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PUBLIC CONSULTATION ON

**A REVISION OF THE MARKET ABUSE DIRECTIVE
(MAD)**

Important comment: this document is a working document of the Commission services for discussion and consultation purposes. It does not purport to represent or pre-judge the formal proposal of the Commission.

INTRODUCTION

Adopted in early 2003, the MAD has introduced a comprehensive framework to tackle insider dealing and market manipulation practices, jointly referred to as “market abuse”. It consists of a framework directive (Directive 2003/6/EC¹), three Commission Directives (Directive 2003/124/EC²; Directive 2003/125/EC³; Directive 2004/72/EC⁴) and a Commission Regulation (Regulation 2273/2003⁵) setting out implementing measures. This consultation focuses on the revision of the framework Directive 2003/6/EC. Proposals for revisions to the implementing measures would follow at a later stage.

The MAD (the Directive and its implementing measures) has introduced a framework to harmonise core concepts and rules on market abuse and strengthen cooperation between regulators. A number of factors argue in favour of a revision of the Directive. In particular, the gaps in regulation of certain instruments and markets as a result of market developments have become more apparent, the effectiveness of enforcement has been uneven and certain provisions impose undue burdens on issuers (notably SMEs). While the financial crisis does not seem to have resulted in increased volume of market abuse in the EU, it has highlighted how markets react quickly to price sensitive information and how much this affects investor confidence in markets. The recent volatility in Euro-denominated sovereign bonds has also led to concerns about the possible role played by Credit Default Swaps (CDS) in this regard.

The Commission is therefore reviewing the MAD regime to pursue the following key objectives:

- Increase market integrity and investor protection by “filling the gaps” in coverage and modernising the legislative framework where needed as called for by the Commission Communication on Regulating Financial Services for Sustainable Growth⁶.
- Strengthen effective enforcement against market abuse as called for by the Commission Communication on Driving European recovery⁷.
- Increase the cost-effectiveness of the legislation by reducing national discretions and introducing more harmonised standards, thereby moving closer to the objective of a single rulebook and reducing undue administrative burden,⁸ especially for SMEs.
- Contribute to improving the transparency, supervisory oversight, safety and integrity of derivatives markets as laid out in the Commission

¹ OJ L 96 of 12.4.2003, p.16

² OJ L 339 of 24.12.2003, p. 70

³ OJ L 339 of 24.12.2003, p. 73

⁴ OJ L 162 of 20.4.2004, p.70

⁵ OJ L 336 of 23.12.2003, p. 33

⁶ COM(2010) 301 of 2 June 2010.

⁷ COM (2009)114 of 4 March 2009.

⁸ As called for by the Action Programme for Reducing Administrative Burdens in the European Union. COM(2007)23 final (24 January 2007).

Communication on Ensuring efficient, safe and sound derivatives markets: Future policy actions.⁹

- Increase coordination of action among national regulators and reduce the risk of regulatory arbitrage; ESMA should play a key role in enhancing a common approach by regulators as well as in ensuring greater cooperation with other important jurisdictions outside the EU, as laid out in the Commission Communication on European financial supervision¹⁰.

The public consultation is grouped into three sections:

- Rules intended to extend the scope of the Directive.
- Rules intended to enhance the effectiveness of the enforcement powers of the competent authorities, their coordination, the role of ESMA and the sanctions regime to be applied to market abuse in the EU.
- Rules intended to enhance the level of harmonization and coordination among regulators in the EU with the objective of creating a single rulebook.

This consultation is open until **23 July 2010**. Responses should be addressed to markt-consultations@ec.europa.eu. The Commission services will publish all responses received on the Commission website unless confidentiality is specifically requested.

The responses to this consultation will provide important guidance to the Commission services to prepare the Commission proposal, which is currently scheduled for adoption before the end of the year.

This review is to be seen together with the review of the Markets in Financial Instruments Directive¹¹ (MiFID) which will be completed by beginning 2011.

A. EXTENSION OF THE SCOPE OF THE DIRECTIVE

1. Introductory Comments

This section presents the issues and suggestions intended to extend the scope of the MAD.

The Commission services consider that market integrity and investor protection would be significantly enhanced by:

- Extending the scope of MAD to cover instruments which are admitted and/or traded on a multilateral trading facility (MTF) but not traded on a regulated market.

⁹ COM(2009) 563 final, 20.10.2009.

¹⁰ COM(2009) 252 final, 27.5.2009

¹¹ Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004

- Extending the scope of MAD so that it covers market manipulation by the use of OTC instruments that can influence the prices of a financial instrument traded on a regulated market or an MTF (as it is already the case when trading OTC derivatives which are admitted to trading on a regulated market when in possession of inside information).
- Prohibiting attempts of market manipulation.
- Adapting the definition of inside information for commodity derivatives.

The MAD was adopted before the Markets in Financial Instruments Directive (MiFID). The gaps in the regulation of certain instruments and markets as a result of market developments have become more apparent. Thus the review of MAD should take into account the new reality created by MiFID and extend its scope to other trading venues (notably MTFs and OTC trading) and to a greater variety of financial instruments, including financial and commodity derivatives.

Moreover, in order to favour a market driven cross-border network of trading venues listing SMEs, to increase the liquidity pool for SMEs, to reduce administrative burden when the advantages of such measure do not seem proportionate to their burden and to take into account the specificities of SMEs, it is necessary to set the basis of a harmonised regulatory framework adapted to the needs of SMEs. Thus, the Commission services consider it is necessary to create a transparent and harmonised system where MAD applies to regulated markets and MTFs but with an adapted regime for SMEs. This adapted regime for SMEs should maintain a high level of investor protection striking a balance between the protection of investors and the needs of SMEs. The Commission services consider that in the Commission proposal for a directive amending MAD, the Commission should define and specify the criteria and how the MAD requirements should be applied and adapted to SMEs¹².

2. Definition of Inside Information for Commodity Derivatives

The general definition of inside information refers to precise information relating to an issuer or a financial instrument which has not been made public, and which if it were, would be likely to have a significant effect on the prices of those financial instruments. However, for commodity derivatives there is a specific definition, which instead of referring to the effect on prices, refers to information which users of commodity derivative markets would expect to receive in accordance with accepted market practices on those markets.¹³

The impact of divergent rules on effective market oversight has been a concern for some time. In 2007 the Commission requested the advice of energy regulators (ERGEG) and securities regulators (CESR) specifically in relation to oversight of electricity and gas markets. They concluded that transparency on those markets has to be improved, and the existing rules and practices are not precise enough or legally binding.¹⁴ It would therefore benefit stakeholders and better protect investors to align the definition of inside information for commodity

¹² At a second stage those criteria could be further specified through delegated acts.

¹³ Article 1, paragraph (1)(1) of Directive 2003/6/EC.

¹⁴ CESR and ERGEG advice to the European Commission in the context of the Third Energy Package, Response to Question F20 – Market Abuse.

derivatives with the general definition of inside information in the Directive, by referring to the criterion of price sensitive information.

Therefore, in relation to derivatives on commodities, “inside information” could mean information of a precise nature which has not been made public, relating, directly or indirectly, to one or more such derivatives and which if it were made public, would be likely to have a significant effect on the prices of such derivatives or affect the price of the underlying asset. This would include notably information which is required to be disclosed in accordance with legal or regulatory provisions at EU or national level, market rules, contracts or customs on the relevant underlying commodity market or commodity derivatives market.

In their advice, CESR and ERGEG also recommended a tailor-made market abuse framework in energy sector legislation for all energy and gas products not covered by MAD¹⁵. DG ENER is currently consulting on such a regime¹⁶ which could ensure the entire electricity and gas sectors are covered by appropriate market integrity rules including an EU-level market monitoring function. The specificities of gas and electricity markets will also be relevant to gas and electricity derivative markets covered by the MAD.

3. Attempts at Market Manipulation

Manipulative behaviours are defined in a largely satisfactory manner in the Directive.¹⁷ However manipulations through orders or transactions may not always be associated with an identifiable impact on the market. The Commission services therefore consider that the existing provisions could be extended to cover attempts to manipulate the market,¹⁸ as it is the case for attempts at insider dealing which are already prohibited under the MAD.¹⁹ It would help in enforcing the market abuse prohibition as regulators would not have to prove that behaviour intended to manipulate the market actually had that effect. This would act as a strong deterrent against engaging in this form of market misconduct.

Therefore the Commission services consider that the definition of “attempt to manipulate the market” could be the entering into transactions or the issuing of orders to trade which: (a) attempt to secure, by a person or by persons acting in collaboration, the price of one or several financial instruments at an abnormal or artificial level, unless the person who entered into the transactions or issued the orders to trade establishes that his reasons for doing so are legitimate and that these transactions or orders to trade conform to accepted market practices on the regulated market or multilateral facility concerned; or (b) attempt to employ fictitious devices or any other form of deception or contrivance.

Moreover, the definitions of “market manipulation” and “attempt to manipulate the market” could be adapted so as to ensure that new patterns of activity that in

¹⁵ CESR and ERGEG advice to the European Commission in the context of the Third Energy Package, response to question 3.

¹⁶ https://ec.europa.eu/energy/gas_electricity/consultations/2010_07_23_energy_markets_en.htm

¹⁷ Article 1 paragraph (1)(2) of Directive 2003/6/EC.

¹⁸ Article 5 of Directive 2003/6/EC.

¹⁹ The importance of such a prohibition was recently signalled by CESR and by the IOSCO Task Force on Commodity Futures Markets, Final Report, Report of the Technical Committee of IOSCO; March 2009, p. 18. Available at: <http://iosco.org/library/pubdocs/pdf/IOSCOPD285.pdf>

practice constitute market manipulation and attempts to manipulate can be included.

ESMA could determine which conduct or practices by means of automated electronic trading may constitute engaging in market manipulation or an attempt to manipulate the market.

4. Market Abuse Committed Through Derivatives and on Primary MTFs

Financial instruments which are not admitted to trading on regulated markets, but are nevertheless admitted to trading or traded on MTFs, are not covered by the scope of the MAD. To date, MTFs,²⁰ which have recently captured a significant market share in competition with regulated markets, have essentially traded equities of large companies that are also traded on regulated markets.

However, today a limited (but still significant) proportion of instruments, notably some commodity derivatives and emission allowances derivatives, are only traded on MTFs, and therefore remain outside of the MAD scope. In addition, admission to trading on MTFs is not being addressed at all in the MAD. Further, a major change is under way as a consequence of market developments and initiatives following the financial crisis: more and more financial instruments which are only traded OTC for now, like CDS, are likely to be traded on MTFs (or on regulated markets). While this will be beneficial in terms of financial stability, it is also important that these instruments are subject to the MAD.

The Commission services therefore propose to extend the scope of the MAD to cover all financial instruments (including derivatives) admitted to trading on a MTF, but not admitted to trading on a regulated market.²¹ As a result, insider dealing and market manipulation of such instruments – shares, bonds, commodity derivatives, emission allowances derivatives – would be prohibited. Not only would this help to ensure a level playing field between the regulation of regulated markets and MTFs, but such an extension of the scope of MAD in the EU would also have the important advantage of fostering convergence with the US where “alternative trading systems” are covered by federal laws on market abuse.

The Commission services propose that the MAD requirements could be applied to instruments admitted and/or traded on an MTF. However these requirements would be adapted to SMEs while ensuring investor protection. In fact, applying the detailed issuer obligations in MAD to certain types of MTFs (e.g. junior markets for SMEs) would impose a disproportionate cost on SMEs that trade on them²². This would discourage SMEs from continuing to list and have an adverse effect on SME markets generally.

²⁰ The scope of MAD has been largely structured on the scope of application of the now repealed Investment Services Directive 93/22/EEC (predecessor of the MiFID), which addressed the activity of investment firms on regulated markets. The provision of the investment service of MTF has been introduced at a later stage by the MiFID.

²¹ Articles 1 and 9 of Directive 2003/6/EC.

²² For example, responses to the Call for evidence pointed out that approximately 50% of companies on the LSE AIM market have an average market capitalisation of less than £10 million and staff of less than 150 employees

Therefore MAD would apply to any financial instrument admitted to trading on a regulated market or on an MTF in at least one Member State, or for which a request for admission to trading on such a market has been made, irrespective of whether or not the transaction itself actually takes place on that market.

Prohibitions of insider dealing and market manipulation would also apply to any financial instrument not admitted to trading on a regulated market or an MTF in a Member State, but whose value depends on a financial instrument as referred to in the previous paragraph.

Prohibition of market manipulation would also apply to any financial instrument not admitted to trading on a regulated market or an MTF in a Member State, but which can have an impact on the value of a financial instrument admitted to trading on a regulated market or on an MTF.

The obligation to disclose inside information²³ would be adapted to issuers which are SMEs that have instruments admitted to trading on a regulated market or an MTF if they fulfil specific criteria which could be further specified taking into account:

- the value of the issued share capital of that company,
- the nature of the business sector in which the company operates,
- the size of the company
- the issuer ensures that the investors are informed every six months about the issuer's inside information
- the quality of the measures taken by the issuer to ensure that a person having access to inside information acknowledges the legal and regulatory duties entailed and is aware of the sanction attached to the misuse or improper circulation of such information.

5. Other extensions of scope and subsequent adjustment of definitions

As the scope of MAD has been largely structured on the scope of application of the now repealed Investment Services Directive (predecessor of MiFID), the MiFID definitions of “financial instrument,” “regulated market,” “multilateral trading facility” would now apply to the MAD regime.

Moreover, in order to adapt the MAD regime to the SMEs' needs, the definitions of “small and medium-sized enterprises” and “issuer” of the Prospectus Directive²⁴ would also be incorporated.

²³ Article 6(1) to (4) of Directive 2003/6/EC.

²⁴ Directive 2003/71/EC of the European Parliament and the Council on the prospectus to be published when securities are offered to the public or admitted to trading as amended, OJ L345 of 31.12.2003.

The Commission services are interested in receiving stakeholders' views on the following 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?**
- (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?**
- (3) Should the prohibition of market manipulation be expanded to cover manipulative actions committed through derivatives?**
- (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?**

B. ENFORCEMENT POWERS AND SANCTIONS

1. Introductory comments

The Commission services consider that increasing the effectiveness of enforcement would require:

- New requirements on transaction reporting.
- Significantly enhancing the powers of competent authorities to investigate market abuse.
- Introducing effective and deterrent sanctions.
- Cooperation between competent authorities with the assistance of ESMA.
- Cooperation with third countries.

The prompt detection and sanctioning of market abuse is key to the enforcement of MAD. As market abuse and especially insider dealing cases are generally very difficult to prove, new powers of regulators should focus on access to data.

2. New Requirements on Transaction Reporting

The crisis has put the focus on some topics which are related to market abuse and to financial stability issues, like short selling and disclosure of information by listed banks on their risks and results. When speculation uses abusive methods to manipulate prices on a market it constitutes market manipulation and is covered by MAD.

However, it may be necessary to introduce some new requirements on transaction reporting to give regulators the means to detect these abuses. Powers should also be extended to obtain information on transactions in instruments exclusively traded on MTFs and in OTC derivatives which can influence the prices of instruments traded on regulated markets or MTFs. In order to be consistent with the current regulatory approach, which provides for transaction reporting in the framework of MiFID, transaction reporting requirements should be included in the review of MiFID rather than in MAD. In addition, position limits that have been incorporated in the rules of some EU exchanges trading physically settled commodity derivatives to prevent market manipulation will be discussed in the context of the MiFID review.

To help improve detection of market abuse it would also be useful to enlarge the scope of suspicious transactions reports by firms to include reporting of suspicious orders and suspicious OTC transactions.

3. Powers of Competent Authorities

The Commission services also envisage a modification to MAD to clarify that while the e-privacy directive (Directive 2002/58/EC) applies, it does not preclude regulators from obtaining telephone and data traffic records under certain conditions when investigating suspected cases of market abuse.

It is of critical importance for proving abuse that regulators have not only the power to demand documents from any person in the course of their inquiries, but also the power to ask a judge to authorise the seizure of documents. Therefore, the powers of the competent authorities should also include at least the right to request authorisation from a judicial authority according to national rules to enter private premises and/or to seize documents.

4. Sanctions (definition, amounts, publication)

The Commission's work-programme includes the adoption of a communication on sanctions in the fields of securities, the banking sector and the insurance sector by the end of the year. In this general context the review of the MAD is of particular importance. The approach of the sanctions regime in MAD is to achieve that the sanctions against market abuse adopted by Member States are sufficiently severe that they deter those who may be tempted to commit market abuse from doing so. Sanctions should therefore be proportionate to the gravity of the infringement and the gains realised, and should be consistently applied.

The sanctioning authority for cases of market abuse rests with national regulators. MAD requires Member States to ensure that it is possible to impose administrative measures or sanctions that are effective, proportionate and dissuasive, without prejudice to the right of Member States to impose criminal sanctions. In this context, evidence by CESR²⁵ shows that there are significant differences and lack of convergence across the EU in terms of the sanctions available for market abuse as well as the application of those sanctions. At present sanctions are simply too weak in some Member States and lead to the risk of weak enforcement and even regulatory arbitrage.

Therefore, the Commission services consider that without prejudice to the right of Member States to impose criminal sanctions, Member States should ensure, in conformity with their national law, that the appropriate administrative measures can be taken and administrative sanctions be imposed against the persons responsible where the provisions adopted in the implementation of this Directive have not been complied with. Member States should ensure that these measures and sanctions are effective, proportionate and deterrent.

In particular Member States could ensure that:

- a) appropriate administrative measures should mean decisions which have at least the effect of putting an end to a breach of the provisions of the national measures implementing MAD and/or of eliminating its effect. Such administrative measures should include at least: injunctions to put an end to an infringement, temporary prohibition of an activity, correction of false or misleading disclosed information and the possibility of issuing public notices on the website of competent authorities.
- b) appropriate administrative sanctions should mean decisions which have the effect of acting as a deterrent against the breach of the provisions of the national measures implementing MAD, in particular administrative fines and periodic penalty payments.
- c) a minimum amount for administrative fines is established so as to guarantee deterrence. Where the infringement to a provision of MAD produces a direct or indirect quantifiable advantage, the amount of the fine should be at least twice that advantage, whether gain or loss avoided.

The Commission services consider that Member States could provide that the competent authority disclose to the public, at least on its website, every measure or sanction that will be imposed for infringement of the provisions adopted in the implementation of MAD, unless such disclosure would seriously jeopardise the financial markets or cause disproportionate damage to the parties involved.

²⁵ CESR "Report on Administrative Measures and Sanctions available in Member States under the MAD", 22 November 2007.

5. Cooperation Between Competent Authorities and with ESMA

The MAD has introduced a framework to harmonise core concepts and rules on market abuse and strengthen cooperation between regulators. However, the financial crisis and the situation in sovereign CDS markets illustrate that a problem of cooperation among authorities still exists.

Therefore competent authorities should cooperate with each other and with ESMA whenever necessary for the purpose of carrying out their duties, making use of their powers whether set out in MAD or in national law. Competent authorities should render assistance to competent authorities of other Member States and to ESMA. ESMA should play a key role in facilitating and ensuring a strong coordination.

In particular, they should exchange information and cooperate in investigation activities. Moreover, competent authorities should exchange information among themselves and with ESMA on investigations concerning cross-border cases and on any decision taken concerning a cross-border case. In case of necessity ESMA could co-ordinate the cross-border exchange of information and cross border cooperation in investigation activities between competent authorities.

Competent authorities could, on request, immediately supply any information required by MAD and if they are not able to supply the information they should explain the reasons both to the requesting competent authority and to ESMA. Competent authorities which receive such information should use it only for the exercise of their functions within the scope of MAD and in the context of administrative or judicial proceedings specifically related to the exercise of those functions, unless the competent authority communicating information consents that the information being used for other purposes.

The Commission services consider that the competent authorities could refuse to act on a request for information only (i) if the communication might adversely affect the security or public policy of the Member State addressed, or (ii) where a final judgment has already been delivered in relation to such persons for the same actions in the Member State addressed. In any such case, they should notify the requesting competent authority and ESMA accordingly, providing as detailed information as possible on those proceedings or the judgment.

The Commission services consider that a competent authority whose request for information is not acted upon within a reasonable time or whose request for information is rejected, should bring that rejection or absence of action within a reasonable timeframe to the attention of ESMA. In such a case, ESMA could carry out a binding mediation procedure in accordance with the ESMA Regulation.

The Commission services also consider that where a competent authority is convinced that acts contrary to the provisions of the MAD are being, or have been, carried out on the territory of another Member State or that acts are affecting financial instruments traded on a regulated market or an MTF situated in another Member State, it should give notice of that fact in as specific a manner as possible to the competent authority of the other Member State and to ESMA. The competent authority of the other Member State should take appropriate action and inform the notifying competent authority of the outcome

and, so far as possible, of significant interim developments. The competent authorities of the various Member States that are competent should consult each other on the proposed follow-up to their action.

The competent authority of one Member State may request also that an investigation be carried out by the competent authority of another Member State, on the latter's territory. The Commission services are of the view that ESMA should be informed of this request. It may further request that members of its own personnel be allowed to accompany the personnel of the competent authority of that other Member State during the course of the investigation. The investigation should, however, be subject throughout to the overall control of the Member State on whose territory it is conducted.

The Commission services consider that competent authorities may refuse to act on a request for an investigation, or on a request for its personnel to be accompanied by personnel of the competent authority of another Member State, where such an investigation might adversely affect the security or public policy of the State addressed, or where a final judgment has already been delivered in relation to such persons for the same actions in the State addressed. In such case, they should notify the requesting competent authority and ESMA accordingly, providing information, as detailed as possible, on those proceedings or that judgment.

The Commission services consider that a competent authority whose application to open an inquiry or whose request for authorisation for its officials to accompany those of the other Member State's competent authority is not acted upon within a reasonable time, or is rejected, may bring that non-compliance rejection or absence of action within a reasonable timeframe to the attention of ESMA. In such a case, ESMA may carry out a binding mediation procedure in accordance with the ESMA Regulation.

Where ESMA through the analysis of the information received is convinced that acts contrary to the provisions of the MAD are being, or have been carried out, it should give notice of that fact in as specific manner as possible to the relevant competent authority. The competent authority should take appropriate action. It should inform ESMA of the outcome and, so far as possible, of significant interim developments.

6. Cooperation With Third Countries

The financial crisis has shown that "market abuse" can have cross-border causes and effects beyond the EU Member States. It is therefore important that the competent authorities of Member States cooperate with competent authorities of third countries where it is necessary for the purposes of the MAD. In particular, competent authorities should exchange information essential or relevant to the exercise of their functions and duties. ESMA could have a coordination role in the development of cooperation agreements between the competent authorities of Member States and the relevant competent authorities of third countries.

The Commission services are interested in receiving stakeholders' views on the following questions:

- (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?**

C. SINGLE RULE BOOK

1. Introductory Comments

MAD currently offers Member States a number of options and discretions in implementing the regulatory framework, and together with different interpretations of certain key concepts, these have resulted in wide divergences in the rules applicable at national level. These options and discretions weaken the effectiveness of the legislative framework and have cost implications for firms who have to comply with different rules in different markets.

With the objective of enhancing convergence across the EU, of reducing the risk of any regulatory arbitrage, of increasing the effectiveness of the legislative framework and of diminishing costs for firms who have to comply with different rules in different markets, this section presents suggestions relevant to progressing toward a single rule book, notably by reducing or eliminating some options and discretions and by introducing the possibility of technical standards.

This section also aims to suggest possible amendments to the rules on the disclosure of inside information by issuers and the possibilities to delay that

disclosure in the very specific case where the viability of a systemically important issuer is at stake and to correct some insufficiently clear provisions.

2. Obligation to Disclose Inside Information

This section sets out a suggestion to reduce the discretion for issuers in relation to the important issue of delayed disclosure.²⁶ MAD allows issuers, under their own responsibility, to delay the public disclosure of inside information provided that: they have a legitimate interest in doing so; this delay would not be likely to mislead the public; and the information can be kept confidential. Member States have the option of requiring issuers to inform the regulator without delay of their intention to delay disclosure. There is a case for eliminating this option by making it compulsory for listed issuers to inform their regulator after the event when they have decided to delay disclosure of inside information. In such cases the risks of insider dealing increase very much. The mere existence of such a measure could help regulators to act against undue delays and have a deterrent effect on undue delays of inside information. Further clarification could be enhanced by clarifying the conditions for deferred disclosure.

Therefore 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. Member States should ensure that when an issuer has delayed the public disclosure of inside information, it should inform the competent authority of that fact immediately after the disclosure of that information has taken place.

Furthermore, in order to provide further clarity about delays in situations where financial institutions are in a grave condition with implications for systemic risk or for a Member State's financial stability (*such as the cases involving Northern Rock in the UK or Société Générale in France*²⁷), it could be desirable that the responsibility for such a decision be given to the regulator itself. The current situation where the decision is left only to the issuer does not seem appropriate given the extreme nature of the situation and the general interest at stake.²⁸

Therefore, if an issuer requires emergency assistance from a government or public body to remain viable, including emergency lending assistance from a central bank, the competent authority may determine that the obligation to disclose inside information should not apply to information about the assistance, if the competent authority is satisfied that: the entity is systemically important; that not disclosing the information would be in the public interest; and that confidentiality of that information can be ensured.

3. Accepted Market Practices

²⁶ Article 6(2) of Directive 2003/6/EC and Article 3 of Directive 2003/124/EC.

²⁷ With regard to Northern Rock, competent authorities needed to establish whether delaying information in the situation of the bank was possible in examining if confidentiality of inside information could be ensured and whether any such delay would not mislead the public (See notably the House of Common's report of January 2008). 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.

²⁸ Even if the recent practice has shown that listed banks were generally discussing with their regulators on such an issue.

Accepted Market Practices – which currently provide a de facto safe-harbour from market manipulation charges – are specific patterns of market behaviour endorsed by supervisors in order to address local market needs. Their use may nonetheless have implications for other markets in the EU (e.g. where shares are listed on more than one market). As a result, some market participants are concerned that a market behaviour conforming to an accepted market practice in one Member State might still be challenged in another Member State, where such a practice has not been endorsed.

Therefore, the Commission services consider that it is necessary to further clarify the definition of “accepted market practices” in the sense of meaning practices that are reasonably expected in one or more financial markets (covering both regulated markets and MTFs) and are accepted as being legitimate by the competent authority in accordance with binding technical standards.

4. Transactions by Managers of Issuers

The requirement to report to regulators transactions by managers in financial instruments related to the company they work for is intended to deter possible insider trading and provide information which may be useful to the public. A threshold of Euro 5,000 calculated on a yearly basis has been set in implementing Directive 2004/72/EC. Some stakeholders have argued that this threshold is too low as it results in markets being flooded with too much information for it to be useful, and has not kept pace with the growth in executive remuneration.

Therefore the Commission services consider that persons discharging managerial responsibilities within an issuer of financial instruments and, where applicable, persons closely associated with them, should, at least, notify to the competent authority the existence of transactions conducted on their own account relating to shares of the said issuer, or to derivatives or other financial instruments linked to them if those transactions reach a threshold of Euro 20,000. Member States should ensure that public access to information concerning such transactions, on at least an individual basis, is readily available as soon as possible.

5. Market Surveillance

The Commission services consider that in order to ensure appropriate market surveillance, Member States should ensure that operators of regulated markets and MTFs adopt structural provisions and implement the necessary technical systems, tools and procedures and the appropriate human resources aimed at effectively preventing and detecting market abuse and notify the competent authority of the Home Member State of the regulated market and MTF if any such abuse is detected.

Moreover, the competent authority may request the person responsible to disclose inside information to publish the information or publish it itself to ensure that the public is correctly informed.

In addition, Member States should also require that any person professionally arranging transactions in financial instruments, who reasonably suspects that a

transaction or an order to trade might constitute insider dealing, market manipulation or an attempt to manipulate the market, should notify the competent authority without delay. This should also apply in the case of transactions in derivatives instruments executed outside a regulated market or MTF.

The Commission services are interested in receiving stakeholders' views on the following questions:

- (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?**
- (12) Should there be greater coordination between regulators on accepted market practices?**
- (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?**
- (14) Do you consider that there are other areas where it is necessary to progress towards a single rulebook? Which ones?**
- (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?**