are not dealt with separately in this section.

(a) UCIs subject to the obligations of the Law in this context

The UCIs having their registered office in Luxembourg or abroad and whose shares or units are admitted to trading on the regulated market of the Luxembourg Stock Exchange, or where a request for admission to trading for these shares or units has been made, are subject to the requirements imposed by the Law in this context. The Law shall not apply to UCIs which have not requested or accepted admission to trading for their shares or parts. The obligations set out in this point 6 shall not apply either to Luxembourg or foreign UCIs whose shares or units are solely admitted on a MTF (for instance the Euro MTF of Luxembourg Stock Exchange).

(b) The issuer capacity

If the legal form of the UCI is an investment company, the UCI shall be considered as issuer. In the case of an *FCP (Fonds Commun de Placement)*, the management company shall be considered as issuer. Nevertheless, for the definition of "inside information", the reference to information concerning an "issuer of financial instruments" should be understood as a reference to the FCP.[8]

(c) Practical implementation of certain provisions of the Law on the relevant UCIs

In this context, the circular specifies the obligations generally imposed by the Law on issuers of financial instruments which are also applicable to UCIs, as well as the practical implementation method of these obligations.

(i) The obligation to publicly disclose inside information

The obligation to publicly disclose inside information applies in principle to UCIs. Nevertheless, the practical impact of such obligation should remain limited, in particular for largely diversified UCIs which publish their NAV (Net Asset Value) on a daily basis or at dates which, in view of the investment policy, may

[8] Information concerning the management company shall be considered as "inside information" only if it also indirectly concerns the FCP (for example of a management company is in suspension of payments and its credit is affected before formal default declaration) and if it is likely to have a significant influence on the price of the FCP units.

be considered as close, that is mainly UCITS subject to Part I of the Law of 20 December 2002 relating to undertakings for collective investment and other largely diversified UCIs which follow diversification rules similar to those set out in Part I of that law.

Indeed, in such cases, the market price is closely linked to the applicable NAV, which should, in principle, discard any major risk in relation to the existence of information corresponding to the requirements of Article 1(1) of the Law and which might have a significant influence on the market price. The correction of an already published NAV might be considered as inside information. It should be borne in mind in this context that the obligation to publicly disclose a recalculated NAV already exists under the applicable laws governing UCIs. With the exception of the above cases, inside information should seldom occur.

On the contrary, inside information may exist in relation to UCIs which do not follow diversification rules similar to those set out in Part I of the Law of 20 December 2002 relating to undertakings for collective investment or which do not calculate their NAV at close intervals and, where applicable, to UCIs whose market price might register a non-marginal difference in its evolution compared to the NAV.

(ii) The obligation to draw up lists of insiders

The same distinction should be made as for the preceding point. Indeed, the necessity to draw up lists of insiders needs to be assessed by considering the following distinction:

i) largely diversified UCIs which publish their NAV on a daily basis or at dates which, in view of the investment policy, may be considered as close (mainly UCITS subject to Part I of the law of 20 December 2002 relating to undertakings for collective investment and other largely diversified UCIs which follow diversification rules similar to those set out in Part I of that law) ;
ii) UCIs that do not follow diversification rules as set out in Part I of the law of 20 December 2002 relating to undertakings for collective investment or which do not calculate their NAV at near intervals ; and
iii) UCIs whose market price might register a non-marginal difference in its evolution compared to the NAV.

In practice, for largely diversified UCIs which publish their NAV at close dates the cases where persons shall be registered on the list should seldom occur. As regards the other types of UCIs, the cases in which a list of insiders shall be established might be more frequent and should include the persons in charge of taking investment decisions and those in charge of the strategic orientation of the UCI (the “permanent insiders”). In addition, for these UCIs, the list of insiders shall include the persons responsible for the preparation of the annual, quarterly or semi-annual results and/or the persons involved in the calculation of the UCIs’

asset value or the value of a substantial part of the UCIs' assets and who may, in this manner, have a global view on the value of the UCIs' units.

The list shall be established and updated by the UCI itself or by its management company in the case of a *fonds commun de placement* or an investment company with a designated management company.

(iii) The obligation to notify managers' transactions

Article 17 of the Law provides, in principle, for an obligation of notification for transactions conducted by various categories of persons. An interpretation considering the intent of this provision indicates that UCIs are not concerned by this obligation. The terminology used in the Law leads to the conclusion that, in this specific context, article 17 of the Law is not applicable to UCIs.

(iv) The obligation to report suspicious transactions

It should be borne in mind that UCIs (and their management companies) are not concerned by the obligation to report suspicious transactions as referred to in article 12 of the Law. This article only applies to credit institutions and other professionals of the financial sector. Thus, the obligations of article 12 shall apply to credit institutions acting as depositary bank or agent in charge of the central administration of a listed UCI and to PFS acting as agent in charge of the central administration of a listed UCI, if in the exercise of their functions, they become aware of facts that lead them to reasonably suspect that a transaction could constitute a market abuse.

Yours faithfully,

COMMISSION DE SURVEILLANCE DU SECTEUR FINANCIER

Simone DELCOURT	Arthur PHILIPPE	Jean-Nicolas SCHAUS
Director	Director	Director General

Annexes

Annexe A: Market Abuse Directive Level 3 – first set of CESR guidance and information on the common operation of the Directive Ref: CESR/04-505b

Annexe B: Form for reporting suspicious transactions
(.xlsformat: http://www.cssf.lu/fileadmin/files/cssf07_280_annexeB_eng.xls)

Annexe C: Notification of managers' transactions
(.xls format: http://www.cssf.lu/fileadmin/files/cssf07_280_annexeC_eng.xls)

Annexe D: Form for reporting buy-back transactions
(.xls format: http://www.cssf.lu/fileadmin/files/cssf07_280_annexeDeng.xls)

Annexe E: Form for reporting stabilisation transactions
(.xls format: http://www.cssf.lu/fileadmin/files/cssf07_280_annexeEeng.xls)

Annexe F: Market Abuse Directive Level 3 – second set of CESR guidance and information on the common operation of the Directive to the market Ref: CESR/06-562b

ANNEXE A:
Market Abuse Directive Level 3 – first set of CESR guidance and information on the common operation of the Directive Ref: CESR/04-505b

THE COMMITTEE OF EUROPEAN SECURITIES REGULATORS

Ref: CESR/04-505b

Market Abuse Directive

Level 3 – first set of CESR guidance and information on the common operation of the Directive

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I. Executive Summary

1.1 CESR's first set of guidance at level 3 concentrates on three market facing issues that CESR members consider to be priorities. The priority areas cover accepted market practices in relation to market manipulation, guidance on what CESR members consider to constitute market manipulation and guidance and a common reporting format for reporting suspicious transactions.

1.2 Chapter two sets out the key issues facing CESR members when operating the Accepted Market Practices (AMPs) regime established in the directive. In chapter three, CESR has established a common format for the analysis of AMPs which will facilitate the consultation obligations placed upon CESR members.

1.3 Chapter four provides guidance to the market on types of practices that CESR members would consider to constitute Market Manipulation. They are described in non-legal terms and they are not intended to affect the scope of interpretation of the relevant directives and regulation.

1.4 Chapter five concludes the paper with guidance and a common format for reporting suspicious transactions. CESR's aim is to ensure that the directive obligation on reporting such transactions operates in a proportionate and effective manner.

II. Accepted Market Practices

2.1 In undertaking its level 3 work, CESR has been particularly mindful of the need to focus its energy on ensuring the proper operation of the regime for accepted market practices (AMPs) in relation to market manipulation. This is dealt with in this section of the paper.

2.2 It should be noted that the concept of accepted market practices also applies to the information which users of commodity derivatives markets would expect to be made public concerning commodity derivatives. This aspect of the Directive is not dealt with in this paper. However, CESR confirms that it is mindful of the need to ensure the smooth operation of AMPs in this field and will keep this under review.

Guidance Provided by the Directive and Level 2 Advice

2.3 Preamble 20 of the Directive 2003/6/EC states that "a person who enters into transactions or issues orders to trade, which are constitutive of market manipulation may be able to establish that the reasons for entering into such transaction or issuing orders to trade were legitimate and that the transactions and orders to trade were in conformity with accepted practice on the regulated market concerned."

2.4 Article 1(5) of the Directive 2003/6/EC defines Accepted Market Practices as practices "that are reasonably expected in one or more financial markets and are accepted by the competent authority in accordance with guidelines adopted by the Commission…".

2.5 These guidelines have now been set out in level 2 implementing measures in Directive 2004/72/EC. In article 2 of that Directive, competent authorities need to assess a particular market practice before accepting it against a non-exhaustive list of factors. Article 3 then sets out the process that the competent authority must follow which includes consultation and disclosure of the decisions.

2.6 It should be emphasised that accepted market practices in no way constitute safe harbours similar to those provided by Articles 7 and 8 of the Directive (which deal with share buy-backs and stabilisation). The intention of the accepted market practice concept is to avoid the penalising of behaviours which would constitute market manipulation under the effect based definition of market manipulation in Article 1(2)(a) of Directive 2003/6/EC, as under certain conditions such behaviours might be justified. However, to benefit from the defence provided, in addition to the transaction/order to trade conforming with an accepted market practice, the person who entered into the transaction or issued the order to trade must establish that their reasons for so doing are legitimate. In the absence of a legitimate purpose the accepted market practice defence would not be available.

Operational issues raised by the legal framework

2.7 The legal framework applicable to accepted market practices raises a number of operational issues that need to be dealt with by CESR and its members.

Process, consultation and disclosure

2.8 The decision as to whether a process constitutes an AMP or not, is a matter of national discretion. AMPs, therefore, are the responsibility of individual CESR members and so a practice which one competent authority considers is an AMP, may not be viewed as such by another. However, each member has a duty to consult, both nationally and with other competent authorities, and to disclose any market practices that they have accepted. There is also an obligation on CESR to publish the AMPs on its website. These will be published in the standard CESR format and a link provided to the national legal text.

2.9 In order to facilitate the implementation of the Directive, CESR members have, during the course of working on this paper, exchanged views on AMPs. It has been decided not to

publish the AMPs which are currently under consideration or have been agreed, as an annex to this paper. Instead, AMPs, once they have been recognised and have undergone the requisite national and European consultation process, are to be published on CESR's website. This means that information upon them can remain contemporaneous as would not be the case if they were published as a static annex. In the future, CESR through CESR-Pol, will exchange views on both existing and emerging AMPs to ensure that European market integrity is maintained.

Market practices versus activities

2.10 CESR has consistently made a distinction between practices and activities carried out in financial markets. The implementing measures at level 2 were based on advice CESR submitted to the Commission in August 2003 (CESR/03-212c). In paragraph 5 of that advice CESR stated that 'Activities' "would cover different types of operations or strategies that may be undertaken such as arbitrage, hedging and short selling. On the other hand, market 'practices' would cover the way these activities are handled and executed in the market."

2.11 In the view of CESR members, 'activities' are considered to be too broad to qualify for the status of accepted market practices. An 'activity' such as short selling or hedging could be undertaken in many different ways. If the activity is carried out in a way which does not constitute market manipulation, then the question of giving it accepted market practice status does not arise. On the other hand, if the 'activity' is carried out in a way which would constitute market manipulation, it is unlikely that a competent authority would be prepared to accept it as an accepted market practice. Hence to give an activity a blanket accepted market practice status would neither be meaningful nor desirable.

2.12 CESR members also considered the issues of whether certain more specific practices, such as crossing/pre-arranged trades, should be given accepted market practice status, subject to the condition that these practices should be undertaken according to the rules of the relevant regulated market applicable to their conduct. However, CESR members came to the conclusion that, in most of the cases considered, conduct of the practice in conformity with the rules of the relevant regulated market would be sufficient in itself to promote market integrity and therefore the question of giving the practice accepted market practice status would not arise.

Common format for assessing AMPs

2.13 CESR members have devised a common format for assessing AMPs. This is set out in accordance with the Directive 2004/72/EC and is designed to facilitate the consultation and disclosure processes. The form is set out in Section III of this guidance.

III. Format of the table for assessing AMP's

Description of the National AMP:

Rationale for why the practice would constitute manipulation

[refer to article 1(2) (a) of Directive 2003/6/EC]

List of Factors

Commission Directive 2004/72/EC Article 2

Non-exhaustive list of factors to be taken into account by Competent Authorities when assessing particular practices whether they occur on a regulated market or an OTC market:

- The level of transparency of the relevant market practice to the whole market(art 2(1) (a))

Transparency of market practices by market participants is crucial for considering whether a particular market practice can be accepted by competent authorities. The less transparent a practice is, the more likely it is not to be accepted. However, practices on non regulated markets might for structural reasons be less transparent than similar practices on regulated markets. Such practices should not be in themselves considered as unacceptable by competent authorities. (preamble 2)

Conclusion regulator:
[fill in the rationale for this factor]

- the need to safeguard the operation of market forces and the proper interplay of the forces of supply and demand; (art 2(1) (b))

Market practices inhibiting the interaction of supply and demand by limiting the opportunities for other market participants to respond to transactions can create higher risks for market integrity and are, therefore, less likely to be accepted by competent authorities. (preamble 1)

Conclusion regulator:
[fill in the rationale for this factor]

- the degree to which the relevant market practice has an impact on market liquidity and efficiency. (art 2(1) (c))

  Market practices which enhance liquidity and efficiency are more likely to be accepted than those reducing them. (Preamble 1)

Conclusion regulator: [fill in the rationale for this factor]

- the degree to which the relevant practice takes into account the trading mechanism of the relevant market and enables market participants to react properly and in a timely manner to the new market situation created by that practice(art 2(1) (d)).

Conclusion regulator: [fill in the rationale for this factor]

- the risk inherent in the relevant practice for the integrity of, directly or indirectly, related markets, whether regulated or not, in the relevant financial instrument within the whole Community. (art 2(1) (e))

  Particular market practices in a given market should not put at risk market integrity of other, directly or indirectly, related markets throughout the Community, whether those markets be regulated or not. Therefore, the higher the risk for market integrity on such a related market is within the Community, the less those practices are likely to be accepted by competent authorities. (Preamble 3)

Conclusion regulator: [fill in the rationale for this factor]

- the outcome of any investigation of the relevant market practice by any competent authority or other authority mentioned in Article 12(1) of Directive 2003/6/EC, in particular whether the relevant market practice breached rules or regulations designed to prevent market abuse, or codes of conduct, be it on the market in question or on directly or indirectly related markets within the Community; (art 2(1) (f))

Conclusion regulator: [fill in the rationale for this factor]

- the structural characteristics of the relevant market including whether it is regulated or not, the types of financial instrument traded and the type of market participants, including the extent of retail investors participation in the relevant market; (art 2(1) (g))

Conclusion regulator: [fill in the rationale for this factor]

Overriding Principles

Overriding principles to be observed by Competent Authorities to ensure that accepted market practices do not undermine market integrity, while fostering innovation and the continued dynamic development of financial markets:

- new or emerging accepted market practices should not be assumed to be unacceptable by the Competent Authority simply because they have not been previously accepted by it;
- Practising fairness and efficiency by market participants is required in order not to create prejudice to normal market activity and market integrity.
- Competent Authorities should analyse the impact of the relevant market practice against the main market parameters such as weighted average price of a single session, daily closing price, specific market conditions, before carrying out the relevant market practice.

Conditional elements

In this final section, you should comment on any conditions relating to legitimate reasons and proper execution.

IV. Types of practice that CESR members would consider to constitute Market Manipulation

Introduction

4.1 The work in this area is aimed at providing the competent authorities and market participants with examples of types of market manipulation which have occurred in recent years and which, in the view of CESR members, would breach the prohibitions on market manipulation contained in the Market Abuse Directive. The guidance and accompanying examples are intended to help the development of a common understanding of what constitutes market manipulation.

4.2 The guidance and examples could also facilitate the identification of relevant variables (diagnostic flags or signals of market manipulation) that could be monitored by competent authorities and by market participants within the limits of their sphere of activity in order to detect or avoid engaging in market manipulation. The examples may also be useful in helping the relevant market practitioners to meet the requirement to notify suspicious transactions to competent authorities.

4.3 Market manipulation can often be avoided by implementing adequate market microstructure measures by explicit rules that forbid specific behaviours or by preventative measures set up by market participants. Therefore some unacceptable conduct set out in the following guidance and examples may not actually be feasible in all market environments across Europe and therefore should not necessarily be read as universally applicable.

Disclaimer

4.4 **The examples of types of practice set out in this paper are deliberately described in non-legal technical terms and it is emphasised that the descriptions are not intended to affect the scope of interpretation of market abuse directives and regulations.**

Directive Definition of Market Manipulation

4.5 The Market Abuse Directive defines market manipulation as meaning:-

a. Transactions or orders to trade:-

- which give, or are likely to give, false and misleading signals as to the supply of, demand for or price of financial instruments [for ease of reference this might be termed "false or misleading transactions"]; or

- which secure by a person or persons acting in collaboration, the price of one or several financial instruments at an abnormal or artificial level ["price positioning"]

unless the transaction/order to trade had a legitimate reason and conforms to accepted market practices on the regulated market concerned.

b. Transactions or orders to trade which employ fictitious devices or any other form of deception or contrivance ["fictitious devices"].

c. Dissemination of information through the media… which gives or is likely to give false and misleading signals as to financial instruments … where the person who made the dissemination knew, or ought to have known, that the information was false or misleading… ["false or misleading information"]

4.6 It is noted that the acceptable market practice defence can only be available in respect of the first two categories ("false and misleading transactions" and "price positioning"). No such defence is available in respect of the other categories.

4.7 The Directive itself gives three particular instances of market manipulation:-

i. Conduct by a person, or persons acting in collaboration, to secure a dominant position over the supply of or demand for a financial instrument which has the effect of fixing, directly or indirectly, purchase or sale price or creating other unfair trading conditions;

ii. The buying or selling of financial instruments at the close of the market with the effect of misleading investors acting on the basis of closing prices;

iii. Taking advantage of occasional or regular access to the traditional or electronic media by voicing an opinion about a financial instrument (or indirectly about its issue) while having previously taken positions on that financial instrument and profiting subsequently from the impact of the opinions voiced on the price of that instrument, without having simultaneously disclosed that conflict of interest to the public in a proper and effective way.

Possible Signals of Market Manipulation

4.8 Article 4 of implementing Directive 2003/124/EC sets out the following non-exhaustive signals of false or misleading transactions or price positioning transactions, which should not necessarily be deemed in themselves to constitute market manipulation.

a. The extent to which orders to trade given or transactions undertaken represent a significant proportion of the daily volume or transactions in the relevant financial instrument on the regulated market concerned, in particular when these activities lead to a significant change in the price of the financial instruments;

b. The extent to which orders to trade given or transactions undertaken by persons with a significant buying or selling position in a financial instrument lead to significant changes in the price of the financial instrument or related derivative or underlying asset admitted to trading on a regulated market;

c. Whether transactions undertaken lead to no change in beneficial ownership of a financial instrument admitted to trading on a regulated market;

d. The extent to which orders to trade given or transactions undertaken include position reversals in a short period and represent a significant proportion of the daily volume or transactions in the relevant financial instrument on the regulated market concerned, and might be associated with significant changes in the price of a financial instrument admitted to trading on a regulated market;

e. The extent to which orders to trade given or transactions undertaken are concentrated within a short time span in the trading session and lead to a price change which is subsequently reversed;

f. The extent to which orders to trade given change the representation of the best bid or offer prices in a financial instrument admitted to trading on a regulated market, or more generally the representation of the order book available to market participants, and are removed before they are executed;

g. The extent to which orders to trade are given or transactions are undertaken at or around a specific time when reference prices, settlement prices and valuations are calculated and lead to price changes which have an effect on such prices and valuations.

4.9 Article 5 of the same Directive sets out the following non-exhaustive signals of transactions employing fictitious devices:

a. Whether orders to trade given or transactions undertaken by persons are preceded or followed by dissemination of false or misleading information by the same persons or persons linked with them;

b. Whether orders to trade are given or transactions are undertaken by persons before or after the same persons or persons linked to them produce or disseminate research or investment recommendations which are erroneous or biased or demonstrably influenced by material interest.

Again, these signals should not necessarily be deemed in themselves to constitute market manipulation.

Examples of the various types of practice which would constitute market manipulation

4.10 The following guidance gives examples of types of practice which, in the view of CESR members, would contravene the prohibition on market manipulation as defined by the Directive, although it is acknowledged that in some cases a practice may, in particular circumstances, have a legitimate purpose. The examples are categorised according to which element of market manipulation as defined by the Directive they relate to. However, it should be noted that there can be some overlap: a practice may involve a number of types of market manipulation according to how it is used.

4.11 False/Misleading Transactions

a) Wash trades. This is the practice of entering into arrangements for the sale or purchase of a financial instrument where there is no change in beneficial interests or market risk or where the transfer of beneficial interest or market risk is only between parties who are acting in concert or collusion. (Repo transactions and stock lending/borrowing or other transactions involving transfer of securities as collateral do not constitute wash trades.)

b) Painting the tape. This practice involves engaging in a transaction or series of transactions which are shown on a public display facility to give the impression of activity or price movement in a financial instrument.

c) Improper matched orders. These are transactions where both buy and sell orders are entered at or nearly at the same time, with the same price and quantity by different but colluding parties, unless the transactions are legitimate trades carried out in conformity with the rules of the relevant trading platform (e.g. crossing trades).

d) Placing orders with no intention of executing them. This involves the entering of orders, especially into electronic trading systems, which are higher/lower than the previous bid/offer. The intention is not to execute the order but to give a misleading impression that there is demand for or supply of the financial instrument at that price. The orders are then withdrawn from the market before they are executed. (A variant on this type of market manipulation is to place a small order to move the bid/offer price of the financial instrument and being prepared for that order to be executed if it cannot be withdrawn in time.)

4.12 Price Positioning

a) Marking the close. This practice involves deliberately buying or selling securities or derivatives contracts at the close of the market in an effort to alter the closing price of the security or derivatives contract. This practice may take place on any individual trading day but is particularly associated with dates such as future/option expiry dates or quarterly/annual portfolio or index reference/valuation points.

b) Colluding in the after market of an Initial Public Offer. This practice is particularly associated with Initial Public Offers of securities immediately after trading in the security begins. Parties which have been allocated stock in the primary offering collude to purchase further tranches of stock when trading begins in order to force the price of the security to an artificial level and generate interest from other investors – at which point they sell their holdings.

c) Abusive squeeze. This involves a party or parties with a significant influence over the supply of, or demand for, or delivery mechanisms for a financial instrument and/or the underlying product of a derivative contract exploiting a dominant position in order materially to distort the price at which others have to deliver, take delivery or defer delivery of the instrument/product in order to satisfy their obligations. (It should be noted that the proper interaction of supply and demand can and often does lead to market tightness but that this is not of itself market manipulation. Nor does having a significant influence over the supply of, demand for, or delivery mechanisms for an investment/product by itself constitute market manipulation.)

d) Creation of a floor in the price pattern. This practice is usually carried out by issuers or other entities which control them, and involves transactions or orders to trade employed in such a way that obstacles are created to the share prices falling below a certain level, mainly in order to avoid negative consequences for their share or credit ratings. This needs to be distinguished from legitimate trading in shares as part of "buy-back" programmes or the stabilisation of financial instruments.

e) Excessive bid-ask spreads. This conduct is carried out by intermediaries which have market power – such as specialists or market makers acting in cooperation – in such a way intentionally to move the bid-ask spread to and/or to maintain it at artificial levels and far from fair values, by abusing of their market power, i.e. the absence of other competitors.

f) Trading on one market to improperly position the price of a financial instrument on a related market. This practice involves undertaking trading in one market with a view to improperly influencing the price of the same or a related financial instrument in another market. Examples might be conducting trades in an equity to position the price of its derivative traded on another market at a distorted level or trading in the underlying product of a commodity derivative to distort the price of the derivative contract. (Transactions to take legitimate advantage of differences in the prices of financial instruments or underlying products as traded in different locations would not constitute manipulation.)

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4.13 **Transactions involving fictitious devices/deception**

a) Concealing ownership. This is a transaction or series of transactions which is designed to conceal the ownership of a financial instrument via the breach of disclosure requirements through the holding of the instrument in the name of a colluding party (or parties). The disclosures are misleading in respect of the true underlying holding of the instrument. (This practice does not cover cases where there are legitimate reasons for financial instruments to be held in the name of a party other than the beneficial owner – e.g. nominee holdings. Nor do all failures to make a required disclosure necessarily constitute market manipulation.)

b) Dissemination of false or misleading market information through media, including the internet, or by any other means (in some jurisdictions this is known as 'scalping'). This is done with the intention of moving the price of a security, a derivative contract or the underlying asset in a direction that is favourable to the position held or a transaction planned by the person disseminating the information.

c) Pump and dump. This practice involves taking a long position in a security and then undertaking further buying activity and/or disseminating misleading positive information about the security with a view to increasing the price of the security. Other market participants are misled by the resulting effect on price and are attracted into purchasing the security. The manipulator then sells out at the inflated price

d) 'Trash and cash'. This is the opposite of pump and dump. A party will take a short position in a security; undertake further selling activity and/or spread misleading negative information about the security with the purpose of driving down its price. The manipulator then closes their position after the price has fallen.

e) Opening a position and closing it immediately after its public disclosure. This practice is typically carried out by portfolio managers and other large investors whose investment decisions are usually valued by market participants as relevant signals of future price dynamics. The canonical unfair conduct consists in closing the position previously acquired immediately after having publicly disclosed it putting emphasis on the long holding period of the investment. However, making a report or disclosure will not, in itself, give rise to a false or misleading impression if it was made in the way specified by any applicable legal or regulatory requirement and was expressly required or permitted by such a requirement.

4.14 Dissemination of false and misleading information

This type of market manipulation involves dissemination of false and misleading information without necessarily undertaking any accompanying transaction. This could include creating a misleading impression by failure properly to disclose a price sensitive piece of information which should be disclosed. For example, an issuer with information which would meet the Directive definition of 'inside information' fails properly to disclose that information and the result that the public is likely to be misled.

(a) Spreading false/misleading information through the media. This involves behaviour such as posting information on an internet bulletin board or issuing a press release which contains false or misleading statements about a company whose shares are admitted to trading on a regulated market. The person spreading the information knows that it is false or misleading and is disseminating the information in order to create a false or misleading impression. Spreading false/misleading information through an officially recognised channel for disseminating information to users of a regulated market is particularly serious as it is important that market participants are able to rely on information dissemination via such official channels.

(b) Other behaviour designed to spread false/misleading information. This type of market manipulation would cover a course of conduct designed to give false and misleading impression through means other than the media. An example might be the movement of physical commodity stocks to create a misleading impression as to the supply or demand for a commodity or the deliverable into a commodity futures contract.

V. Possible Signals of Suspected Insider Dealing or Market Manipulation Transactions

Introduction

5.1 Article 6.9 of the Directive 2003/6/EC requires "any person professionally arranging transactions in financial instruments who reasonably suspects that a transaction might constitute insider dealing or market manipulation shall notify the competent authority without delay". The Directive and its implementing measures do not deal with the steps which those persons subject to this requirement need to take to identify such transactions. Those subject to the requirement clearly need to ensure that they comply with this obligation. However, CESR does not propose in this initial guidance to prescribe how this obligation is discharged, except in respect of the form for reporting suspicious transactions.

5.2 This section is intended to provide those persons subject to the notification requirement with guidance as to indications of transactions which may involve insider dealing or market manipulation. Until the coming into force of the Market Abuse Directive, no Member State operated a mandatory suspicious transactions reporting regime for market abuse. However, in a number of jurisdictions, market participants had already been alerting the authorities on a voluntary basis to situations they regard as suspicious or abnormal in this context. The following guidance draws on these cases as well as the views of CESR members as to what might constitute a signal of a suspicious transaction. Annexed to this guidance is a standard reporting format which should be used by institutions to report suspicious transactions to the relevant competent authority.

The Duty to Notify Suspicious Transactions

5.3 It should be emphasised that the notification regime laid down by the Directive requires that persons subject to it decide on a case-by-case basis where there are reasonable grounds for suspicion concerning the relevant transaction. The indications given below are therefore neither exhaustive (a particular transaction may be suspicious even if it matches none of the indications) nor determinative (a transaction may not necessarily be suspicious simply because it matches one or more of the indications). The indications are therefore merely a starting point and firms need to exercise their judgement and consider the particular circumstances of the case before deciding whether or not to report.

5.4 CESR members are clear that blanket pro forma notifications to the authorities of all transactions conducted through an institution would not be in conformity with the provisions of the notification regime. Such notifications would not benefit from the protection provided by Article 11.3 of Directive 2004/72/EC against breach of restriction on disclosure obligations or other liabilities arising from the notification. This is because in the view of CESR members blanket notifications would not be in good faith. Nor would such practice conform with the requirement to consider on a case by case basis whether there were reasonable grounds for suspicion. 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.

Guidance Provided by the Directive

5.5 Directive 2003/6/EC and accompanying implementing Directives outline what constitutes insider dealing and market manipulation. This is supplemented by the proposed CESR guidance on practice that constitutes market manipulation (see Chapter 4 of this paper).

5.6 It is worth noting Recital 9 of Directive (reference) which states

"Notification of suspicious transactions by persons professionally arranging transactions in financial instruments to the competent authority requires sufficient indications that the transactions might constitute market abuse…. Certain transactions by themselves may seem completely void of anything suspicious, but might deliver such indications of possible market abuse, when seen in perspective with other transactions, certain behaviour or other information."

Investment firms and credit institutions should therefore not only notify transactions which they consider are suspicious at the time the transaction is carried out but also any transactions of which, in the light of subsequent events/information (for example publication of financial results, profits warnings or announcement of a takeover bids in relation to the security in question), they might retrospectively become suspicious. However, this does not mean that they are required to go back and retroactively review transactions in the run-up to that event or development.

Indications of Possible Suspicious Transactions

5.7 It is again emphasised that these examples of indications are only a starting point for consideration of whether a transaction is suspicious and are neither conclusive nor comprehensive. Moreover, they are to be applied using judgement rather than necessarily being interpreted literally. It is recognised that transactions meeting signals may be legitimate and hence not give reasonable grounds for suspicion.

5.8 *Possible Signals of Insider Dealing or Market Manipulation*

a) An unusual concentration of transactions in a particular security (for example, with one or more institutional investors known to be affiliated with the issuer or a party with a particular interest in the issuer such as a bidder/potential bidder);

b) An unusual repetition of a transaction among a small number of clients over a certain period of time

c) Unusual concentration of transactions and/or orders with only one client; or with the different securities accounts of one client; or with a limited number of clients (especially if the clients are related to one another).

5.9 Possible Signals of Insider Dealing

a) The client opens an account and immediately gives an order to conduct a significant transaction or, in the case of a wholesale client, unexpectedly large or unusual orders in a particular security – especially if the client is insistent that the order is carried out very urgently or must be conducted before a particular time specified by the client;

b) The client's requested transaction or investment behaviour is significantly out of character with the client's previous investment behaviour. (e.g. type of security; amount invested; size of order; duration of holding). [1]

[1] One case reported by a CESR member involved a client wanting to sell his whole portfolio and immediately invest the proceeds in the securities of a specific company. Others have involved a client who had previously invested only in mutual funds suddenly requesting the purchase of the securities of a single company or a client who had previously only invested in 'blue chip' stocks who made a sudden switch into illiquid securities. In a further case a 'buy and hold' client suddenly conducted a purchase of a particular security just before the announcement of inside information and then a sale directly after the announcement.

c) The client specifically requests immediate execution of an order regardless of the price at which the order would be executed (this indicator pre-supposes more than the simple placing of a 'market order' by the client);

d) Significant trading by major shareholders or other insiders before the announcement of important corporate events.

e) Unusual trading in the shares of a company before the announcement of price sensitive information relating to the company; transactions resulting in sudden and unusual changes in the volume of orders and shares prices before public announcements regarding the security in question;

f) Employees' own account transactions and related orders timed just before clients' transactions and related orders in the same financial instrument.

5.10 *Possible signals of Market Manipulation*

(a) Transactions with no other apparent justification than to increase/decrease the price of or to increase the volume of trading in a financial instrument. Particular attention might be given to orders of this kind which result in the execution of transactions near to a reference point during the trading day – e.g. near the close;

(b) The client submits orders which, because of their size in relation to the market in that security, will clearly have a significant impact on the supply of or demand for or the price or value of the security. Again, particular attention might be given to orders of this kind which result in the execution of transactions near to a reference point during the trading day – e.g. near the close;

(c) Transactions which appear to have the purpose of increasing the price of a financial instrument during the days preceding the issue of a related derivative/convertible;

(d) Transactions which appear to have the purpose of maintaining the price of a financial instrument during the days preceding the issue of a related derivative/convertible when the market trend is downward;

(e) Transactions which appear to be seeking to modify the valuation of a position while not decreasing/increasing the size of that position;

(f) Transactions which appear to be seeking to increase/decrease the weighted average price of the day or of a period during the session;

(g) Transactions which appear to be seeking to set a market price when the liquidity of the financial instrument is not sufficient to fix a price within the session (unless the rules or regulation of the regulated market explicitly allow such operations);

(h) Transactions which appear to be seeking to bypass the trading safeguards of the market (e.g. as regards volume limits; bid/offer spread parameters; etc);

(i) When a transaction is to be concluded/executed, changing the bid-ask prices (as computed by the trading system) when this spread is a factor in the determination of the price of that transaction;

(j) Entering significant orders in the central order book of the trading system a few minutes before the price determination phase of the auction and cancelling these orders a few seconds before the order book is frozen for computing the auction price so that the theoretical opening price might look higher or lower than it otherwise would do;

(k) Transactions which appear to be seeking to maintain the price of the underlying financial instrument below the strike price of a related derivative at expiration date;

(l) Transactions which appear to be aimed at modifying the price of the underlying financial instrument so that it crosses over the strike price of a related derivative at expiration date;

(m) Transactions which appear to be seeking to modify the settlement price of a financial instrument when this price is used as a reference/determinant in the calculation of margins requirements.

Method of Reporting Suspicious Transactions

5.11 Article 9 (2) of Commission Directive 2004/72/EC provides that where the information specified to be reported

> "is not available at the time of notification, the notification shall include at least the reasons why the notifying persons suspect that the transactions might constitute insider dealing or market manipulation. All remaining information shall be provided to the competent authority as soon as it becomes available."

Article 10 of that Directive also provides that

> "Notification to the competent authority can be by mail, electronic mail, telecopy of telephone, provided that in the latter case confirmation is notified by any written form upon request by the competent authority".

Persons making suspicious transactions reports therefore do not need to have all the required information before contacting the competent authority. If the case is one which (the persons subject to the reporting obligation consider) needs to be brought to the attention of the competent authority urgently, then CESR would urge them to make the first contact quickly. This can be by telephone if appropriate, giving the basic details and reasons for suspicion. The other information can be supplied subsequently.

Suspicious transaction reporting format

5.12 CESR considers that it will assist those subject to the obligations to report suspicious transactions if there is a standard reporting format for doing so. CESR has therefore drawn up the format below.

Description of the transaction(s) *Please include details of the financial instrument(s), including the ISIN code of the instrument; the market(s) concerned; the original order's entry date/time, price and size; the times and sizes of the transaction(s); the type and characteristics of the order, etc*
Reasons for suspecting that the transaction(s) might constitute insider dealing/market manipulation

Identities of persons carrying out transaction(s) *Names, address, telephone number, date of birth, account number, client identification code used by the firm, etc*
Identities of any other persons known to be involved in the transaction(s) *Names, address, telephone number, location, date of birth, relation to person carrying out transaction; position held , role played, etc*
Capacity in which the person performing the transaction(s) acts *e.g. broker, underwriter, agent*
Further information which may be of significance (please list any accompanying material you are supplying)
Details of the person making notification. *Name of person, name of firm, position held within firm, contact details etc*
Signed……. (*person making notification*) Dated……(*Date of notification)*

ANNEXE B: FORM FOR REPORTING SUSPICIOUS TRANSACTIONS
(version September 2007)

Notifying person	
(i) Name, (ii) address and (iii) capacity[1] of the financial intermediary	
Name, first name and telephone number of the natural person making the notification, and, if different, of the person to be contacted by the CSSF	
Financial instrument (issuer, type, ISIN code)	
Market (please specify the name and venue of the market and whether it is a "regulated market" or not)	
General description of the transaction	
Orders:	
- Entry date and time	
- Quantity	
- Trade direction (purchase/sale)	
- Characteristics (order type[2], validity, etc…)	
- Type of trading market (e.g. block trade)	
Execution:	
- Date and time	
- Market price	
- Negotiated quantity	
- Total price	
- Further information on the transaction, if any	
Reasons for suspicion that the transaction might constitute a market abuse	
Identification of the person carrying out the transaction and of any other person involved in the transaction	
a) Natural person: Name, first name, address, telephone number, date and place of birth, nationality, account number, any other useful information (profession, position held, relationship, etc…)	
b) Legal person: Company name, head office, telephone number, account number, any other useful information (registration date, etc…) and identity of the instructing party within the company	
Further significant information	
List of accompanying material, if any	

Date and signature _____

[1] Reference is made here to the capacity in which the person subject to the notification obligation operates, such as for own account or on behalf of third parties.

[2] Within the meaning of article 9(1)(a) of Directive 2004/72/EC "limit order, market order or other characteristics of the order".

ANNEXE C:
NOTIFICATION OF MANAGERS' TRANSACTIONS
(version September 2007)

Identification of the notifying person	
a) Name and first name(s) of the person making the notification; if legal person: company name and registered office	
b) If the notifying person is referred to in article 1(12)[3], please specify the functions within the issuer	
c) If the notifying person is referred to in article 1(13)[4], please indicate: "one of the persons closely associated with" and the name, first name and functions of the person with whom they are personally closely associated	
Name of the issuer	
Reason for notification	
Description of the financial instrument	
Nature of the transaction Acquisition[5] Disposal [6]	
Date of the transaction	
Place of the transaction[7]	
Negotiated quantity	
Price per security	
Total amount of the transaction (fees excluded)	

Details of the person making notification or of his representative (name, address, telephone number, fax):

Date and signature _____

[3] - a member of the administrative, management or supervisory bodies of the issuer;
- a senior executive, who is not a member of the bodies as referred to above, having regular access to inside information relating, directly or indirectly, to the issuer, and the power to make managerial decisions affecting the future developments and business prospects of this issuer.

[4] - the spouse of the person discharging managerial responsibilities, or any partner of that person considered by national law of the concerned person as equivalent to the spouse;
- according to their national law, dependent children of the person discharging managerial responsibilities;
- other relatives of the person discharging managerial responsibilities, who have shared the same household as that person for at least one year on the date of the transaction;
- any legal person, trust or partnership, or any legally dependent association whose managerial responsibilities are discharged by a person referred to in point 2) of this article or in the preceding three indents of this point, or which is directly or indirectly controlled by such a person, or that is set up to the benefit of such a person, or whose economic interests are substantially equivalent to those of such person.

[5] Acquisition shall mean purchase, but also any other transaction the result of which is the acquisition of financial instruments.

[6] Disposal shall mean sale, but also any other transaction the result of which is the transfer of financial instruments.

[7] Any useful information relating to the place of the transaction, mainly the concerned market.

ANNEXE D:
FORM FOR REPORTING BUY-BACK TRANSACTIONS

PART I (relating to expected buy-back transactions)

Identification and details of the reporting person/contact person (name, address, telephone number, fax)	
Issuer	
Objectives of the buy-back programme	
Date and method of initial public disclosure of the buy-back programme	
Date of the last communication relating to the executed transactions	
Time-scheduled buy-back programme (if yes, please enclose schedule)	
Authorised daily volume (25% of the average daily volume in the month preceding the month during which the programme is publicly disclosed or average daily volume of the 20 trading days preceding the date of purchase) (number of shares)	
In case the above limit is exceeded:[8]	
Date of preliminary notification to the CSSF	
Date of public disclosure	
Please specify whether the buy-back programme is managed by an investment company or a credit institution (if yes, please indicate the management company and the date of the agreement)	

PART II (relating to executed buy-back transactions)

Date	Time	Market	Transaction	Quantity	Price[9]

Date and signature _____

[8] In accordance with article 5(3) of Regulation (EC) No 2273/2003.

[9] Cf. article 5(1) of Regulation (EC) No 2273/2003: Price of the last independent trade or the highest independent bid.

ANNEXE E:
FORM FOR REPORTING STABILISATION TRANSACTIONS

Identification and details of the reporting person/contact person (name, address, telephone number, fax)	
Issuer	
Financial intermediary in charge of the stabilisation and contact	
Market	
Type of offer	
Price and other characteristics of the offer, if any	
Date of commencement of trading OR (for initial offer) **Date of public disclosure of the final price** (for secondary offer)	
Stabilisation period	
Required public disclosure done on: **by means of:**	
Overallotment option (volume, price and date of exercise)	

Transaction details

Date	Time	Direction	Number of securities	Weighted average price	Amount

Date and signature _____

ANNEXE F:
Market Abuse Directive Level 3 – second set of CESR guidance and information on the common operation of the Directive to the market; Ref: CESR/06-562b

THE COMMITTEE OF EUROPEAN SECURITIES REGULATORS

Ref: CESR/06-562b

Market Abuse Directive

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

July 2007

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Introduction

1. In December 2005 CESR agreed that CESR-Pol should carry out a second phase of market-facing Level 3 work in respect of the Market Abuse Directive. A draft second set of guidance was published for European-wide consultation on 2 November 2006 (Ref. CESR/06-562). The following issues were covered in the draft guidance.

    I. What constitutes inside information;
    II. When is it legitimate to delay the disclosure of inside information;
    III. When does information relating to a client's pending orders constitute inside information;
    IV. Insider lists in multiple jurisdictions – proposing a mutual recognition system to apply in this area (i.e. a competent authority would accept an insider list maintained in accordance with the rules of another CESR member).

2. The draft guidance has been revised to take account of comments made in the consultation exercise and, following approval of the CESR Chairs, is now published in its final form. A Feedback Statement on the consultation exercise (Ref. CESR/07-402) is being published separately.

3. Preparation of the guidance has been undertaken by CESR-Pol, through the Market Abuse Level 3 Drafting Group. The permanent operational group CESR-Pol is chaired by Mr Kurt Pribil, Chairman of the Austrian Finanzmarktaufsicht (FMA). The Market Abuse Level 3 Drafting Group was chaired by Mr Dilwyn Griffiths, Head of Market Monitoring of the Financial Services Authority (FSA) of the United Kingdom.

Status of the guidance

4. The outcome of CESR's work is reflected in the guidance set out in this paper, which does not constitute European Union legislation and will not require national legislative action.

5. CESR Members will apply the guidance in their day-to-day regulatory practices on a voluntary basis.

6. The way in which the guidance will be applied will be reviewed regularly by CESR. CESR's guidance for the consistent implementation of the Market Abuse Directive will not prejudice, in any case, the role of the Commission as guardian of the Treaties.

Second set of CESR Guidance on the Operation of the Market Abuse Directive

I WHAT CONSTITUTES 'INSIDE INFORMATION' UNDER THE MARKET ABUSE DIRECTIVE?

Introduction

1.1 This section of the guidance covers what constitutes 'inside information' as defined by paragraph 1 of Article 1.1 of the Market Abuse Directive (2003/6/EC) (MAD). It does not deal either with inside information relating to commodity derivatives or inside information relating to client pending orders (i.e. trading information).

1.2 Paragraph 1 of Article 1.1 of the Market Abuse Directive defines 'inside information' by means of the following four criteria. It is

- information of a precise nature
- which has not been made public
- relating, directly or indirectly, to one or more issuers of financial instruments or to one or more financial instruments
- and which, if it were made public, would be likely to have a significant effect on the prices of those financial instruments or on the price of related derivative financial instruments

1.3 The following paragraphs provide guidance on what CESR considers is covered by the four above criteria, taking into account the relevant provisions of the Level 2 Implementing Measures and drawing on the advice CESR provided to the Commission in December 2002 for these Implementing Measures (Ref. CESR/03-212c)[1]. It should be noted that the criteria of information of a precise nature and significant price effect are very much linked to each other and hence it is important not to consider each criterion in isolation. However, CESR considers that it is possible to identify separately the factors which should be taken into account in respect of each criterion.

Information of a Precise Nature

1.4 Article 1 of Commission Directive 2003/124/EC amplifies what is meant by the term "information of precise nature" as follows:

> *"….information shall be deemed to be of a precise nature if it indicates a set of circumstances which exists or may reasonably be expected to come into existence or an event which has occurred or may reasonably be expected to do so and if it is specific enough to enable a conclusion to be drawn as to the possible effect of that set of circumstances or event on the prices of financial instruments or related derivative financial instruments*."

1.5 The precise nature of information is to be assessed on a case-by-case basis and depends on what the information is and the surrounding context. However, the following general points can be made. CESR considers that in determining whether a set of circumstances exists or an event has occurred, a key issue is whether there is firm and objective evidence for this as opposed to rumours or speculation[2] i.e. if it can be proved to have happened or to exist. When considering what may reasonably be expected to come into existence, the key

[1] The advice provided to the Commission does not constitute Level 3 guidance
[2] 'Speculation' in this context is used in the sense of conjecture without any definite knowledge.

issue is whether it is reasonable to draw this conclusion based on the ex ante information available at the time. It should be noted that CESR considers that in general, other than in exceptional circumstances or unless requested to comment by the competent regulator pursuant to Art 6.7 of MAD, issuers are under no obligation to respond to speculation or market rumours which are without substance.

1.6 It is also important to note that, if the information concerns a process which occurs in stages, each stage of the process as well as the overall process could be information of a precise nature. An example might be a takeover bid. The fact that the proposed takeover might not in the end take place does not mean that the approach to the target company is not precise information in its own right[3].

1.7 In addition, it is not necessary for a piece of information to be comprehensive to be considered precise. For example, an approach to a target company about a takeover bid can be considered as precise information even though the bidder had not yet decided the price. Similarly, a piece of information could be considered as precise even if it refers to matters or events that could be alternatives. For example, the fact that a company was proposing to launch a takeover bid for one or other of two companies could be considered as precise even though the bidding company had not finally decided which would be its target (this example again assumes that the bidding company cannot take advantage of Article 6.2 of MAD).

1.8 As regards whether a piece of information is specific enough to allow a conclusion to be drawn about its impact on prices, CESR considers this would occur for example in two circumstances. The first would be when the information is such as to allow the reasonable investor to take an investment decision without, or at very low, financial risk – i.e. the investor would be able to assess with confidence how the information, once publicly known, would affect the price of the relevant financial instrument and related derivative financial instruments. For example, someone knowing that a particular issuer was about to be subject to a takeover bid could be confident that that issuer's share price would rise when the bid became public. The second would be when the piece of information was such that it is likely to be exploited immediately on the market – i.e. that as soon as the information became known, market participants would trade on the basis of it.

Made Public

1.9 As regards making information public, companies with inside information to disclose should use the disclosure mechanisms specified by their Competent Authority. So, for example, if they are required to make information publicly available through a particular electronic news service it will not necessarily be sufficient for them only to give the information to a newspaper. However, for the purposes of determining whether a transaction was made using inside information, it should be noted that information can be publicly available[4] even if it was not disclosed by the issuer in the specified manner. This applies whether the information became public through an incorrect disclosure by the issuer or through a third party.

Significant Price Effect

1.10 Article 1 of Commission Directive 2003/124/EC amplifies what is meant by the concept of 'information likely to have a significant price effect'.

> *"…information which, if it were to be made public, would be likely to have a significant effect on the prices of financial instruments or related derivative*

[3] The example here is simply intended to illustrate what precise information is and does not mean that the target company would necessarily have an obligation to make an announcement at this point: it may be able to rely on the provision allowing it to delay disclosure.

[4] In this context publicly available information may also include information which is made accessible on a commercial basis – e.g. electronic information services for which a subscription is required

financial instruments shall mean information a reasonable investor would be likely to use as part of the basis of his investment decisions."

1.11 The 'reasonable investor test' set out above assists in determining the type of information to be taken into account for the purposes of the "significant price effect" criterion. In this context it should be noted Article 17.2 of MAD makes clear that implementing measures do not modify the essential provisions of the Level 1 Directive.

1.12 CESR considers that those with potential inside information need to assess on an ex ante basis whether or not information is likely to have a significant price effect. It is a question of determining the degree of probability with which at that point in time such an effect could reasonably have been expected. The Directive test is "likely" so on the one hand the mere possibility that a piece of information will have a significant price effect is not enough to trigger a disclosure requirement but, on the other hand, it is not necessary that there should be a degree of probability close to certainty.

1.13 CESR is clear that fixed thresholds of price movements or quantitative criteria alone are not a suitable means of determining the significance of a price movement. For example, the volatility of 'blue-chip' securities is typically less than that of smaller, less liquid stocks. Large absolute percentage rises in big company stocks are likely to be rare events and do not mean that smaller percentage share price changes should not be seen as significant. In determining whether a significant effect is likely to occur, the following factors should be taken into consideration[5]:

i) the anticipated magnitude of the matter or event in question in the context of the totality of the company's activity;

ii) the relevance of the information as regards the main determinants of the financial instrument's price;

iii) the reliability of the source;

iv) market variables that affect the price of the financial instrument in question (These variables could include prices, returns, volatilities, liquidity, price relationships among financial instruments, volume, supply, demand, etc.).

1.14 Some useful indicators of whether information is likely to have a significant price effect that should be taken into consideration are whether:

- the type of information is the same as information which has, in the past, had a significant effect on prices
- pre-existing analysts research reports and opinions indicate that the type of information in question is price sensitive
- the company itself has already treated similar events as inside information

It should be emphasised that these factors are only indicators. They should not be treated as definitive in terms of meaning that the information in question will necessarily have a significant price effect. Companies should also take into account that the significance of the information in question will vary widely from company to company, depending on a variety of factors such as the company's size, recent developments and the market sentiment about the company and the sector in which it operates. In addition, what is likely to have a significant price effect can vary according to the asset class of the financial instrument. For example, a piece of information which may be price sensitive for an equity issuer may not be so for an issuer only of debt securities.

Examples of Possible Inside Information Concerning the Issuer

[5] See Recital 1 to Commission Directive 2003/124/EC

1.15 The following is a non-exhaustive and purely indicative list of events of the type which might constitute inside information. The fact that an event does not appear on the list does not mean it cannot be inside information. Nor does the fact that an event is included on the list mean that it automatically will be inside information: the **materiality of the event** needs to be considered. Something would only constitute inside information if it was sufficiently material. Moreover, as noted above, it is the specific circumstances of each case which need to be considered.

Information which directly concerns the issuer:

- Operating business performance;
- Changes in control and control agreements;
- Changes in management and supervisory boards;
- Changes in auditors or any other information related to the auditors' activity;
- Operations involving the capital or the issue of debt securities or warrants to buy or subscribe securities;
- Decisions to increase or decrease the share capital;
- Mergers, splits and spin-offs;
- Purchase or disposal of equity interests or other major assets or branches of corporate activity;
- Restructurings or reorganizations that have an effect on the issuer's assets and liabilities, financial position or profits and losses;
- Decisions concerning buy-back programmes or transactions in other listed financial instruments;
- Changes in the class rights of the issuer's own listed shares;
- Filing of petitions in bankruptcy or the issuing of orders for bankruptcy proceedings;
- Legal disputes;
- Revocation or cancellation of credit lines by one or more banks;
- Dissolution or verification of a cause of dissolution;
- Changes in the assets' value;
- Insolvency of relevant debtors;
- Reduction of real properties' values;
- Physical destruction of uninsured goods;
- New licences, patents, registered trade marks;
- Decrease or increase in value of financial instruments in portfolio;

- Decrease in value of patents or rights or intangible assets due to market innovation;
- Receiving acquisition bids for relevant assets;
- Innovative products or processes;
- Product liability or environmental damages cases;
- Changes in expected earnings or losses;
- Orders received from customers, their cancellation or important changes;
- Withdrawal from or entry into new core business areas;
- Changes in the investment policy of the issuer;
- Ex-dividend date, changes in dividend payment date and amount of the dividend; changes in dividend policy..

1.16 The Directive definition of inside information also encompasses information which relates **indirectly** to issuers or financial instruments. The following is a list of examples of such information. Again, these examples are indicative and non-exhaustive and are subject to the same conditions and caveats set out in paragraph 1.15 above. It should be noted that, where the information meets the tests for being inside information, the confidentiality duty and the prohibition to enter into transactions stated in Articles 2 and 3 of MAD apply. There is, however, no legal basis to require prompt disclosure under Article 6.1 of MAD, because this article only applies to issuers and to information that directly concerns them. (Indeed, it is recognised that in the examples listed below, the issuer would usually either not be aware of the information before it was publicly announced, or, if they were aware, would be precluded from making any disclosure themselves until the other agency had made its announcement.) Nevertheless, if such events when they become public knowledge would have consequences directly affecting the issuer which would meet the tests for inside information, the disclosure requirement in Article 6 of MAD would apply at the relevant point. .

Information which indirectly concerns the issuer

- Data and statistics published by public institutions disseminating statistics;
- The coming publication of rating agencies' reports;
- The coming publication of research, recommendations or suggestions concerning the value of listed financial instruments;
- Central bank decisions concerning interest rates;
- Government's decisions concerning taxation, industry regulation, debt management, etc.;
- Decisions concerning changes in the governance rules of market indices, and especially as regards their composition;
- Regulated and unregulated markets' decisions concerning rules governing the markets;
- Competition and market authorities' decisions concerning listed companies;

- Relevant orders by government bodies, regional or local authorities or other public organizations;

- A change in trading mode (e.g., information relating to knowledge that an issuer's financial instruments will be traded in another market segment: e.g. change from continuous trading to auction trading); a change of market maker or dealing conditions.

II WHEN ARE THERE LEGITIMATE REASONS TO DELAY THE PUBLICATION OF INSIDE INFORMATION

Introduction

2.1 Article 6.2 of the MAD provides that "*An issuer may under his own responsibility delay the public disclosure of inside information, as referred to in paragraph 1, such as not to prejudice his legitimate interests provided that such omission would not be likely to mislead the public and provided that the issuer is able to ensure the confidentiality of that information.*"

2.2 This section of the guidance deals with situations in which there are legitimate interests for an issuer to delay the publication of inside information. It does not cover the other two conditions set out in Article 6.2 and the relevant implementing measures (that the delay would not likely to mislead the public; and that the issuer is able to ensure the confidentiality of the information).

Legitimate Interests

2.3 The term 'legitimate interests' is amplified by Article 3 (1) of the implementing Directive 2003/124/EC.

"For the purposes of applying Article 6(2) of Directive 2003/6/EC, legitimate interests may, in particular, relate to the following non-exhaustive circumstances:

(a) negotiations in course, or related elements, where the outcome or normal pattern of those negotiations would be likely to be affected by public disclosure. In particular, in the event that the financial viability of the issuer is in grave and imminent danger, although not within the scope of the applicable insolvency law, public disclosure of information may be delayed for a limited period where such a public disclosure would seriously jeopardise the interest of existing and potential shareholders by undermining the conclusion of specific negotiations designed to ensure the long-term financial recovery of the issuer;

(b) decisions taken or contracts made by the management body of an issuer which need the approval of another body of the issuer in order to become effective, where the organisation of such an issuer requires the separation between these bodies, provided that a public disclosure of the information before such approval together with the simultaneous announcement that this approval is still pending would jeopardise the correct assessment of the information by the public."

2.4 The article makes clear that the examples it sets out of circumstances where there are legitimate interests for delaying public disclosure constitutes a non-exhaustive list. So it is open to issuers to delay the disclosure of information in other situations, provided the conditions in Article 6 (2) of the MAD apply.

2.5 CESR has considered whether, in giving guidance on this issue, it should provide any further examples of such situations. However, CESR believes that, as the right to delay the disclosure of inside information is a derogation from the general rule rather than the norm, it would

not be appropriate to give a long list of (other) circumstances in which the issuer has the right to delay. It remains the issuer's responsibility to determine whether, in its own specific circumstances, the disclosure of inside information can be delayed given due regard to the applicable conditions.

2.6 CESR is therefore confining its guidance to providing indicative examples of the two circumstances mentioned in Article 3 (1) of implementing Directive 2003/124/EC. The guidance has the objective of illustrating rather than extending the provisions of the Directive. The guidance draws on the advice CESR provided to the Commission in December 2002 (Ref: CESR/02-089d) in respect of this implementing Directive.

Illustrative Examples of Legitimate Interests for Delay

2.7 As usual, it should be noted that the examples below are not intended to be exhaustive and issuers will need to consider the particular circumstances of their case when deciding whether they can delay disclosure.

2.8 The following are examples of the first set of circumstances ('negotiations in course') mentioned in implementing Directive 2003/124/EC:

- Confidentiality constraints relating to a competitive situation (e.g. where a contract was being negotiated but had not been finalized and the disclosure that negotiations were taking place would jeopardise the conclusion of the contract or threaten its loss to another party). This is subject to the provision that any confidentiality arrangement entered into by an issuer with a third party does not prevent it from meeting its disclosure obligations;

- Product development, patents, inventions etc where the issuer needs to protect its rights provided that significant events that impact on major product developments (for example the results of clinical trials in the case of new pharmaceutical products) should be disclosed as soon as possible;

- When an issuer decides to sell a major holding in another issuer and the deal will fail with premature disclosure;

- Impending developments that could be jeopardised by premature disclosure.

2.9 Cases within the scope of the second set of circumstances ('decisions taken which need the approval of another body') include those where there are complex decision-making processes involving multiple hierarchical layers in the issuer's organization.

Other Guidance

2.10 Finally it should be emphasized that meeting the test for having a legitimate interest in delaying a disclosure is not by itself sufficient reason to delay the disclosure. In all the situations a further evaluation should be done to decide whether the other conditions in Article 6.2 of the MAD apply i.e. that the delay in disclosing the inside information would not be likely to mislead the public; and that the issuer is able to ensure the confidentiality of the information.

2.11 As regards how companies should behave in the period between inside information arising and the time when it is disclosed or its ceasing to be inside information, CESR offers the following observations. At the time the decision is made to delay disclosing the inside information, companies may wish to consider recording the reasons for doing so. This provides a clear audit trail which may be to the advantage of the issuer if the regulator

requires that this information is provided to them. Once the decision to delay disclosure has been made, companies will need to ensure that knowledge of the information is restricted to those who need to have access to it and that those who are insiders are aware that the information is confidential and recognise their resulting obligations. If the issuer subsequently becomes aware that the information has not been kept confidential and there has been a leak, it should disclose the information as soon as possible in the manner specified. Issuers should also keep under review whether the delay in disclosing the information is likely to be misleading and, if they conclude that this is the case, again the information should be announced as soon as possible.

2.12 CESR does not propose at this stage to offer any further guidance on when delay in disclosing inside information would not be likely to mislead the public. It is aware, however, of the argument that any delay in disclosing information would be misleading. CESR does not share this view. If this argument were correct, then clearly there would have been no purpose in including a provision in the Directive which allowed for delay since the criteria for doing so could never be met.

III WHEN DOES INFORMATION RELATING TO A CLIENT'S PENDING ORDERS CONSTITUTE INSIDE INFORMATION

Introduction

3.1 As regards information relating to client orders, the relevant legislative provision is Article 1.1 par.3 of MAD which specifies that "*For persons charged with the execution of orders concerning financial instruments, 'inside information' shall also mean information conveyed by a client and related to the client's pending orders".*

3.2 These persons should properly manage that kind of inside information in order to avoid the abuse of it. This means that, according to Art. 2 and 3 of MAD, , such a person shall not:

a. use that information by acquiring or disposing of, or by trying to acquire or dispose of, for his own account or for the account of a third party, either directly or indirectly, financial instruments to which that information relates[6];
b. disclose that information to any other person unless such disclosure is made in the normal course of the exercise of his employment, profession or duties;
c. recommend or induce another person, on the basis of that information, to acquire or dispose of financial instruments to which that information relates.

3.3 According to Art. 4 of MAD the same prohibitions apply to any other person who possesses that information and who, at the same time, knows, or ought to have known, that that information is inside information.

3.4 The persons typically involved in the above situations are employees of intermediaries.

3.5 Considering that intermediaries work in complex environments, these prohibitions imply that they should find measures and tools that allow them to act without using inside information. Therefore, guidance could be helpful to allow intermediaries and their employees to better understand when information related to a client's pending orders is inside information.

"*Client's pending order*" as inside information: conditions set out by the Directives

[6] Article 2.3 provides that this shall not apply to transactions conducted in the discharge of an obligation that has become due to acquire or dispose of financial instruments where that obligation results from an agreement concluded before the person concerned possessed inside information.

3.6 According to Article 1.1 par.3 of MAD "*information conveyed by a client and related to the client's pending orders"* is inside information if it satisfies three conditions[7]:

a. it "*is of a precise nature*",
b. it "*relates directly or indirectly to one or more issuers of financial instruments or to one or more financial instruments*",
c. "*if it were made public, it would be likely to have a significant effect on the prices of those financial instruments or on the price of related derivative financial instruments"*.

3.7 Conditions *sub* a) and c) are further defined by Art 1(1) of implementing Directive 2003/124/EC.

As to condition a): "*information shall be deemed to be of a precise nature:*

1) "*if it indicates a set of circumstances which exists or may reasonably be expected to come into existence or an event which has occurred or may reasonably be expected to do so and*"

2) "*if it is specific enough to enable a conclusion to be drawn as to the possible effect of that set of circumstances or event on the prices of financial instruments or related derivative financial instruments".*

As to condition c): *"information which (…) would be likely to have a significant effect on the prices" (..,) shall mean information a reasonable investor would be likely to use as part of the basis of his investment decisions"*.

"Information conveyed by a client and related to a client's pending order" : Guidance

i) Client's pending order

3.8 Neither MAD nor the relevant implementing Directive define the term 'client's pending order'. CESR does not consider it can produce a single definitive definition of the term but offers the following guidance to assist in clarifying when there is a pending client order. An indication that there is a pending order for a client is that a person charged with executing orders is approached by another in relation to a transaction and

a) the transaction is not immediately executed in response to a price quoted by that person ; and
b) the person concerned has taken on a legal or regulatory obligation relating to the manner or timing of the execution of the transaction.

Thus, for example, merely polling for a price (contacting various brokers to establish at what price they are prepared to buy or sell a particular financial instrument or type of financial instrument) would not in itself constitute a client's pending order as no order has yet been placed.

ii) When is the information conveyed by a client inside information: general considerations

3.9 The main difficulties in understanding when information conveyed by a client relating to their pending order is inside information basically refer to the problem of determining when the above mentioned conditions on the precise nature and the price sensitivity are met.

3.10 Before examining the scope of guidance on the precise nature and the price sensitivity of such information, it is convenient to recognise that orders are in general characterised by several elements concerning three parameters: price, quantity and execution timing. Many

[7] In addition, implicitly the fourth condition is that information should not be already public.

different combinations of these elements can be valued in different ways. The identity of the client and the financial instrument to which the order relates may also be relevant.

3.11 In addition, these elements are different across markets according to their specific microstructure. For instance, some electronic trading systems can allow stop-loss orders, or partially-displayed orders, and so on. Furthermore the market impact of the order execution may depend on the market's liquidity; the way in which the order will be executed; the trading method used (auction, continuous trading, etc); and so on.

3.12 All the relevant factors should be taken into account in order to determine whether the information conveyed by a client relating to their pending order is inside information. As usual, it should be emphasised that the following guidance is indicative and not exhaustive.

iii) Price sensitivity

3.13 The price sensitivity of information relating to a client's pending order is likely to be influenced by:

a. The order's dimension/size, compared, for example, with the average size of the orders in that market or the daily trading volume. The greater the size of the order as compared with the average size of orders in that market, the more likely it is to have an influence on the price of the financial instrument;

b. the liquidity of the market during the period of the order execution;

c. the bid-ask spread: the wider the spread, the more likely that an order may have an impact on the price;

d. the price limit for the order and the relationship of that price limit to the current bid-ask spread;

e. the execution timeframe as instructed by the client (e.g. the quicker the client wants the order executed, the more likely there is to be a price impact);

f. the execution timing in relation to determining relevant or reference prices such as opening, closing minimum or maximum prices or exercise prices of related financial instruments such as derivatives, covered warrants, structured bonds, etc;

g. the identity of the client;

h. whether the order is likely to influence the behaviour of other market participants.

iv) Precise nature

3.14 As set out in implementing Directive 2003/124/EC (see paragraph 3.7 above) the relevant conditions for determining if the information is of a precise nature are twofold: "1) *if it indicates a set of circumstances which exists or may reasonably be expected to come into existence or an event which has occurred or may reasonably be expected to do so and 2) if it is specific enough to enable a conclusion to be drawn as to the possible effect of that set of circumstances or event on the prices of financial instruments or related derivative financial instruments".*

3.15 While the second condition is very close in nature to that of price-sensitivity, discussed above, the first expresses quite clearly that information does not have to be certain to constitute inside information. i.e. information relating to an order could be inside information even if all of its characteristics are not yet completely defined. In this respect a set of useful guidance can be outlined as follows.

3.16 The test for the precise nature of information relating to an order is more likely to be satisfied:

a. the more defined are the order's size, price limit and execution period;

b. the more predictable the pattern of the trading behaviour of a client, the more precise will be the nature of a particular order from that client.

Other Guidance

3.17 CESR has been asked what a person charged with executing client orders should do if, having received a client order to conduct a significant transaction in a financial instrument, it subsequently received orders from other clients concerning that same instrument. Recital 18 of MAD is relevant in this context. The pertinent element of the Recital is as follows

> "…. The mere fact that market-makers, bodies authorised to act as counterparties, or persons authorised to execute orders on behalf of third parties… confine themselves … to pursuing their legitimate business of buying or selling financial instruments … should not in itself be deemed to constitute use of …inside information."

The fact that a person charged with executing client orders receives a big order from a client does not mean that it has to cease executing other orders it may receive concerning the same financial instrument until the first order has been completed.

IV INSIDER LISTS

4.1 Article 6.3 paragraph 3 of MAD obliges Member States to require issuers, or persons acting on their behalf or for their account, to establish insider lists, to be regularly updated and to be provided to competent authority upon request. In addition, the implementing Directive 2004/72/EC [8] provides for further details as to the content of the insider list, the way it should be updated and maintained, and the information duties related to such insider list.

4.2 In general, across Europe, Member States have implemented these provisions so that they apply to issuers whose financial instruments are admitted to trading on a domestic regulated market and/or to domestic issuers having financial instrument admitted to trading on a Regulated market of another EU or EEA Member State.

4.3 There are already a certain number of issuers whose financial instruments are admitted to trading on regulated markets in different European jurisdictions. Consequently, it appears that the same issuer has to comply with the requirement to draw up and maintain insider list in accordance with the legal framework applicable in each of the concerned jurisdictions. In other words, there may be overlapping requirements with respect to keeping the insider list, in certain circumstances. From the competent authorities' perspective, it is considered that overlapping is preferable to loopholes. However, it may be argued that such overlapping could prove "burdensome" for issuers.

4.4 It should be recalled that the requirements to keep, maintain and provide the competent authority with insider lists only applies to the issuer that has requested or approved admission of its financial instruments to trading on a regulated market in a Member State (Article 9 par. 3 MAD).

[8] Commission Directive 2004/72/EC of 29 April 2004 implementing Directive 2003/6/EC of the European Parliament and of the Council as regards accepted market practices, the definition of inside information in relation to derivatives on commodities, the drawing up of lists of insiders, the notification of managers' transactions and the notification of suspicious transactions.

4.5 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.

4.6 This recommendation does not challenge the obligation on an issuer in each of the relevant jurisdictions to establish an insider list and the right for the competent authority from any of these jurisdictions to request such list. In this context it should be noted that under the MAD a competent authority only needs to be supplied with an insider list if it requests it from the issuer: there is no obligation on an issuer spontaneously to provide its insider list to the competent authority or inform it of updates to the list.

4.7 With respect to the persons acting on behalf of for the account of the issuer, regardless of their nationality or their location or place of incorporation, the rules to follow have to be the rules of the jurisdiction applicable to the issuer.

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