

**COMMISSION de SURVEILLANCE
du SECTEUR FINANCIER**

OBSOLÈTE

Luxembourg, le 7 novembre 2007

A toutes les personnes concernées

CIRCULAIRE CSSF 07/323

Concerne : portant modification de la Circulaire CSSF 07/280 concernant les modalités d'application de la loi du 9 mai 2006 relative aux abus de marché

Mesdames, Messieurs,

Nous avons l'honneur de faire suite à la Circulaire CSSF 07/280 du 5 février 2007 concernant les modalités d'application de la loi du 9 mai 2006 relative aux abus de marché (la « **Circulaire 07/280** »). La présente circulaire a pour objet de modifier la Circulaire 07/280 suite notamment à la publication, le 12 juillet 2007, par le Comité européen des régulateurs des marchés de valeurs mobilières (CERVM - CESR) d'une deuxième série d'orientations et d'informations de « niveau 3 » pour la mise en œuvre de la Directive Abus de marché (« Level 3 - second set of CESR guidance and information on the common operation of the Directive to the market » Réf. CESR/06-562b). Le document publié en juillet 2007 donne des précisions relatives (i) à la définition de l'« information privilégiée » ; (ii) aux « intérêts légitimes » en vertu desquels un émetteur peut différer la publication d'une information privilégiée ; (iii) aux informations sur les « ordres en attente » du client dans le contexte de la définition d'informations privilégiées ; et (iv) aux listes à établir par les émetteurs ou les personnes agissant en leur nom ou pour leur compte comprenant les personnes ayant accès régulièrement ou occasionnellement aux informations privilégiées (les listes d'initiés).

La Circulaire 07/280 est modifiée comme suit :

- Dans la Section 1. de la Circulaire 07/280 intitulée « Remarques générales sur les éléments pouvant constituer des indices d'une manipulation de marché », il est inséré un nouveau troisième paragraphe qui a la teneur suivante :

« Le 12 juillet 2007, le Comité européen des régulateurs des marchés de valeurs mobilières a publié une deuxième série d'orientations et d'informations de « niveau 3 » pour la mise en œuvre de la Directive Abus de marché (« Level 3 – second set of CESR guidance and information on the common operation of the Directive to the market » Réf. CESR/06-562b). Nous vous invitons à vous référer également à ce document, annexé à la présente circulaire comme ANNEXE F, et plus particulièrement aux différentes précisions relatives à la définition d' « information privilégiée » (cf. partie I « What constitutes inside information under the market abuse directive? » et partie III « When does information relating to a client's pending orders constitute inside information »). »

- Dans la Section 3. de la Circulaire 07/280 intitulée « Les listes à établir par les émetteurs ou les personnes agissant en leur nom ou pour leur compte comprenant les personnes ayant accès régulièrement ou occasionnellement aux informations privilégiées », il est inséré un nouveau quatrième paragraphe qui a la teneur suivante :

« Pour les émetteurs qui ont demandé l'admission de leurs instruments financiers à la négociation sur un marché réglementé situé ou opérant au Luxembourg, et dont les instruments financiers sont également admis à la négociation sur un marché boursier situé ou opérant dans un pays autre que le Luxembourg, la CSSF accepte que les listes d'initiés à établir conformément à l'article 16 de la Loi puissent être établies dans la forme prévue, le cas échéant, par la réglementation applicable sur cet autre marché boursier à condition de comprendre les informations mentionnées aux paragraphes précédents. »

- Dans l'ANNEXE B de la Circulaire 07/280, (i) il est inséré dans la rubrique « Marché » une mention supplémentaire demandant de préciser si le marché sur lequel les instruments financiers sont négociés est ou non un « marché réglementé » au sens des directives européennes ; et (ii) la rubrique « quantités traitées et prix total » est subdivisée en deux rubriques distinctes « quantités traitées » et « prix total ».

- Dans l'ANNEXE C de la Circulaire 07/280, (i) il est inséré une nouvelle rubrique « Quantité traitée » après la rubrique « Lieu d'opération » ; et (ii) il est inséré dans la rubrique « Montant total de l'opération » une mention supplémentaire clarifiant que le montant total doit être déclaré « hors frais ».
- Le document CESR/06-562b est ajouté en tant que nouvelle ANNEXE F à la Circulaire 07/280.

Une version coordonnée de la Circulaire 07/280 sera publiée sur le site Internet de la CSSF.

Nous vous prions d'agréer, Mesdames, Messieurs, l'expression de nos sentiments distingués.

COMMISSION DE SURVEILLANCE DU SECTEUR FINANCIER

Simone DELCOURT
Directeur

Arthur PHILIPPE
Directeur

Jean-Nicolas SCHAUS
Directeur général

ANNEXE B : FORMULAIRE DE NOTIFICATION DES OPERATIONS SUSPECTES
(version septembre 2007)

Déclarant	
(i) Dénomination, (ii) adresse et (iii) qualité ¹ de l'intermédiaire financier	
Nom, prénom(s), et numéro de téléphone de la personne physique effectuant la déclaration, et, si elle est différente, de la personne à contacter par la CSSF	
Instrument financier (émetteur, type, code ISIN)	
Marché (à préciser le nom et le lieu du marché et s'il s'agit d'un « marché réglementé » ou non)	
Description générale de l'opération	
<i>Ordres:</i>	
- Date et heure d'introduction	
- Quantité	
- Sens de l'opération (achat/vente)	
- Caractéristiques (type d'ordre ² , validité...)	
- Mode de négociation (p.ex. « block trade »)	
<i>Exécution:</i>	
- Date et heure	
- Cours	
- Quantités traitées	
- Prix total	
- Autres précisions éventuelles sur l'opération	
Raisons amenant à soupçonner que l'opération pourrait constituer un abus de marché	
Identification de la personne effectuant l'opération et de toute autre personne impliquée dans l'opération	
a) Personne physique : nom, prénom(s), adresse, numéro de téléphone, date et lieu de naissance, nationalité, numéro de compte, toute autre référence utile (profession, fonctions, lien de parenté, ...)	
b) Personne morale : Dénomination sociale, siège social, téléphone, numéro de compte, toute autre référence utile (date d'immatriculation,...) et identité du donneur d'ordre au sein de la société	
Toute autre information pertinente	
Eventuellement, liste des pièces jointes	

Date et signature _____

¹ Est visée ici la qualité en vertu de laquelle agit la personne soumise à l'obligation de notification, telle que pour compte propre ou pour le compte de tiers.

² Au sens de l'article 9 1. a) de la Directive 2004/72/CE « ordre limité, ordre «au mieux» ou autres caractéristiques de l'ordre ».

ANNEXE C :
DECLARATION DES OPERATIONS DES PERSONNES EXERCANT DES RESPONSABILITES
DIRIGEANTES (version septembre 2007)

Identification du déclarant	
a) Nom et prénom(s) du déclarant ; dans le cas des personnes morales : dénomination sociale et siège social	
b) Si le déclarant est une personne mentionnée à l'article 1er, point 12) ³ , préciser les fonctions exercées au sein de l'émetteur	
c) Si le déclarant est une personne mentionnée à l'article 1er, point 13) ⁴ , indiquer : « Une des personnes ayant un lien étroit avec » et les nom, prénom(s) et fonctions de la personne avec laquelle elles ont un lien personnel étroit	
Dénomination sociale de l'émetteur	
Motif de la notification	
Description de l'instrument financier	
Nature de l'opération Acquisition ⁵ Cession ⁶	
Date de l'opération	
Lieu de l'opération ⁷	
Quantité traitée	
Prix par titre	
Montant total de l'opération (hors frais)	

Coordonnées du déclarant ou de son représentant (nom, adresse, téléphone, fax) :

Date et signature _____

³ - un membre des organes d'administration, de gestion ou de surveillance de l'émetteur,
- un responsable de haut niveau qui, sans être membre des organes visés au tiret précédent, dispose d'un accès régulier à des informations privilégiées concernant directement ou indirectement l'émetteur et du pouvoir de prendre des décisions de gestion concernant l'évolution future et la stratégie d'entreprise de cet émetteur.

⁴ - le conjoint de la personne exerçant des responsabilités dirigeantes, ou tout autre partenaire de cette personne considéré comme l'équivalent du conjoint par la loi nationale de la personne concernée,
- les enfants qui, en vertu de leur loi, sont à charge de la personne exerçant des responsabilités dirigeantes,
- tout autre parent de la personne exerçant des responsabilités dirigeantes qui partage le même domicile depuis au moins un an à la date de l'opération concernée,
- toute personne morale, patrimoine fiduciaire ou autre trust, ou toute association sans personnalité juridique dont les responsabilités dirigeantes sont exercées par une personne visée au point 12) du présent article ou aux trois tirets précédents du présent point, ou qui est directement ou indirectement contrôlée par cette personne, ou qui a été constituée au bénéfice de cette personne, ou dont les intérêts économiques sont substantiellement équivalents à ceux de cette personne.

⁵ Par acquisition, on entend non seulement les achats, mais également toute autre opération dont le résultat est l'acquisition d'instruments financiers.

⁶ Par cession, on entend non seulement les ventes, mais également toute autre opération dont le résultat est la cession d'instruments financiers.

⁷ Toutes informations utiles relatives au lieu de l'opération, dont notamment le marché concerné.

ANNEXE F:

« Market Abuse Directive Level 3 – second set of CESR guidance and information on the common operation of the Directive to the market; Réf. CESR/06-562b »



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

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

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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 speculation² 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 right³.
- 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 available⁴ 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 consideration⁵:
- 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 relates⁶;
 - 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 conditions⁷:
- 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/EC⁸ 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.
