

Brussels, 31 January 2005

EAPB Position on the CESR Consultation Paper “ Market Abuse Directive – Level 3 – preliminary CESR guidance and information on the common operation of the Directive” (CESR/04-505)

The European Association of Public Banks (EAPB) represents the interests of 17 public banks, funding agencies and associations of public banks throughout Europe, which together represent some 100 public financial institutions with a combined balance sheet total of EUR 3,000 billion and over 170,000 employees, i.e. representing a European market share of approximately 15%.

The EAPB would like to thank CESR for the opportunity to comment on the above mentioned consultation paper and welcomes the initiative to consult market players and other concerned bodies on this important issue.

The EAPB would very much appreciate CESR considering these comments and taking them into account. The comments focus on a choice of crucial issues.

The proposals which CESR made with its consultation paper are of paramount importance for the practical application of the provisions of the Market Abuse Directive and its implementing measures. Even though the rules are very detailed in general, many aspects of the Level 1 and 2 rules on market manipulation and the requirement to report suspicious transactions remain vague. Therefore the EAPB would very much welcome these aspects to be formulated more precisely. Also the setting out of certain categories of behaviour which constitutes market abuse would be very helpful in this regard.

Furthermore the compatibility of certain national market practices and European law on the basis of the criteria laid down at Levels 1 and 2 should be examined. This, in order to achieve the directive's aim to maintain generally accepted market practices while ensuring that the development of innovative market practices is not hampered.

It will be very cumbersome for the banking industry to implement the requirement introduced under Article 6(9) of the Market Abuse Directive to report transactions suspected of constituting insider dealing or market manipulation. This especially turns out to be problematic as regards the fact that compliance with the rules will take place, not in the interests of preventing violations against the ban on insider dealing and market manipulation by the banks themselves, but in such a way, that violations by other market participants can be notified to the competent authorities in order to provide them with leads for investigation and prosecution. This will transfer the responsibility for a supervisory authorities' primary task to the private service providers. When elaborating this requirement it is therefore substantial for CESR to keep strictly to the narrow framework established at Levels 1 and 2. Particularly in this context the EAPB has serious reservations concerning the following:

Paragraph 5.1

In paragraph 5.1 of the paper, CESR expresses the view that persons who are subject to the requirement to report suspicious transactions must have "the necessary systems and controls" to identify such transactions. The EAPB strongly rejects this view. The provisions laid down in the Market Abuse Directive and in the Directive 2004/72/EC impose no investigative duties on those required to report suspicious transactions which would oblige them systematically to analyse the information available to them for suspicious elements. Nor are these persons required to adopt structural provisions to prevent or detect market manipulation.

Paragraph 5.6

As regards recital 9 of the Market Abuse Directive, CESR concludes that transactions appearing innocuous at the time of their execution need to be reported if they become suspicious in the light of subsequent events or information (cf. paragraph 5.6). It is true that a person working for an investment firm or bank must report any transaction which may seem innocuous in itself, if he is already aware of further transactions, certain behaviour or other information that, viewed together with the transaction being executed, give rise to an obvious suspicion of insider dealing or market manipulation. It is also true that it may be necessary to consider details of earlier transactions to substantiate a suspicion regarding a transaction being carried out. It must be emphasised, however, that this applies only if the person arranging the transaction, knows of these circumstances or details himself. The EAPB would strictly reject any requirement to take account of information on the other side of a

Chinese wall. In contrast, CESR's conclusion is unfounded, violates the framework established by the European legislators and should therefore be corrected. Persons required to report suspicious transactions have no obligation to notify the authorities if the circumstances giving rise to the suspicion only become known after the event (i.e. after the transaction has been executed).

Paragraph 5.9

Paragraphs 5.7 to 5.10 list examples of possible signals of violations against the ban on insider dealing and market abuse. These are not meant to be conclusive or exhaustive, but to be merely a starting point for consideration of whether a transaction might be suspicious. This constitutes a sensible approach. In contrast, the EAPB does not agree with the approach of regarding the examples as a "starting point for consideration". This would imply an obligation to analyse every transaction in depth for signs of possible market manipulation. However, this is expressly not intended, neither by Level 1 nor by Level 2 rules.

Particularly the examples for possible signals of insider dealing cited in paragraph 5.9 are seen as highly problematic and need to be deleted or at least amended, if maintained. Examples a), b) and c) describe routine occurrences which, in the absence of additional circumstances lack any discernible connection to insider dealing. Yet such a connection is essential if the examples are to be regarded as effective signals. Therefore the EAPB would very much welcome either deleting these examples or at least stating that there must, in addition, be some indication that the client is in possession of insider information. Although examples d) and e) can, in principle, be considered as being adequate evidence of possible insider dealing, they are unsuitable in their present form given the scope of the notification requirement.