



Asociación Española de Banca

**COMMENTS FROM THE SPANISH BANKING ASSOCIATION TO SECTION V
OF THE CESR "LEVEL 3-PRELIMINARY CESR GUIDANCE AND
INFORMATION ON THE COMMON OPERATION OF THE MARKET ABUSE
DIRECTIVE"**

Possible Signals of Suspected Insider Dealing or Market Manipulation Transactions

General comment:

We agree with one of the basic principles of the Preliminary Guidance, which states that analysis of transactions should be carried out within reasonable terms and this implies, in our view, that the assessment should be done on grounds of (1) the nature and features of the transaction itself and (2) the circumstances that surround the transaction, reasonably considered. In this line, we miss in the Preliminary Guidance an explicit mention that clarifies that circumstances to be taken into account by firms in this assessment should be publicly available to market participants, excluding those circumstances or information that cannot be easily known or accessed or those circumstances which market participants' employees are not reasonably supposed to know in the normal course of business. As an example, some 'market manipulation' signals focus on reference factors such as the day "of issue of a related derivative/convertible" or "the valuation of a position", factors that may or may not be generally available to market participants. A "best effort" approach in this regard is advisable.

Paragraphs 5.6 y 5.9 e) :

According to CESR Preliminary Guidance, the duty of investment firms and credit institutions extends not only to transactions that are being carried out but also to those that might retrospectively become suspicious, in the light of subsequent events or information.

In our view, this goes beyond the Directive's purpose. The duty of notification, as we see it in light of the Directive, is mainly defined as a preventive measure or "first line" deterrent, rather than an obligation of the firms to investigate and to undertake an extensive supervision of their clients' trading activity. The latter clearly goes beyond the scope of market participants' main purpose and falls within the scope of bodies vested with powers of a public nature. These official bodies are supposed to have the global perspective (opposite to the partial and limited one had by firms) necessary to approach misbehaviour and to exercise investigation and eventually sanction powers.

Although we consider firms should contribute to foster market integrity (and this justifies a duty of reporting suspicious transactions like the one set out in the Directive), forcing firms to allocate resources to discharge police powers, not only focused on transactions and immediate circumstances that surround them, but also on subsequent or new-discovered facts and information, that must be systematically treated and put in a context to make sense, seems to go far beyond what is meant with this preventive measure in the Directive.

Paragraph 5.9 b) and c) :

These two signals are vague and should be complemented with additional elements or even combined with each other or other factors to be considered a real sign of suspicion. Considered in themselves, these two types of behaviour shall respond to legitimate purposes in 90% of the cases, so they do not seem to serve their purpose any more. On the contrary, keeping them as signals should lead to a high degree of uncertainty.

Paragraph 5.10 c) :

Again we go back to our comment on paragraph 5.6: this provision assumes that firms should go into past facts or information, what it appears to belong to a formal investigation rather than to a reasonable analysis of transactions as they are taking place. In our view, circumstances that have to be evaluated by firms should necessarily be limited to a specific and reasonable time frame before and after the transaction is effectively carried out.