

EU Commission Conference on the Market Abuse Directive (MAD)
Brussels, 12 November 2008
Summary of discussion

This is an informal summary and does not represent the views of the European Commission. Not all comments/questions from the floor are noted here. The presentations held at the conference are available under:

http://ec.europa.eu/internal_market/securities/abuse/12112008_conference_en.htm

The conference was organised by the "Securities Markets" Unit of the Directorate General of Internal Market and Services of the European Commission (Unit MARKT G3).

Opening remarks

Emil Paulis, Director of Financial Services Policy and Financial Markets at the Directorate General of Internal Market and Services of the European Commission (DG MARKT, Directorate G) opened the conference. He recalled the importance of the Market Abuse Directive in terms of investor protection and market integrity, notably in difficult times as the ones that markets are currently going through. He outlined the conference agenda and the importance for the Commission to regularly discuss with stakeholders.

Keynote speech: Kurt Pribil, Executive Director of the Financial Markets Authority (FMA), Austria, Chair of CESR-Pol

Kurt Pribil explained the role of CESR-Pol: this role consists mainly in promoting convergence across the EU among regulators. Their recent work has focussed on establishing level 3 guidance or "urgent groups" on important supervisory issues, notably on short selling, and to promote among regulators the resolution of cross boarder investigation issues. He underlined the interest of some of CESR-Pol previous guidance and of its current work on insider lists, share buy-backs programs and suspicious transaction reports. Concerning this last subject he gave the view that some regulators should obtain more suspicious transaction reports in the future. He also encouraged the Commission to further harmonise administrative sanctions with respect to market abuse in the EU. Finally, he stressed that CESR Pol will provide precise input on any future proposals for amendments to the MAD framework, as soon as the Commission will make them public for consultation.

Keynote speech: Pervenche Berès, MEP, Chairwoman of the Economic and Monetary Affairs Committee of the European Parliament

Pervenche Berès stressed that the MAD is a major piece of the European Financial Services Action Plan and expressed the view that at this stage in the context of the financial turmoil, *"the review of MAD is part of the rescue plan."* She regretted that the Commission had not already disclosed its intended report on the review of the MAD and said that there was no reason *"not to move all the pieces at the same time"* and to wait for other pieces of work to be finalised. Quoting the report produced by MEP Rasmussen previously this year, she asked the Commission to think about extending the scope of the MAD to non regulated markets. More

generally, she encouraged the Commission to assess carefully if some legislative amendments were needed. On sanctions, she considered that *"we are half of the way"* and that the *"regulatory burden was the price for limiting risks of abuses"*.

Keynote speech: Carmine di Noia, Deputy Director General of Assonime, member of the European Securities Markets Experts Group (ESME)

Carmine di Noia claimed that the MAD is a very good piece of legislation despite the fact that it is a minimum harmonisation directive. Because of this minimum harmonisation nature, the MAD has produced a situation where there is a lack of convergence in the EU and has paved the way for "superequivalence" at national level. In this view, the crisis is a strong incentive to do something more now. He expressed satisfaction regarding the fact that the work program of the Commission includes actions on reducing the regulatory burden generated by the MAD, especially on the issue of insider lists. He also put emphasis on some of the ESME group recommendations, such as the need to modify the definition of inside information, so that listed issuers will not be obliged to disseminate an excessive amount of inside information. He stressed the importance of false rumours in the markets and the usefulness of additional CESR guidance to encourage issuers to comment on them in specific cases.

Panel 1: The MAD's scope

Dilwyn Griffith, Head of Market Monitoring at the UK Financial Services Authority (FSA), pointed out a number of issues, notably the usefulness (a) of covering some non regulated markets by market abuse rules; (b) of getting suspicious transaction reports for OTC transactions; (c) of providing for sanctions for commodity derivatives transactions. He also mentioned that it would probably be clearer to explicitly state in the MAD that some financial instruments, notably the certificates for difference, are covered by the prohibition of insider dealings.

Ludovic Aigrot, Head of EU Affairs at Nasdaq OMX, also estimated that an extension of the scope of the MAD to non regulated markets could be envisaged, especially when MTFs trade instruments the value of which is not related to regulated markets. However he encouraged making a clear distinction between the rules on the prohibition of market abuses, and those obliging issuers to disseminate inside information. In this view, the Commission should also examine whether it is possible to link the definitions of financial instruments provided by the MAD and by the Markets in Financial Instruments Directive (2004/39/EC – "MiFID").

Anthony Belchambers, member of the Board of the Futures and Options Association (FOA), mainly focussed its speech on the enforcement of the MAD. He notably stated that (a) whistleblowing could help detecting abuses; (b) the role of investment firms is major in detecting abuses, even if they are not "policemen"; (c) the *"numbers game on sanctions can be good and bad"*; (d) we need more offences and a more proportionate approach better distinguishing the importance of different abuses.

Diarmuid O'Hegarty, Executive Director of the London Metal Exchange (LME), insisted on the specificities of abuses concerning commodity derivatives. He also stressed the difficulty to study price manipulation, and the need to increase national budgets allocated to the monitoring of abuses in the EU, especially if compared to the US.

Panel 2: Inside information

The members of the panel, Jean-Michel Van Cotte, Deputy Director of the Belgian Commission Bancaire, Financière et des Assurances, Carlo Milia, from the Italian supervisory authority (CONSOB), and Ilonia Pieczynska-Czerny, Director at the Polish Financial Services Authority, expressed the general view that the definition of inside information was functioning well.

Bertrand Legris, moderator of the panel from the Directorate General of Internal Market and Services of the European Commission, drew their attention to the fact that a certain level of criticism has been expressed by the industry on the fact that the same definition of inside information applies both for the banning of using inside information and for the obligation of listed issuers to disseminate inside information. However, the panellists did not agree with this criticism.

On the question of the definition of "*using inside information*", Mr. Van Cotte expressed the view that since no causal link between the possession of inside information and a transaction was exacted by the MAD, the enforcement by the Belgian CBFA could be considered as effective.

Concerning the different tools to prove insider dealings, the members of the panel also considered that (a) access by regulators to telephone data was essential; (b) insider lists were particularly useful for regulators; (c) cooperation among regulators in the EU had improved and was satisfactory.

Panel 3: Market manipulation

The members of the panel, Paul-Willem van Gerwen, Head of the Dutch Regulator Supervision Division, Georg Baur, Director of Financial Markets at the Association of German Banks, Andrey Bagley, Managing Director at Goldman Sachs International, Zden Hustak, Attorney at Law in the Czech Republic and Margaret Chamberlain, Head of Financial Services and Markets department at Travers Smith (moderator of the panel) agreed that (a) the market manipulation cases were increasing during the present crisis; (b) the definition of this type of abuse in the MAD functions well; (c) there is a need to further harmonize the emergency measures that were recently taken by regulators concerning short selling.

Mr. Bagley insisted (a) on the importance of looking closely at the issue of market practices, which do not work in a completely satisfactory way; (b) on the practical difficulties generated across the EU by short selling rules, e-g on the calculation of short positions, and on the fact that a huge amount of resources have been needed to understand and implement them.

Mr. Baur considered that recital 31 of the MAD directive, which provides that knowing the content of a recommendation made from public information before the recommendation became public could not amount in itself to an inside information, was not justified. He considered that such a recommendation generally impacts trades.

On buy-back programs and stabilisation, the members of the panel generally considered that no amendment to the MAD directive is needed.

Panel 4: Enforcement

Questioned by Maria Velentza, Head of Unit G3 in DG MARKT and moderator of the panel, Gérard Rameix, Secretary General of the Autorité des Marchés Financiers, outlined that the French regulator had just been granted the faculty to pronounce higher sanctions (up to 10 million euros when no profit can be proved). He stressed that the increased fragmentation of trading venues associated with MiFID may bring more technical difficulties to detect abuses; that the possibility, which exists in certain Member States like France, to grant a judge the authorisation to seize documents (especially electronic data) and to enter private premises was very useful; that criminal sanctions are not appropriate in most cases for the purposes of deterring market abuses, notably because of the slowness of criminal procedures; that settlement systems were also useful, notably to deal with the relatively minor abuses.

Scott Friestadt, Deputy Director of the Enforcement Division of the US SEC, provided an overview on the important number of market abuse cases that the SEC is dealing with; the high percentage of success of its investigations; the faculty that it has to sanction up to 3 times the potential profit generated by the abuse; the significant amounts returned to victims of abuses as a consequence of so called "*disgorgement procedures*".

Dr. Jesper Lau Hansen, professor of financial markets law at the University of Copenhagen, expressed the view that today the enforcement of the MAD is satisfactory in Denmark; that total harmonisation of sanctions was not appropriate and that the European Commission should take action before the European Court of Justice if in some Member States the sanctions they are providing for are too weak.

Looking to the future of market abuse enforcement

Carlos Tavares, Vice Chairman of CESR, Chairman of the Portuguese regulator (CMVM), made extensive reference to reports made by CESR on the powers of the regulators to enforce the MAD and notably to impose sanctions. He further considered that there was still a problem of convergence in these fields in the EU.

He notably stressed difficulties for regulators in some Member States to obtain telephone data, to freeze assets, and to publish sanctions. He also explained that the issue of false information disseminated by journalists was an important one.

Closing remarks

Emil Paulis, Director of Financial Services Policy and Financial Markets in the Directorate for Internal Market and Services delivered the final closing remarks. He highlighted the importance of better prevention of abuses and of achieving a higher level of enforcement in the EU. He also stated that the Commission is also checking that the MAD framework does not impose excessive burdens on the industry. He also said that a revision of the MAD by the Commission services is underway; appropriate proposals for revision will be published in the next months and will be subject to public consultation. Finally, he thanked the panellists and the large audience (around 200 persons).