European Association of Co-operative Banks
Groupement Européen des Banques Coopératives
Europäische Vereinigung der Genossenschaftsbanken

Mr.
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E-MAIL

EACB position on market abuse additional level 2 implementing measures

Dear Mr. Demarigny,

The European Association of Co-operative Banks (EACB)[1] acknowledged CESR's consultation paper on market abuse additional level 2 Implementing Measures. The EACB would like to highlight some important issues by the following:

We welcome the call for evidence, which preceded publication of the consultation paper. The hearing held with market participants on this present document represents a welcome development in that it is crucial to have practitioners' view to determine whether or not market abuse is involved. Unfortunately, the consultation period was quite short. Hence, we can only give you more general replies.

Cost-benefit analysis of any additional implementing measure:

All additional level 2 implementing measures should be preceded by a *cost-benefit analysis* (see recital 43, 8. indent of the market abuse directive).

Cost-benefit-analysis should primarily apply to "insider lists" and "suspicious transactions", where comprehensive and costly obligations are mandatory for addressees; they must also offer additional benefit when it comes to prosecute market abuse.

[1] The European Association of Co-operative Banks represents over 4.500 co-operative credit institutions active in all the EU Member states and serving over 100 Million customers. Co-operative banks are predominantly retail banks whose client base is made up of private customers and SMEs.

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Insiders' Lists (questions 10-16):

It should be possible for investment firms to resort to already existing Chinese-Walls-procedures (lists of material sensitive information maintained there under and of employees who have reported these sensitive information to the Compliance-Officer), e.g. as laid down in article 10, 1. and 5. indent ISD 93/22/EEC. These organisational systems enable investment firms even now to inform the competent authority at any time if it is reasonably suspected that employees have/could have any information which could lead to market abuse. With regard to article 6.3 subpara. 3 of the market abuse directive, the investment firms must be able to refer to these existing systems accepted by the competent authority under the ISD when it comes to reporting requirements. N. 66 of the consultation paper should be integrated into CESR's advice that it ensures, that similar/equivalent procedures are admissible, thereby enabling the investment firm in question to fulfil the requirements of article 6.3, subpara. 3 of the market abuse directive. In case internal persons have regular access to inside information, it should be sufficient to establish a permanent list. In that case it should therefore not be required to establish a separate list additionally with regard to each matter or event when it becomes inside information.

Moreover, updating the insiders' list periodically should be enough to comply with article 6.3 of the market abuse directive.

Suspicious Transactions (questions 21-24):

The person obliged to report shall not be actively mandated to prove transactions, either before or after execution. CESR advices should be reworded to state that reporting requirements shall only apply where, in the context of daily business, facts emerge from which it can be concluded without further ado that the market has been manipulated (according to article 2 of the market abuse directive). We therefore suggest deleting the two first sentences in advice n. 94 2. bullet point and substituting "has sufficient indications" by "has palpable indications" in the third sentence. Only in this case, can one speak of "reasonable suspects" in the sense of article 6.9 of the market abuse directive. Advice n. 94 first and third bullet points have also to be deleted because they tend towards an active obligation to proof for investment firms.

It is not entirely clear whether the duty of notification is also applicable to transactions executed for own account or for the account of affiliated parties. If this would be the case, the requirement to notify suspicious transactions would result in self-incrimination. As a consequence, a requirement to notify suspicious transactions should in any case be limited to transactions of clients that are unrelated parties.

We would like to draw attention to the fact that the person obliged to report will find himself in a tense relationship: on the one hand, if he does not report, he will be penalized (article 14 market abuse directive), on the other hand he is obliged to keep customer data confidential (see advice n. 83 consultation paper). This requirement calls for a very explicit and narrow definition of the obligation to report.

Investment firms are already obliged to report on transactions carried out in financial instruments dealt in on a regulated market to their competent authorities (article 20.1.b ISD). In connection with other information, which must be given to the authority and to the market, e.g. ad-hoc reports, the competent authority may check whether market manipulation is at stake. Therefore, the obligation to examine transactions by the competent authorities must not be shifted to investment firms by an extensive interpretation of article 6 of the market abuse directive but remain in the hands of the competent authority.

Finally, CESR indicates that in case of notification of transactions that are reasonably considered as suspected, the banks and investment firms shall be exposed to liability vis-à-vis their clients. An unconditional indemnification against this liability shall in any case be granted.

We stay at your disposal for any further question.

Sincerely,

Hervé GUIDER
Secretary General