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EUROPEANISSUERS' RESPONSE TO THE REVISION OF THE MARKET ABUSE DIRECTIVE (MAD) DATED 25 JUNE 2010

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INTRODUCTION

EuropeanIssuers welcomes the European Commission's initiative to review the Market Abuse Directive (hereinafter MAD) in order to reduce the burden for the functioning of the markets and make the MAD framework more effective.

The obligations set out under the MAD have proved to be in some cases very burdensome for all companies, in particular the obligation to maintain insider lists and the obligation to notify managers' transactions at a very low threshold. We would not therefore be happy to see an extension of the MAD rules on the basis of the current framework, which should be simplified for all companies.

We also believe that there is a need for a more holistic review of the burdens on smaller and mid-cap companies and of the appropriate regulatory approach for primary and secondary markets, particularly growth markets for smaller companies, rather than looking at the individual measures in each directive. There is a case for considering the distinction between MTFs that serve only a secondary market function and those which serve growth markets and have a primary market function. If there were to be such a distinction, it would be important that retail investors could see that the level of rules on "listing" MTFs can be (but is not always) lower than a regulated market, or that the level of rules for different market segments may differ.

While we welcome the opportunity to comment, we would, however, like to express our disapproval of the recent tendency for the Commission to publish consultations with very short deadlines. This makes it very difficult for associations such as ourselves to obtain views from our members. We therefore call on the Commission to revert to its own commitment to best practice in all future consultations in order to ensure that genuine consultation with the widest possible range of European stakeholders is achieved.

QUESTIONS

1 - Should the definition of inside information for commodity derivatives be expanded in order to be aligned with the general definition of inside information and thus better protect investors?

We support the proposal provided that it does not create additional disclosure obligations on the issuers of the underlying instruments, as they are not necessarily involved in the creation of the commodity derivatives.

2 - Should MAD be extended to cover attempts to manipulate the market? If so why? Is the definition proposed in this consultation document based on efficient criteria to cover all cases of possible abuses that today are not covered by MAD?

We don't object to an extension of the MAD to cover attempts to manipulate the market.

3 - Should the prohibition of market manipulation be expanded to cover manipulative actions committed through derivatives?

Yes.

4 - To what extent should MAD apply to financial instruments admitted to trading on MTFs?

5 - In particular should the obligation to disclose inside information not apply to issuers who only have instruments admitted to trading on an MTF? If so why?

6 - Is there a need for an adapted regime for SMEs admitted to trading on regulated markets and/or MTFs? To what extent should the adapted regime apply to SMEs or to "companies with reduced market capitalisation" as defined in Prospectus Directive? To what extent can the criteria to be fulfilled by SMEs as proposed for such an adapted regime be further specified through delegated acts?

We strongly agree that there would be a need to adapt the MAD before extending it to SMEs admitted to trading on regulated markets and / or MTFs. There were very good reasons for some Member States, competent authorities and exchanges to adapt lighter regulatory regimes for their smaller companies.[1] The extension of the MAD to trading on regulated markets and / or MTFs should therefore only be carried out if the MAD regime itself is simplified[2]. Extending the MAD as it is now would add additional costs to smaller companies to access the market without extending equivalent benefits in replacing the national regimes.

In the case of the MAD, however, we believe that it is questionable whether some of the obligations on companies actually achieve a useful purpose, as was highlighted in the Q&A discussion at the Commission's MAD conference on 2 July 2010. On that basis, we consider that the regime should be simplified for all companies in the EU, not just the smaller issuers. We would consider revision / simplification of the areas highlighted in the Demarigny Report to be

[1] In France, the exchange-regulated market Alternext benefits already from the extension. However, a lighter regulatory regime applies that nevertheless ensures transparency for investors. Similarly in the UK, the exchange-regulated AIM market has avoided the more burdensome elements of the directive such as the requirement to maintain insider lists.

[2] As underlined by the Report by Fabrice Demarigny, *An EU-listing Small Business Act, Establishing a proportionate regulatory and financial environment for small and medium-sized Issuers listed in Europe*, March 2010. See in particular Recommendations 13 to 15 on Market Integrity.

[3] See also the Report by the European Securities Markets Expert Group on Market Abuse: the EU legal framework and its implementation by Member States - an evaluation - 6 July 2007.

an essential prerequisite to any extension of the MAD: insider lists, market transactions and buyback programmes.

We consider, however, that the Report's recommendation that insider lists could be waived for smaller issuers, given that experience has shown that they are very rarely used by regulators in their investigations, while constituting a significant administrative burden on companies, should instead be replaced by a recommendation to delete the requirement for all Member States. Instead the focus should be on ensuring that the persons likely to have access to inside information are duly informed of their legal and regulatory duties and are aware of the sanctions attached to the misuse or improper circulation of such information, and that supervisors should have access to all relevant documents[3].

See further our responses to questions 12 and 13 below.

7 - How can the powers of competent authorities to investigate market abuse be enhanced? Do you consider that the scope of suspicious transactions reports should be extended to suspicious orders and suspicious OTC transactions? Why?

8 - How can sanctions be made more deterrent? To what extent need the sanction regimes be harmonised at the EU level in order to prevent market abuse? Do you agree with the suggestions made on the scope of appropriate administrative measures and sanctions, on the amounts of fines and on the disclosure of measures and sanctions? Why?

9 - Do you agree with the narrowing of the reasons why a competent authority may refuse to cooperate with another one as described above? Why? What coordination role should ESMA play in the relations among EU competent authorities for enforcement purposes? Should ESMA be informed of every case of cooperation between competent authorities? Should ESMA act as a binding mediator when competent authorities disagree on the scope of information that the requested authority must communicate to the requesting authority?

10 - How can the system of cooperation among national and third country competent authorities be enhanced? What should the role of ESMA be?

We understand from CESR's Report on administrative sanctions that there are many differences in the Member States as regards the sanctions foreseen.

We are not sure that the review of the MAD should take in consideration the amount of the fines; this is a typical field where the national legislators should take into account the complex regime of sanctions foreseen by civil and criminal law. However, information sharing between authorities should be useful.

11 - Do you consider that a competent authority should be granted the power to decide the delay of disclosure of inside information in the case where an issuer needs an emergency lending assistance under the conditions described above? Why?

No. We believe that the responsibility should remain with the issuer and that it would be unhelpful to investors to have differential treatment only for financial institutions. Given powers being granted to the competent authorities elsewhere (ability to suspend short selling,

moves to create a workable bank resolution regime, etc) and the potential for divergent application by national authorities, we do not believe that this is either necessary or desirable.

In addition, it is difficult to define the criteria according to which the competent authority should be granted the power to decide the delay of disclosure of inside information. During the financial crisis it appears that banks received assistance through different mechanisms: loans, capital involvement through preference shares, etc. In any case, if the Commission intends to introduce any disposal it should refer to "systemic risk or "Member State's financial stability" and this criteria should be evaluated by Prudential authorities instead of market authorities.

12 - Should there be greater coordination between regulators on accepted market practices?

We agree that accepted market practices ("AMPs") may have an impact on a cross-border basis and that greater co-ordination would be helpful. In particular, we support the recommendations of the Demarigny Report that EU harmonisation of the activity of liquidity providers would assist the liquidity of smaller issuers' shares admitted to trading on EU regulated markets. Liquidity providers, acting with appropriate Chinese walls and by virtue of an agreement with the relevant issuer, should be able to provide their services across the EU. In addition, article 3 of the Regulation (EC) 2273/2003 on buyback programmes[3] should accept that one of the purposes of such programmes may be to facilitate the activity of such providers. The inclusion of such AMPs in the safe-harbour regime would solve cross-border problems. In this regard, it is not at all clear why such an exemption might be inappropriate, as stated by the Commission in the previous consultation document; the protection of investors should be ensured by the application of the specific conditions set forth by the Regulation.

One possible solution in order to solve the cross-border implications could be to establish a kind of coordination at the level of ESMA.

Moreover we support the Commission's view according to which AMPs should cover also MTFs, subject to our earlier comments in response to question 6 above.

We would like also to reiterate some comments regarding AMPs already illustrated in the previous consultation. According to article 1 of the MAD, the market participant is exempted from punishment provided that his reasons for doing the transactions are legitimate. This means that the burden of proof is on the market participant and that transactions are in principle deemed to be prohibited. Consideration should be given to whether the burden of proof should be reversed in the sense that the reasons for trading should be deemed to be legitimate and accepted unless the competent authority declares them as being illegitimate. In this way an amendment of level 1 would be necessary[4].

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[3] Even if in the last level 3 guidance CESR put the buy-back programmes as an issue to deal with, it did not release any clarification on the topic (see CESR/09-219).

[4] As an alternative, Level 3 could come forward with presumptions of legitimate reasons. Moreover, as highlighted by CESR in the overview of the sanctions under the MAD, the diversity of measures and sanctions applied by the Member States may be relevant. According to the applicable regime in some Member States, the AMPs and the existence of a legitimate reason lead to an exemption from the application of administrative sanctions but not from the application of criminal ones (e.g. Italy). It would be important to ascertain if the same happens in other Member States because differences in this field could create unjustified disparities and stand in the way of a level playing field: more information by way of a survey of CESR members would be welcome.

13 - Do you consider that it is necessary to modify the threshold for the notification to regulators of transactions by managers of issuers? Do you consider that the threshold of Euro 20,000 is appropriate? If so why?

a) We support the Commission's proposal to raise the threshold, although we note that the Demarigny Report recommended notification of transactions representing more than 0.02% of the company's market capitalization, rather than a low amount in euro. If market capitalization is not to be chosen as the basis for disclosure, we would suggest that a more appropriate threshold would be 50.000 euro. This would reduce the administrative burdens on issuers.

   Once the threshold of 50.000 euro has been reached, the calculation of the threshold should restart from zero until 50.000 euro has been reached again. A different formulation does not have any market signaling and it would create the same problems that we already have with the criticised threshold of 5.000 euro.

   We support the proposal to notify, at least to the competent authority, the existence of transactions conducted at the threshold indicated above. Member States should ensure that public access to information concerning such transactions, on at least an individual basis, should be readily available.

b) It should be clarified that the exemption in article 2/3 covers the issue of transactions of a portfolio manager performed in the interest of an issuer's director provided conditions are met in order to guarantee the independence of the portfolio manager. The Trading Plan Instrument of 2009 in the UK gives a valid illustration of the types of trading plans: under these provisions a director may either set up a trading plan giving a portfolio manager the discretion over the dates, prices and quantities of securities that can be dealt; or enter into a trading plan via a written or computer-based algorithm that determines these parameters. In these situations, the director of a company doesn't violate insider trading rules provided that the instructions have been given before the director gets any relevant inside information.

14 - Do you consider that there are other areas where it is necessary to progress towards a single rulebook? Which ones?

We would note that the revised Emissions Trading Scheme Directive (2009/29/EC) includes a provision in Article 1.12 to the effect that

"The Commission shall, by 31 December 2010, examine whether the market for emissions allowances is sufficiently protected from insider dealing or market manipulation and, if appropriate, shall bring forward proposals to ensure such protection. The relevant provision of the European Parliament and of the Council of January 2003 on insider dealing and market manipulation (market abuse) may be used with any appropriate adjustments needed to apply them to trade in commodities."

It would be helpful if the provisions on market abuse could extend to secondary markets for emissions trading in line with the position adopted on July 14th 2010 by the Climate Change Committee on the ETS Regulation for primary markets.

15 - Do you consider that it is necessary to clarify the obligations of market operators to better prevent and detect market abuse? Why? Is the suggested approach sufficient?

As for market operators, there is no definition in the MAD. The MiFID has a definition of "market operator"[5] which refers (only) to a person who manages and operates the business of a regulated market. In other cases the MiFID refers to the "market operator" as the subject who manages and operates the business of the MTFs[6] but this case is not included in the general definition above mentioned.

Due to the fact that the MiFID has a partial definition which includes only the subject managing a regulated market (and not MTF) and that the definition of market operator is not included in the MAD, it should be necessary to coordinate the two Directives and insert a definition of "market operator" in the MAD. This definition could cover both cases (regulated markets and MTFs) and the same definition could be used (and modified) in the review of MiFID.

***EuropeanIssuers** was set up to represent the interests of publicly traded companies in Europe, which are subject to complex rules on issues such as shareholder rights, corporate governance and reporting and market regulations. Our members include both national associations and companies from all sectors in 14 European countries, where there are some 9.200 such companies with a combined market value of some € 5.000 billion.*

EuropeanIssuers' ultimate goal is to achieve well functioning European financial markets which serve the interests of their users, together with good corporate governance and responsible share ownership. More information can be found at www.europeanissuers.eu.

[5] See art. 4, n. 13.

[6] See art. 4, n. 15.