

Call for evidence

Review of Directive 2003/6/EC on insider dealing and market manipulation

(Market Abuse Directive)

This document is a working document of the Commission services for consultation. It does not purport to represent or pre-judge any future formal proposals of the Commission.

You are invited to comment on the views reflected in this paper. These views are only an indication of the approach the European Commission may take and are not its final policy position.

This exercise forms part of the **Action Programme for Reducing Administrative Burdens in the European Union**¹. In addition it addresses some of the issues covered in the Commission Communication **Driving European recovery**², which is intended to tackle the most important shortcomings in the markets that have been observed in the current financial crisis. In this context, we would welcome the views of all interested stakeholders.

As well as responding to the specific proposals and questions, we also ask you to describe any alternative approaches you think would achieve our objectives.

Your comments will help the Commission services to develop proposals to review the Market Abuse Directive. We are keen to fully understand and assess the financial and other impacts of our proposals and any alternative approaches. Therefore, we ask you to comment on the effectiveness of the provisions, on compliance costs, impacts on competition and other impacts, as well as on other implied costs and benefits. These elements will be taken into account when we prepare our final policy position.

Where possible, we are seeking both quantitative and qualitative information.

We are also keen to hear from you on any other issues you consider important.

You are invited to send your contributions until 10 June 2009 to markt-g3@ec.europa.eu

This call for evidence of the Commission services will contribute to the intended review of the Market Abuse Directive by the Commission. In this review the Commission services will look, on the one hand, at the possibilities of simplification and burden reduction and, on the other hand, at ensuring greater effectiveness of the MAD in order to respond adequately to any deficiencies or risks that may have arisen as in the current financial crisis.

¹ Action Programme for Reducing Administrative Burdens in the European Union; COM(2007)23 final (24 January 2007).

² COM (2009)114 of 4th March 2009.

MARKET ABUSE DIRECTIVE (MAD)

CALL FOR EVIDENCE

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1. INTRODUCTION

1.1. Context

The Market Abuse Directive³ and the associated implementing measures (three "level 2" Directives and one Regulation⁴) entered into force more than four years ago. The new rules established a common legal framework to deal with the negative practices of insider dealing and market manipulation in the EU financial markets. The 27 Member States transposed these texts into their national laws and regulations.

The Commission intends to bring forward in 2009 legislative amendments to those provisions that create excessive burden for the functioning of markets or, more generally, are considered inappropriate for the effectiveness of the MAD framework.

Indeed since the entry into force of the MAD rules, several new developments and trends relevant to market integrity and to fighting market abuse could be observed:

(a) Growing importance of non-regulated markets and, especially, of equity market segments for small and medium capitalisations, which currently fall outside the scope of the MAD⁵;

(b) Increase in gross and net issuance of shares, of share buy-back volumes, of short selling and of trade volumes in general; increase in the number of mergers and acquisitions and the current financial crisis which, by leading to more volatility in equity prices, may have facilitated certain forms of abuse, such as the spreading of false rumours⁶.

(c) Other developments, like the growth of offshore financial centres charged with transmitting orders on behalf of clients, may also have made detection of abuse more difficult.

1.2. Objectives and scope of this report

At this stage, the services of the European Commission are focusing on two objectives: effectiveness of the Market Abuse framework and simplification and reduction of regulatory burden. The latter is carried out in the context of its general "Action Programme for Reducing Administrative Burdens in the European Union" to measure administrative costs arising from legislation in the EU and to reduce administrative burdens by 25% by 2012⁷.

In addition, a number of other issues, crucial for the effective operation of the MAD, are being considered in this Call for Evidence in response to significant market and regulatory developments (e.g. the appropriateness of the scope of the MAD, the duty of the issuers to disseminate inside information or the possibility to delay disclosure). The issue of supervisory and enforcement powers under the MAD is not being addressed in this document. This broad issue, going beyond the functioning of the MAD, has recently been the focus of various initiatives at EU level, including the report of de Larosière group⁸ and the forthcoming analysis on the sanctions in the main financial

³ Directive 2003/6/EC

⁴ Directive 2003/124/EC, Directive 2003/125/EC, Directive 2004/72/EC and Regulation 2273/2003

⁵ The scope of the MAD is mainly restricted to regulated markets; for further details, see point 2.1.1.

⁶ In the EU, between 2004 and 2007 the volume of mergers and acquisitions was multiplied by 2.5 and share buy-backs followed by a reduction of capital accounted for more than half of the level of emissions.

⁷ See http://ec.europa.eu/enterprise/admin-burdens-reduction/home_en.htm.

⁸ The "de Larosière group" is a high level group of independent experts established under the chairmanship of Jacques de Larosière, former managing director of the International Monetary Fund (IMF). The mandate of the group is essentially to make proposals in order to strengthen the EU supervisory arrangements.

services directives foreseen by the ECOFIN roadmap⁹. Thus, it should be addressed more appropriately at a first stage on a horizontal basis. Then the results of this horizontal exercise will be used in the review of the MAD directive.

This exercise would allow us to assess whether the provisions of the MAD framework are clear, effective and efficient when applied in practice. The current financial crisis may bring to light new issues and concerns related to tackling market abuse and other forms of misconduct in the European financial markets.

1.3. Method

The services of the European Commission take into consideration contributions from all interested stakeholders, including industry, regulators, Member States, the European Parliament and consumers.

Prior to this Call for evidence, the European Commission services requested the European Securities Markets Expert Group (ESME) to produce its opinion on the operation of the MAD. ESME delivered its report on 11 July 2007¹⁰. The European Commission services also asked the Committee of European Securities Regulators (CESR) to draw up a list of administrative sanctions and measures applicable in the Member States. CESR delivered a comprehensive report on this subject on 22 November 2007¹¹. Furthermore, the services of the European Commission also took account of further CESR work and guidance¹². In February 2008, Member States were invited to respond to a set of questions on the operation of the MAD. On 12 November 2008 the services of the European Commission organised a conference, where stakeholders (market participants, supervisors and academics) exchanged their experiences and views on the operation of the MAD regime.

1.4. Overview

The basic objectives of the MAD framework are set out in its Recital 12. The MAD has been put in place to ensure integrity of the Community financial markets and to enhance investor confidence in those markets. Measures against insider dealing and market manipulation were adopted to ensure that the same framework for allocation of responsibilities, enforcement and co-operation applies across the EU.

Available evidence and inputs suggest that the MAD regime has improved the fight against market abuse in the EU. This view prevails among the competent authorities responsible for the supervision and enforcement and the Member States, but is also held by many market participants.

The introduction of the MAD has clearly facilitated convergence of concepts and practices related to combating market abuse. The core definitions in the Directive, especially in relation to market manipulation, have been duly transposed into national legislation by most Member States.

⁹ The ECOFIN roadmap, agreed in October 2007 by EU Finance Ministers, contains a series of actions aiming at responding to the market, regulatory and supervisory weaknesses identified in the financial crisis.

¹⁰ http://ec.europa.eu/internal_market/securities/docs/esme/mad_070706_en.pdf.

¹¹ http://www.cesr.eu/index.php?page=document_details&id=4852.

¹² For instance, the June 2007 CESR report on CESR members' powers (<http://www.cesr.eu/index.php?docid=4853>) and the CESR level 3 guidance and information on common operation of the MAD to the market.

Moreover, the competent authorities are employing increasingly similar tools and approaches to fight market abuse and are cooperating closely.

At the same time we are aware that it is rather difficult to measure the impact (performance) of this framework and formulate solid conclusions. There is only fragmented evidence based on empirical studies concluding that: (i) in the UK the share of suspicious transactions before issuers' regulatory announcements has been relatively constant over the last few years and (ii) in the Netherlands suspicious activity in the form of illegal insider trading and leaks of information has significantly declined since the MAD entered into force, but only for some firms with low capitalisation¹³.

Without prejudging the outcome of this Call for evidence, the services of the European Commission consider that at this stage certain elements of the MAD framework could be usefully reassessed. This refers, in the first place, to the simplification of some information requirements, in the cases where administrative burden which they entail may be disproportionate. Secondly, we think it is important to ensure that specific rules on treatment of inside information could be waived in exceptional cases, in order to take account of situations where the viability of the issuer is at stake. Thirdly, further amendments could contribute to better efficiency of the MAD framework (e.g. clarification of the conditions under which issuers can delay disclosure of inside information; clarification of rights of competent authorities to access telephone and data traffic records; disclosure on short selling).

A list of the possible policy proposals on the major issues identified is provided in the final part of this Call for evidence (Part 3, page 19).

2. ANALYSIS

2.1. THE SCOPE OF THE MAD

2.1.1. Only regulated markets?¹⁴ (Articles 1(3) and 9 of Directive 2003/6/EC)

The current scope of the MAD is largely determined by the reference to regulated markets: the Directive deals with market manipulation and insider dealing in financial instruments admitted to trading on regulated markets in the EU or for which a request for admission to trading on such market has been made, "*irrespective of whether or not the transaction itself actually takes place on that market*". In the case of insider dealing it also covers financial instruments, not admitted to trading on a regulated market, but the value of which depends on the value of financial instruments admitted to trading on a regulated market (or for which a request for admission to trading has been made).

However, last years have seen major increase in volumes traded outside the main trading venues operating as regulated markets. This major market shift, facilitated by the entry into force of the Markets in Financial Instruments Directive (MiFID)¹⁵ could be a strong argument for expanding the scope of the MAD beyond regulated markets, and in particular, for including multilateral trading facilities (MTFs¹⁶).

¹³ For the FSA study see: *Updated Measurement of Market Cleanliness*, www.fsa.gov.uk/pubs/occpapers/op25.pdf; for the AFM study see: *The effects of a change in market abuse regulation on stock prices and volumes: Evidence from the Amsterdam stock market* <http://www.afm.nl/marktpartijen/default.aspx?DocumentId=9910>

¹⁴ Concerning the specific issue of commodity derivatives, see point 2.1.3.

¹⁵ Directive 2004/39/EC

¹⁶ Defined in Article 4(15) of the MiFID.

The idea of a more extensive scope is not new: the explanatory memorandum to the original Commission proposal¹⁷ already underlined that “*market integrity can only be guaranteed with a general application of prohibitions of abusive behaviour*”. Moreover, in acknowledgement of the growing importance of marketplaces other than regulated markets in the overall trading volumes in financial instruments and of new market abuse risks involved, some Member States have already extended, at national level, the application of the MAD framework to certain “non-regulated markets”¹⁸. Additionally, pursuant to Article 26(2) of the MiFID investment firms and system operators that manage an MTF are now required to report to the competent authority significant breaches of their rules and disorderly trading that may involve market abuse. However, this provision does not automatically extend the scope of the MAD to every market abuse committed on MTFs: in some instances insider dealing and market manipulation still could not be sanctioned.

It has also to be born in mind that MiFID intended to bring a level playing field between the various trading systems, i.e. regulated markets and alternative trading platforms, notably MTFs. However, due to the limited scope of application of the MAD, MTFs are subject to less stringent requirements, in terms of transparency and integrity. This unequal treatment may generate competition distortions between different types of markets.

On the other hand, there are also some technical arguments against an extension of the scope of MAD to cover MTFs : (i) financial instruments admitted to trading on regulated markets already amount to a rather broad scope; (ii) the scope of the MAD is defined in such a way that it can potentially be extended to additional financial instruments if they are admitted to trading on a regulated market; (iii) this scope also covers insider dealing on MTFs if the financial instrument concerned is at the same time traded on a regulated market¹⁹; in this regard if MTFs were to prove very successful in the years ahead in terms of trading volumes, this would probably mainly concern financial instruments already admitted to trading on regulated markets²⁰; (iv) any extension of the scope would need to establish criteria, notably on size of markets, to delimit adequately the new scope; in particular any extension of some MAD obligations to MTFs would need to be proportionate and adapted to their market model (v) some provisions of the Directive (e.g. on stabilisation or even on disclosure of inside information) would probably be less suitable for less liquid “non-regulated markets”.

The services of the European Commission recognise that there are divergent arguments as to the extension of the scope of MAD to “non-regulated markets”. However, bearing in mind the need to secure integrity of markets and to ensure a level playing field between regulated markets and alternative trading platforms it is worth examining the possibility of extending the MAD scope to MTFs.

☞ *Question: Do you consider that the scope of the MAD should go beyond regulated markets? In particular, should it be extended to cover MTFs?*

¹⁷ Proposal for a Directive of the European Parliament and of the Council on insider dealing and market manipulation (market abuse), COM/2001/0281; <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52001PC0281:EN:HTML>

¹⁸ The AIM and PLUS market in the UK, Alternext in France, unofficial markets in Germany, MTF in Spain and Luxembourg, etc.

¹⁹ The conclusion is a little bit different for market manipulation: Article 9 of the level 1 Directive states that the MAD shall apply ... “*irrespective of whether or not the transaction itself actually takes place on that market*”; “*the transaction*” referred to is certainly the one made to benefit from a manipulation (by false information or by orders/transactions) committed only on a regulated market. However, if such a manipulation is committed, and if a profit is (also) made on an MTF or OTC, this profit can be taken into consideration for deciding on the level of the sanction.

²⁰ In accordance with Article 9(1) of the level 1 Directive, abuse could then fall within the scope of MAD. The present statistics on MTF volumes are not very precise, but they show that the non-OTC part of transactions handled on MTFs is probably around 10% of the global amount of transactions and that it is concentrated mostly on a limited number of blue-chips or at least on shares admitted to trading on regulated markets.

2.1.2. What kind of financial instruments should be covered by the MAD, especially in comparison with the MiFID? (Article 1(3) of Directive 2003/6/EC)

The definition of financial instruments in the MiFID is more recent and significantly broader than the one in the MAD. In particular, MiFID-defined financial instruments also include certain types of derivatives: contracts for differences (CFDs), credit default swaps, climatic derivatives and emission allowances derivatives that are not covered by a corresponding definition in the MAD. This raises the question whether a reference in the MAD to the MiFID definition of financial instruments would be desirable and justified in order to clarify the treatment of transactions in these derivative instruments under the MAD.

We may distinguish three categories of financial instruments covered by the MAD. First, the instruments listed in the MAD definition of financial instruments. Second, those mentioned in the last indent of Article 1(3) of Directive 2003/6/EC: “*any other instrument admitted to trading on a regulated market in a Member State (...)*”. Third, the insider dealing prohibition also applies to transactions on “*any financial instrument not admitted to trading on a regulated market in a Member State, but whose value depends on the value of another instrument [which is admitted to trading on a regulated market]*”.

Arguably, market manipulation by dissemination of false or misleading information, which currently may be sanctioned under the MAD only with respect to financial instruments admitted to trading on a regulated market, may also be committed by using instruments that are not admitted to trading on such markets but the value of which depends on such instruments. Therefore, it is worth considering whether the same treatment should be granted, in terms of financial instruments covered, to prohibitions of market manipulation and insider dealing, in order to eliminate negative incentives to circumvent the MAD framework.

Moreover, we see certain benefits of clarifying the treatment of contracts for differences (CFDs) under the MAD regime, due to their increasing use in insider dealing practices. A CFD is an agreement to exchange the difference in value of a share (or an index). It is an investment at the margin and its value is directly bound to that of the share. We could assume that if the share is admitted to trading on a regulated market, trades in a related CFD are covered by the MAD as CFDs are considered a financial instrument under the MiFID.

Concerning commodity derivatives²¹, Directive 2003/6/EC only states in Article 1(3) that “*Financial instrument shall mean (...) derivatives on commodities*”. The question then arises whether it would be helpful to define them along the lines of the MiFID definition (possibly by adding a reference to the definition given by the MiFID as far as regulated markets are concerned). Directive 2004/39/EC provides a certain degree of precision on the concept of commodity derivative (in Annex 1, section C, points 5, 6 and 7). It refers to the legal technique which they use (options, futures, swaps, forwards or other contracts), to the form of settlement (cash/physical) and to the type of market (regulated/MTFs) on which they are traded²².

In order to clarify the scope of application of the MAD in relation to the various types of financial instruments currently traded on the EU financial markets, the definition of financial instruments in the MAD could be aligned with the definition of financial instruments provided for in MiFID.

²¹ Concerning the volume of commodity derivatives traded on regulated markets in the EU, at the end of May 2008 the estimated notional value of outstanding contracts for Brent and West Texas Intermediate futures in ICE Futures was \$144 billion.

²² The MiFID level 2 Regulation 1287/2006 does not specify further the concept of commodity derivatives traded on regulated markets.

⚡ *Questions: Do you agree with an alignment of the MAD definition of financial instrument to the definition for the same concept provided for in MiFID? Do you think it could be useful to explain in more detail in the MAD what is meant by a financial instrument "whose value depends on another financial instrument" or to list asset classes, such as CFDs and CDS, which belong to this category?*

2.1.3. The specific case of commodity derivatives markets (Article 1(1) of Directive 2003/6/EC)

Commodity derivatives fall within the scope of the MAD when they are admitted to trading on regulated markets. Initially, the “Third Energy Package”²³ proposed tightening up the transparency requirements on “physical information” concerning energy and gas markets. Subsequently, the European Regulators' Group for electricity and gas (ERGEG) and CESR were asked to examine whether the scope of the MAD was properly addressing market integrity issues on the electricity and gas markets, if their assessment would be different if greater transparency obligations were adopted and, more generally, what are the suggestions by the regulators in order to mitigate any shortcomings.

In their report²⁴ CESR and ERGEG have concluded that there are strong interactions between physical and financial energy markets. However, both the ERGEG and the CESR share the view that extension of the scope of the market abuse regulations (on insider trading, market manipulation and disclosure obligations) in the MAD to physical products is not recommendable as it does not reflect the needs of the energy markets. They argue that there are numerous specific features of energy markets which do not justify this solution. These include, for example, existing transparency disclosures, cases of public interest where public disclosure could be delayed, the identity of the issuers of derivatives (exchanges) and the structure of energy markets for which the MAD provisions on manipulation are not very well suited.

A tailor-made market abuse framework for physical markets in a separate piece of legislation (not in financial services regulation) and an interface between regulators concerned could be a possible way forward.

⚡ *Question: Do you see a need for introduction of a market abuse framework for physical markets?*

2.2. INSIDE INFORMATION

2.2.1. Definition of inside information: the general definition (Article 1(1) of Directive 2003/6/EC and Article 1 of Directive 2003/124/EC) and the particular definition for commodity derivatives

The definition of inside information, which is essential for determining the scope of the insider dealing prohibition and for the disclosure duties of issuers of financial instruments, refers to some qualitative and potentially abstract concepts like information of precise nature, not made public, or one which is considered as having an impact on market prices. Some of these concepts (precise nature of information and information which if it were made public, would be likely to have a significant impact on price) have been further clarified by the Commission in the 'level 2' measures

²³ Two proposals for Directives amending Directive 2003/54/EC and Directive 2003/55/EC.

²⁴ See CESR/ERGEG advice on commodity derivatives; October 2008; <http://www.cesr.eu/index.php?docid=5270>

to assist market participants and regulators²⁵. In addition, CESR has developed useful guidance seeking convergence in application of these concepts among its members, by providing instructive examples and indicators on how these concepts could be understood and applied.

At this stage, it would seem that no major concerns are associated with the aforementioned concepts²⁶. However, due to the open formulation of this definition, they can occasionally raise difficulties in terms of interpretation. Nevertheless, we consider that increasingly, as a result of publicised enforcement activity of competent authorities and developing jurisprudence in this area, market participants will have better understanding of how these concepts delimit 'inside information' definition for MAD purposes. In addition, we may expect that CESR work will continue on this subject.

In this context, there does not seem to be a need to revise the concepts used to define inside information for MAD purposes.

☞ *Question: Do you share this view as far as insider dealing prohibition is concerned? (see also next point for disclosure of inside information). If not, which concepts would you advise to modify and how?*

However, the situation may be different with respect to commodity derivatives. Some concerns have been expressed that the particular definition of inside information for commodity derivatives, in Article 4 of Directive 2004/72/EC, is not as precise as the general one in Article 1(1) of Directive 2003/6/EC. In particular, unlike the general definition, it does not refer to circumstances which have, or are likely to have, a significant effect on the prices of commodity derivatives. Instead, it mentions “*information (...) which users of markets on which such derivatives are traded would expect to receive [as they are regularly given to them] (...) or which is compulsorily disseminated [in accordance with provisions (...) on the relevant underlying commodity market or commodity derivative market]*”. As a result, markets in commodity derivatives may be currently afforded a different degree of investor protection as other markets covered by the MAD, because of lesser precision in how the inside information is defined in their case²⁷.

The current MAD provisions on this issue may not offer sufficient certainty. Alignment of the definition of inside information for commodity derivatives with the general definition given by the MAD could be considered. However, if new obligations on public disclosure in the physical commodities markets were tailored in the short to medium term as a consequence of the Third Energy Package, we may need to reassess whether maintenance of the status quo is more appropriate.

☞ *Question: Do you support an alignment of the inside information definition for commodity derivatives with the general definition of the directive?*

²⁵ Art. 1 of Directive 2003/124/EC.

²⁶ In particular, the ESME report considers that “*The definition of inside information works well as a test for when a person in possession of such information should refrain from trading or encouraging trading in relevant financial instruments*”.

²⁷ Such conclusion could be supported by findings of the ERGEG and CESR, which indicate in their consultation paper that “*both findings from electricity and gas markets show that, despite a certain amount of information being published, transparency of fundamental data has to be improved. (...) Some existing rules are not precise enough or not legally binding. (...) Regulators as well as market participants see a need for an improvement of the regulatory framework with regard to information on fundamental data (e.g. generation, transmission, transportation, storage and capacity levels)*”.

2.2.2. Dissemination of inside information and deferred disclosure mechanism (Article 6 of Directive 2003/6/EC and Article 3 of Directive 2003/124/EC)

2.2.2.1 General obligation of disclosure of inside information

Article 6(1) of Directive 2003/6/EC makes it compulsory for issuers of financial instruments to inform the public as soon as possible of any inside information which directly concerns the said issuers. The purpose of this requirement is to ensure that inside information available to the issuers is not unjustifiably withheld from the markets, but is disclosed and may be priced in as soon as possible. However, this provision is importantly complemented by the deferred disclosure mechanism set out in Article 6(2), which allows issuers under specific conditions to delay the public disclosure. The disclosure duty and the possibility to delay this disclosure constitute a broad framework, under which inside information should be handled by the issuers and, as a result, play a very important role in day-to-day operations of the MAD regime at the issuers' level. Their importance was illustrated by the handling of emergency situations involving a number of issuers in the EU (e.g. Northern Rock, Société Générale²⁸).

European regulators have been informed that some issuers are experiencing difficulties with following the aforementioned provisions. These difficulties arise around the specific conditions under which the disclosure of inside information could be delayed and in particular, the requirements that (i) deferred disclosure would not mislead the public and (ii) confidentiality of the inside information is preserved. Occasionally, issuers also point to uncertainty resulting from the fact that the duty to disclose employs the same broad definition of inside information that is being used to prohibit insider dealing.

ESME has also expressed concerns on this issue²⁹. In its report it consequently proposed to remedy the situation in a number of ways, which included: (i) introducing a distinct definition of inside information for disclosure purposes (ii) narrowing the concept of precise nature employed in the definition of inside information, when used for disclosure purposes; or (iii) enlarging the scope of exceptions to immediate dissemination by deleting the “*not likely to mislead the public*” condition. Some Member States have also expressed the view that a single definition raises difficulties for issuers.

At this stage, changes in the definition of inside information for disclosure purposes would not seem to be justified. The general obligation for issuers to disclose inside information, even if based on a somewhat broad definition of inside information, has some important advantages. Firstly, it offers a strong incentive for improving public availability of information regarding the issuers and their financial instruments. It thus supports investors' confidence and is beneficial to the liquidity and efficiency of financial markets. Secondly, it is also an effective means to reduce the possibilities of insider dealing.

At this stage, no changes in the definition of inside information for disclosure purposes would seem to be justified.

²⁸ In the case of Société Générale, competent authorities needed to consider whether the delay in revealing the fraud and the implied increase in capital would not mislead the public. With regard to the Northern Rock, competent authorities needed to establish whether delaying information in the situation of the bank was possible even though confidentiality of inside information could not be ensured and whether any such delay would not mislead the public.

²⁹ ESME report stresses that: “*problems arise when the definition [of inside information] is also used to determine when an issuer has a duty to make information public. (...) Companies (...) have adopted a variety of strategies to delay the need for disclosure. Regulators have adopted inconsistent approaches to the matter (...). To some extent (...) the precise nature of the disclosure obligations pertains only to “the coming into existence of a set of circumstances or the occurrence of an event”. For abuses of inside information, the set of circumstances, which “may reasonably be expected to come into existence” or the events “which may reasonably be expected to occur” are additionally relevant*”.

⚡ *Question: Do you consider that any changes to the definition of inside information for disclosure purposes is necessary?*

It should be acknowledged that issuers are exposed to certain risks when they face the decision whether or not to delay the disclosure of inside information to the markets. These risks are notably associated with a potential breach of the MAD regime, if the relevant requirements are not duly respected. That is why it is necessary to ensure that conditions for delaying the disclosure of inside information are sufficiently precise and not unduly restricted. Issuers should be able to use this possibility in a way that is effective and in the best interest of the issuer and investors in its financial instruments. However, anecdotal evidence available to the services of the European Commission would seem to suggest that Article 6(2)³⁰ of Directive 2003/6/EC, which sets out the condition for deferred disclosure of inside information, does not always satisfy these two criteria.

There are exceptional cases where the financial viability of an issuer is at stake; in those extraordinary circumstances it may be necessary to delay the disclosure of the relevant facts to the markets in order not to put at risk the outcome of any emergency measures being prepared or taken. From a public interest point of view, this may be particularly vital in the case of banks and other issuers that are systemically important for financial stability. Under the current regime, such issuer would normally be considered as compliant with the first condition for deferred disclosure (as acting in order not to prejudice its legitimate interests)³¹. However, it would not be able to decide on delaying the disclosure unless the other two conditions are satisfied, that is: (i) such omission would not be likely to mislead the public and (ii) the confidentiality of this inside information is ensured. While issuers should always strive to fulfil all three conditions, there is merit in reconsidering whether failure to comply with either of the two latter requirements should automatically stop the issuer from using the deferred disclosure mechanism. The question becomes particularly relevant at the times of heightened market uncertainty and challenges to the financial stability.

To eliminate the impact of such ambiguities it seems necessary to clarify conditions for the delay of inside information when the financial viability of a financial institution is in danger and a central banks intervention is being organised to provide necessary liquidity; our initial reflection is that such situations should be clearly exempted from the requirement to disclose inside information. To this effect, it can be examined whether Article 7 should be broadened and exclude also financial stability measures from the scope of the MAD.

It is also useful to examine how to best address the uncertainty related to the more abstract condition for deferred disclosure of inside information (i.e. the omission would not be likely to mislead the public). In addition, we would also welcome comments regarding its role and usefulness in the overall performance of the deferred disclosure mechanism.

It may be necessary to revisit the mechanism for deferred disclosure of inside information in order to ensure (i) that the conditions for the use of this possibility are sufficiently precise and (ii) that when the viability of an issuer is at stake, they are not unduly stringent. It may be worth examining whether exemptions to the obligation of disclosure of inside information should be broadened and

³⁰ "An issuer may under his own responsibility delay the public disclosure of inside information (...) such as not to prejudice his legitimate interests provided that such omission would not be likely to mislead the public and provided that the issuer is able to ensure the confidentiality of that information".

³¹ See Article 3 of Directive 2003/124/EC "Legitimate interests" means "negotiations in course or related elements where the outcome or normal pattern of those negotiations would be likely to be affected by public disclosure (...) decisions taken or contracts made by the management body of an issuer which need the approval of another body of the issuer to become effective ...".

should exclude financial stability measures from such an obligation. Effecting changes or providing clarifications in this area may imply changes to Level 1 and/or Level 2 measures.

☞ *Question: Do you agree that the described deficiencies of the deferred disclosure mechanism need to be addressed, possibly by way of amendments to the MAD framework? Do you consider that Level 3 guidance could be sufficient?*

☞ *Do you agree that the issuer may be exempted from disclosing inside information in situations when that information concerns emergency measures being prepared in case the issuer's financial stability is endangered?*

☞ *What are other deficiencies in this area that raise major interpretation / application difficulties? What is the best way to address them?*

2.2.2.2 Disclosure duty in commodity derivatives markets

In the context of the issuers' duty to disclose inside information, as set out in Article 6(1), questions have been raised whether this general requirement is suitable for commodity derivative markets. In those markets, issuers of commodity derivatives are typically the operators of the markets (e.g. exchanges). Those 'technical' issuers in normal circumstances are not in possession of inside information that is sought to be disclosed. Due to their role in spot markets (or activity profile), certain stakeholders (or even market participants) could be better placed to disclose such inside information³².

Consideration should be given to reviewing the obligation to disseminate inside information for commodity derivatives issuers (e.g. electricity and gas derivatives).

☞ *Question: Do you agree with this approach? Can you identify cases where a modification or deletion of the obligation may be undesirable for market integrity?*

2.2.3. Prohibition of insider dealing (Articles 2, 3 and 4 of Directive 2003/6/EC)

Persons who possess inside information are prohibited under the MAD from using it by acquiring or disposing of, or by trying to acquire or dispose of, financial instruments to which that information relates. These operations or attempts may be taken for the own account of the person possessing inside information or for account of a third party, and they may be performed either directly or indirectly³³. As a key element of the insider dealing prohibition, the concept of “using” inside information should be sufficiently clear and leading to harmonised application across the EU. It should also be sufficiently broad to cover all situations where an individual takes an advantage from the possession of inside information.

However, Member States have not taken a single view on how the concept of 'using inside information' should be transposed in the implementation of the insider dealing prohibition at national level. Two broad approaches could be distinguished at this stage:

- Whenever a person being in possession of inside information trades (or attempts to trade) it is in breach of the insider dealing prohibition.

³² With regard to the energy sector CESR and ERGEG stated that: “Disclosure obligations could oblige the responsible market participants (e.g. generators, suppliers, TSOs, etc.) to disclose information which is likely to influence physical and/or futures markets prices ...”

³³ See Article 2(1) of Directive 2003/6/EC.

- Use of inside information takes place only when a person trades (or attempts to trade) on the basis of inside information.

The implications of following either of the two approaches seem to be quite significant. If the first one is followed, it would be generally sufficient to prove that the person possessing inside information knew or ought to have known that this was inside information, when the trades (or attempts to trade) were made. A relatively wide range of situations could be potentially sanctioned, as the breach is established on the basis of objective elements relatively easy for the supervisor to assess and exoneration possibilities available to the insider are limited to those explicitly stated in the MAD. According to the second approach, an insider dealing case would be established only if it is proven that the underlying motive for the trade was the possession of inside information. As a result, some situations could be potentially excluded from incrimination: (i) when the party concerned is able to persuade the competent authority that it had taken a decision to trade before possessing the inside information (e.g. by showing he had carried out research); and (ii) when the competent authority will not be able to collect evidence concerning a party's reasons for trading (as in the "*on the basis of*" concept, there is no presumption of use of inside information).

This matter has been recently brought to the attention of the European Court of Justice (ECJ), in the context of a preliminary ruling³⁴ requested by a court in Belgium. At this stage, there is merit in considering the ECJ preliminary ruling before the services of the European Commission envisage measures that would seek to clarify this apparent divergence.

👉 *Question: Would you support this approach?*

2.2.4 Three new tools to help to detect suspicious transactions

2.2.4.1 Insider lists (Article 6(3) of Directive 2003/6/EC and Article 5 of Directive 2004/72/EC)

The requirement that issuers (or persons acting on their behalf or for their account) must draw up and update insider lists³⁵ was introduced in the MAD in order to assist competent authorities in their investigatory activities and to serve as a deterrent against potential insider dealing practices within the issuer's organisation. Available feedback from the competent authorities would suggest that these objectives are being largely met: insider lists have significantly strengthened the competent authorities' ability to identify insiders who might have been involved in abusive practices. The lists have also been instrumental in raising awareness about market abuse risks that may arise in the issuer's organisation and in its business environment.

At the same time issuers and other parties to which this requirement is addressed have been distinctly critical of the compliance duties involved and legal uncertainty associated with this measure. In particular, drawing up and maintaining of insider lists may imply an important administrative and organisational burden for the entities that are expected to ensure the accuracy of the lists. This task may become particularly complex and difficult to accomplish in the context of inside information, access to which is shared in larger organisations and/or with third parties working with the issuer. Moreover, certain divergences exist in transposition of this provision across the Member States, possibly as a result of the open manner in which the relevant requirements were phrased.

³⁴ Case C-45/08, Spector Photo Groep versus CBFA

³⁵ The lists must indicate the persons working for the issuers who have access to inside information.

Regulators at national level have collectively made significant efforts to develop a common approach to a number of supervisory and compliance issues in this area, in particular by adopting the 2nd (and prospectively the 3rd) set of CESR guidance on common operation of the Directive. These efforts may nonetheless be insufficient to address problems with legal certainty, harmonised approach or workability of the insider lists' requirement in specific circumstances, and regulatory action at EU level may be necessary to tackle those problems in an effective manner.

At this stage, a number of issues could be usefully reassessed with a view to introducing modifications to the duty to draw up and maintain insider lists. Firstly, due consideration needs to be given to the administrative and organisational burden created by the compliance with this requirement. Secondly, measures that would lead to greater alignment of national implementing measures regarding insider lists could be envisaged (e.g. replacement of minimum requirements for the content of insider lists in Article 5 of Directive 2004/72/EC by an exhaustive set of requirements). Thirdly, changes that will bring legal certainty (and eliminate any remaining ambiguities) in this area could also be considered (elimination of an apparent contradiction in Article 6(3) 3 subparagraph signalled in the ESME report³⁶, treatment of third parties that co-operate with the issuer but do not work under his mandate).

The rules on insider lists may need to be re-examined in order to address concerns regarding the balance between their efficiency and the burden they entail for the entities obliged to produce them. Due consideration needs to be given to problems with legal certainty, consistency at EU level or workability of the insider lists' requirement in specific circumstances.

🔗 *Question: Do you consider that the obligations to draw up lists of insiders are proportionate?*

2.2.4.2 Transaction reporting by managers and closely associated persons and subsequent disclosure (Article 6(4) of Directive 2003/6/EC and Article 6 of Directive 2004/72/EC)

According to some stakeholders, the administrative burden associated with this measure³⁷ may have outweighed the overall benefits of having scrupulous reporting of private transactions by the issuer's management. The services of the European Commission regard this reporting duty as an important element of the MAD framework, but at the same time see merit in considering some improvements to this measure.

Firstly, the threshold for transactions that have to be reported (in Directive 2004/72/EC set at 5 thousand euros but subject to national variations) may need to be revised. Secondly, a clearer distinction may need to be considered between the detailed reporting addressed to national competent authorities and more general information on those transactions directed to the wider public, in order to avoid flooding the markets with hardly useful information. The relevant provisions of the Directive could also be made more precise on a number of technical aspects: (i) stating that the closely associated persons must communicate their transactions to the persons discharging a managerial function, so that the latter is able to calculate whether the threshold for notification has been reached and (ii) clarifying how transactions of a portfolio manager performed in the interest of an issuer's manager should be treated.

It may be necessary to reassess this measure and consider whether it provides for sufficient legal certainty.

³⁶ In which case it would probably read "*Member States shall require issuers and persons acting on their behalf or for their account to draw up (...), update (...) and transmit the lists*". See also: ESME report, p. 12.

³⁷ The measure imposes an obligation on "*persons discharging managerial responsibilities within an issuer (...) and, where applicable, persons closely associated with them*" to "*notify to the competent authority the existence of transactions conducted on their own account relating to shares of the said issuer, or to derivatives (...). Member States shall ensure that public access to information concerning such transactions (...) is readily available as soon as possible*".

⚡ *Question: Do you see a need for a regulatory action in the above areas? Would you suggest further improvements?*

2.2.4.3 Reporting of suspicious transactions (Article 6(9) of Directive 2003/6/EC and Article 7(11) of Directive 2004/72/EC)

DG MARKT services have not identified major interpretation problems with this new measure³⁸ introduced by the MAD. In terms of its effects, most competent authorities and Member States are very positive about the usefulness of the suspicious transactions reports for detecting market abuse. CESR members inform that in 2007 they received 1 057 reports signalling suspicious transactions³⁹. Indeed it seems that, as a rule, investment firms have properly assumed their obligation to report suspicious transactions. Nevertheless, further improvements in terms of efficiency could be envisaged in the text: notably the reporting requirement could be enhanced by making it approximate a whistle blowing measure⁴⁰.

The advantages of this measure seem to largely outweigh any regulatory burden. However, level 1 or 2 changes could still be envisaged in order to enhance the efficiency of the reporting mechanism.

⚡ *Question: Do you agree that rules on suspicious transactions reporting do not require modifications?*

2.2.5. The competent authorities' right of access to telephone and existing data traffic records (Article 12 of Directive 2003/6/EC)

Telephone data records can be particularly useful for obtaining proof of possession and use of inside information. Article 12 of the MAD stipulates that competent authorities must have the right to “*require existing telephone and existing data traffic records*”. At the same time, the data protection aspects of handling telephone (and data traffic) records by relevant service providers are substantially covered by Directive 2002/58/EC⁴¹ (e-Privacy Directive). Some regulators have interpreted the provisions of this latter directive as implying that they would not always be able to require access to existing telephone and data traffic records (notably in the case of administrative proceedings).

However, pursuant to Article 15(1) of the e-privacy Directive Member States may adopt legislative measures to restrict the scope of the obligation to erase or make anonymous traffic data which are no longer needed for the purpose of transmission of a communication “*when such restriction constitutes a necessary, appropriate and proportionate measure within a democratic society to safeguard national security (i.e. State security), defence, public security, and the prevention, investigation, detection and prosecution of criminal offences*”. In a recent ruling the ECJ⁴² examined this provision and concluded that “*Directive 2002/58 does not preclude the possibility for the Member States of laying down an obligation to disclose personal data in the context of civil proceedings*”. *Prima facie* this implies that if access to telephone data must be preserved to ensure effective protection of copyright, it must *a fortiori* be preserved for administrative proceedings undertaken in the public interest. However, the ECJ put great emphasis on the principle of

³⁸ “Any person professionally arranging transactions in financial instruments who reasonably suspects that a transaction might constitute insider dealing or market manipulation shall notify the competent authority without delay”.

³⁹ CESR-Pol statistics shared with DG MARKT services.

⁴⁰ See also the consultation paper on the 3rd set of CESR guidance and information on common operation of the Directive to the market was published in May 2008. The 1st set of guidance, where common format for reporting suspicious transactions was proposed, was published in May 2005.

⁴¹ Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 on processing of personal data and the protection of privacy in the electronic communications sector.

⁴² Case C-275/06, 29 January 2008, *Promusicae v Telefonica de España*.

proportionality and the necessity of reaching a fair balance between the various fundamental rights at stake.

It may be necessary to amend the MAD and/or the e-privacy Directive, in order to remove any uncertainties on the rights of the competent authorities to require this data. Article 12(2)(d) of Directive 2003/6/EC could clearly state that the power of competent authorities to require existing telephone and data traffic records in the course of their proceedings against market abuse are not limited by confidentiality restraints or other limitations on entities possessing such records that may stem from the e-privacy Directive.

☞ *Question: Do you consider that an amendment of the MAD is necessary?*

2.3. MARKET MANIPULATION

2.3.1. Definition of market manipulation by transactions/orders to trade (Article 1(2) of Directive 2003/6/EC)

Among the different types of market abuse, market manipulation involving transactions orders or trades is probably the most complex to define and analyse. It has given rise to few investigations, on average less than ten per Member State in 2007 (according to data provided by CESR members).

The definition of “market manipulation” could potentially explain the difficulty of the regulators to detect and sanction such illegitimate behaviour more frequently. It refers to very broad concepts, such as “*abnormal or artificial level [of price]*”, “*fictitious devices or any other form of deception or contrivance*” and “*dominant position*”, which are not defined in the MAD. However, this definition seems to operate well as no significant criticism was exercised by stakeholders regarding its interpretation or application. In particular, nearly all the Member States saw no need to give further details of what the impact of any manipulation on prices should be, as it is different in each case. Moreover (i) a broad definition and broad concepts are necessary to embrace all the different types of manipulation, which are then defined in detail in the sanctions decided at national level; (ii) the actual definition makes a clear difference between manipulation and speculation and (iii) the level 1 and 2 Directives give numerous examples of manipulation, which are further developed in the first set of CESR guidance on operation of the Directive⁴³.

As a consequence, no legislative change is envisaged.

☞ *Question: Do you think that the definition of market manipulation should be amended? If this is the case, what elements of the definition should be reconsidered?*

2.3.2. Accepted market practices (AMP) (Articles 1(2)(a) and 1(5) of Directive 2003/6/EC)

Article 1(2) of Directive 2003/6/EC allows for a safe harbour for market practices that could otherwise be considered as market manipulation by adding “*unless the person who entered into the transactions or issued the orders to trade establishes that his reasons for so doing are legitimate and that these transactions or orders to trade conform to accepted market practices on the regulated market concerned*”. This provision creates a possibility for the competent authorities to consider a specific behaviour as illegitimate even if it follows an AMP which they have accepted. Such situation gives rise to uncertainty for market participants, who may have difficulties in producing evidence of the legitimacy of a transaction / order to trade. However, (i) the risk is

⁴³ CESR/04-505b.

certainly limited as legitimacy and AMP will generally coincide and (ii) in exceptional cases it is desirable to allow the competent authorities to take action with respect to behaviour that nominally follows an AMP but could still be manipulative.

Moreover, the wording of Article 1(2) means that a transaction/order to trade resembling a market manipulation practice must comply with an accepted market practice in order not to be considered manipulative. In this respect European Commission services note that until today only very few Member States have established accepted market practices⁴⁴.

More importantly, it could be observed that competent authorities from different Member States take divergent views on the admissibility of a specific market practice. Such situation, though compatible with the MAD framework, may be problematic in case of financial instruments traded in more than one jurisdiction. It is worth considering why the competent authorities are reluctant to decide on AMPs, and whether the list of factors used to assess AMP could be revisited to see alignment in this area.

At this stage, consideration should be given to whether further level 3 work on this topic could help.

✎ *Question: Do you consider that the rules on accepted market practices should be amended in the MAD? Do you think there is room for greater convergence among competent authorities in this area?*

2.3.3. Exemption for buy-back programmes and stabilisation activities (Article 8 of Directive 2003/6/EC and Commission Regulation 2273/2003)

The importance of buy-back programmes and stabilisation activities has grown significantly in recent years; not only the number of these activities has increased but they have also become more complex and diverse. In this context, it may be useful to consider whether certain classes of justified buy-backs and stabilisation activities⁴⁵, which are currently not covered by the safe harbour that the Regulation 2273/2003 offers, should be included in its scope.

With regard to buy-backs, the MAD pursues three objectives: to reduce the capital of an issuer and to meet the obligations arising from debt financial instruments exchangeable into equity instruments and from employee share option programmes or other allocations of shares to employees. In this regard, views have been expressed that the number of exemptions covered by the safe harbour should be increased. Possible extensions could cover in particular the situation of financing merger and acquisition transactions. Nonetheless, it should be reminded that even when the safe harbour protection does not apply to a specific buy-back operation, it does not mean that it should be automatically considered as a manipulative behaviour. Given the variety of situations in which buy-back activity for M&A reasons could be undertaken, a broad exemption on these grounds might be inappropriate. Therefore, any change to the Regulation in this respect would need to be carefully considered from the perspective of protecting the interests of the investors.

The Regulation 2273/2003 did not require transposition into the national legal orders of the Member States and its provisions are being directly applied across the EU. It is therefore worth considering whether it has produced sufficient convergence as regards the conditions for issuers trading in their own shares. It may be particularly relevant with respect to complying with the threshold of “25% of the average daily volume of the shares in any one day on the regulated market

⁴⁴ At present, there are five accepted market practices in the Member States: two in France, one in Spain, in Austria and in Portugal

⁴⁵ Stabilisation is defined as “any purchase or offer to purchase relevant securities (...) by investment firms or credit institutions, which is undertaken in the context of a significant distribution of such relevant securities exclusively for supporting the market price of these relevant securities for a predetermined period of time, due to a selling pressure in such securities”.

on which the purchase is carried out". At this stage we would tend to conclude that this is not a major issue as, whatever methods of calculation are used across the EU, this threshold is most often far from being reached.

On stabilisation, the ESME report observes that "*the interpretation of permitted stabilisation differs across Europe*", especially on the instruments concerned (notably debt securities) and on the possibility for investment firms undertaking the stabilisation of exceeding the 5% over allotment limit. It considers that this situation implies that when a stabilisation affects more than one Member State a single supervisor should be identified and that this could be achieved by further level 3 guidance. It should be examined whether the CESR third set of guidance which addresses stabilisation could efficiently cover these issues.

Not all buy-back programmes and stabilisation activities should benefit from an outright exemption (safe harbour) under the MAD rules. Even if some of them are currently not included within the scope of Regulation 2273/2003, they are not to be automatically considered as manipulative behaviour. There may be merit in considering the specific areas where greater convergence would be desirable in the application of these rules.

☞ *Question: Do you consider that the safe harbours for buy -back programmes and stabilisation activities should be revisited? Do you think that greater convergence is desirable in the application of the Regulation 2273/2003? What would be the most appropriate way forward in this respect?*

2.3.4. Short selling

There is a global debate on short selling. The crisis prompted, in September 2008, a range of more radical temporary measures, taken in an uncoordinated way in the EU, either to ban short selling on numerous shares of financial institutions, or to ban naked short selling on these shares, and/or to require disclosure of net short positions (generally of more than 0.25% of the capital of the concerned issuers).

Short selling is an investment technique which may play an important role in supporting efficient markets. However, it could also be misused in different ways.

The Commission is considering carefully the various measures taken by Member States with respect to short selling.

We consider that divergent measures on short selling in the Member States might be difficult to reconcile with the objective of developing integrated and efficient financial markets in the EU. Market participants will need to bear undue costs of compliance with multiple EU regimes and cope with legal risks that will affect their trading activity in the EU markets. A more harmonised approach could eliminate undesirable regulatory arbitrage between Member States.

☞ *Do you see a need for a comprehensive framework for short selling? If so, should it be addressed in the Market Abuse Directive? What issues should such a regime cover?*

☞ *Should short sellers be required to report positions to competent authorities? Under which conditions should naked short selling be allowed? Should competent authorities be able to take emergency measures (e.g. temporary bans on short selling or on naked short selling) within prescribed limits when they need to address specific market risks and disruptions?*

☞ *Is there a need to enhance risk management by financial intermediaries and banks? Should investment firms and banks be required to have necessary arrangements in place to ensure timely delivery of financial instruments traded on own account or in the context of execution of clients' orders?*

3. CONCLUSION: PRELIMINARY FINDINGS AND POSSIBLE IMPROVEMENTS SUBMITTED TO CONSULTATION

The MAD framework has largely contributed in reducing cases of market abuse and market manipulation. However, some difficulties remain. Apart from issues related to measures and sanctions, which are not considered in this document but which will be addressed later when a horizontal exercise on measures and sanctions will be carried out, the services of the European Commission have identified the following issues which may require amendments to the MAD by.

A) Main issues principally linked to simplification and regulatory burden reduction

1. Insider lists of persons having access to inside information: these lists are very useful to deter abuse and to investigate them; however the obligation to draw up lists is very burdensome. Ways to reduce the regulatory burden may need to be considered. At least a greater alignment of national implementing measures could be achieved by replacing the minimum requirements of the directive by an exhaustive set of requirements.
2. Transaction reporting by managers of listed issuers: even if the measure is very useful, its scope is probably too broad which reduces its efficiency. One approach could be to restrict the scope of the obligation to report managers' transactions so that, for example, trades decided on the account of managers but without their intervention would not be concerned. Other options could be to consider increasing the threshold of 5000 euros, making a clearer distinction between reporting to the regulator and disclosure to the markets and clarifying the treatment of specific categories of trades.
3. Commodity derivatives: notably in the energy sector, issuers of commodity derivatives are "technical issuers" (exchanges) that are not in a position to possess inside information that they are obliged to disclose; as a consequence they could be relieved from the obligation to disclose inside information.

B) Main issues aiming at achieving greater efficiency of the MAD framework

The following deficiencies of the MAD will need to be addressed:

1. We will have to carefully consider a possible extension of the scope of the MAD. It could concern, on the one hand, the application of insider dealing and market manipulation prohibitions to MTFs and, on the other, extending the market manipulation prohibition to practices involving financial instruments the value of which depends on another instrument admitted to trading on a regulated market.
2. The rules which authorize issuers to delay the disclosure of inside information do not appear to be sufficiently clear and adapted to exceptional circumstances. A delay of disclosure when the financial viability of an issuer is at stake may be needed. There may also be a need to clarify the criteria for delaying disclosure of inside information and notably the criteria stating that it has to be verified that an omission of disclosure "*would not be likely to mislead the public*".
3. Telephone and data traffic records: competent authorities are sometimes limited by e-Privacy rules when seeking access to these sources for supervisory purposes. This issue could point to a need to amend the MAD.

4. Finally, European Commission will consider whether coordinated measures will need to be taken at EU level with respect to short selling.