

Mr. A. Docters van Leeuwen
Chairman
CESR
11-13 Avenue de Friedland
75008 Paris
France

BY E-MAIL

Date 4 February 2005

Your ref.

Our ref. \276\20232217\Position Papers\b015-
276(marketabuse).doc

Re. Consultation on Market Abuse, Level 3 – preliminary CESR guidance and
information on the common operation of the Directive

Dear Mr. Docters van Leeuwen,

Ealic, the European Association for Listed Companies, aims to represent European listed companies and to promote their common interests on the European level. Ealic was incorporated in December 2002 as a non-profit association. Its membership is growing. Presently sixty-five public companies are member. A membership list is attached for your convenience.

Ealic welcomes this open consultation regarding the paper "Market Abuse Directive – Level 3 – Preliminary CESR guidance and information on the common operation of the Directive" (the "**Consultation document**"). Ealic is pleased to respond to the proposals set forth in the Consultation document, in particular with respect to the relationship between disclosure obligations for issuers and CESR's explanation of market manipulation.

Chapter 4 of the Consultation document contains a list of practices that CESR members would consider market manipulation. Ealic has reservations on the wisdom of providing such a list of practices, which would imply that such practices are manipulative *per se*, while such may not always be the case. The initial proposal to the level 2 directive (issued in May 2001) contained such list, which however was subsequently deleted on the ground that not all those practices could be considered as market manipulation. In some cases the practices listed in the initial proposal would provide an indication solely and would not constitute a presumption of any violation. Accordingly, the level 2

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Directive (2003/124/EC) itself offers some indications on what should be considered a signal of an ongoing market manipulation (art. 4).

In light of the foregoing, Ealic considers that the wording of paragraph 4.10 of the Consultation document appears too strict. It cannot be sustained that the types of practices listed would in any event contravene the prohibition on market manipulation. Such practices may at best signal the *possibility* of a violation. This is particularly the case with respect to the examples provided in paragraph 4.14 of the Consultation document. This paragraph refers to “failure properly to disclose a price sensitive piece of information which should be disclosed”. Ealic would like to point out that a failure in disclosing could be perfectly legitimate according to article 6.2 of the Market Abuse Directive (2003/6/EC) which allows the issuer to delay disclosure in particular circumstances. Indeed, a failure to disclose in a timely fashion in itself does not constitute market manipulation if it can be shown that the issuer deliberately decided not to disclose price sensitive information; only in circumstances where it cannot be argued that a postponement is justified there could be market manipulation. Moreover, a failure in disclosing may be a violation of issuers' obligations and not constitute market manipulation pursuant to article 1 of the Market Abuse Directive.

CESR indicates as another example of market manipulation the “creation of a floor in price patterns” which “needs to be distinguished from legitimate trading in shares as part of buy-back programmes or the stabilization of financial instruments”. Ealic considers that this distinction requires clarification in order to avoid that legitimate behaviours by market participants may be classified as manipulative. For instance, in many regulated markets there are liquidity providers (like specialists or market makers) whose behaviour is perfectly legal and approved by competent authorities, even if in some cases it could lead to a floor in price patterns. In some countries, liquidity providing on behalf of a listed issuer is legitimate under certain circumstances. Ealic therefore considers that such practice should be recognised as an accepted market practice.

Ealic would be pleased to enter into a further dialogue with CESR regarding this subject matter.

Sincerely,

Paul Cronheim
General Secretary

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Aegon	Mediobanca
Alcatel	Michelin
Atos Origin	Océ
Akzo Nobel	OPG
Assicurazioni Generali	P & O Nedlloyd
Autostrade	Philips
Banca Nazionale del Lavoro	PSA Peugeot Citroen
BNP Paribas	RAS Riunione Adriatica di Sicurtà
Carbone Lorraine	Reed Elsevier
Carrefour	Royal Dutch Shell
CIR	Saint-Gobain
CSM	Sanofi Synthelabo
DSM	Sanpaolo IMI
Enel	SMI
Eurotunnel	Solvay
Essilor International	Société Générale
Fiat	Stork
Finmeccanica	Telecom Italia
France Telecom	Total Fina Elf
Fortis	UCB
Fugro	Umicore
Grolsch	Unicredito Italiano
Hermès International	Unilever
IHC Caland	Vallourec
Interbrew	Veolia Environnement
Italcementi	Van der Moolen
Kas Bank	Vinci
L'Air Liquide	Vivendi Universal
L'Oreal	VNU
Lafarge	Vopak
Lagardère	Wessanen
LVMH	Wolters Kluwer
Marzotto	

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Organisations of Listed Companies

- **Association Française des Entreprises Privées – Association des Grandes Entreprises Françaises (AFEP)**
- **Association Nationale des Sociétés par Actions (ANSA)**
- **Assoziane fra le società italiane per azioni (ASSONIME)**
- **Association belge des sociétés cotées (ASBL) - Belgische vereniging van beursgenoteerde vennootschappen (VZW) – (ABSC – BVBV)**
- **Vereniging Effecten Uitgevende Ondernemingen (VEUO)**

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