Dear Mr. Demarigny,

we welcome the opportunity for giving us the opportunity to submit our preliminary views on the questions raised in your consultation paper. The second Commission Mandate on Market Abuse focuses on a relatively small number on which the Commission is obliged to ask for technical advise. In the time available we are not sure that we have identified all problem areas. Consequently the fact that an issue is not mentioned does not mean that we consider it to be important. We would therefore request a further opportunity to make comments before the response is finalised.

However we would emphasis that a number of our concerns are embedded in the Market Abuse Directive and its interpretation directly. But we believe that our suggestions might help to address these problems based on the holistic approach of the scope of this additional mandate covering implementing measures on the basis of Articles 1,6 and 14.

Mandate 3.1. (1)

Implementing measures consisting of guidelines related to the definition of "Accepted market practices".

It is not clear to which market and which practices the provision refers. We suggest that parameters should be laid down within the procedure at Level 2 referring to acceptet market practices.

- On the relevant market concerned and
- the relevant "acceptance" by the relevant "authority"

Presumably these would form the basis for any acceptance of the regulator and for a safe harbour. We would wish to know the extent to which the regulator can refuse or accept hitherto existing "accepted market practices". A canon of admissible reasons to refuse the legitimacy of these "accepted" market practices consisting with Level 2 would be useful. A number of "accepted market practices" in certain markets could be rectified by the inclusion of some element of intent, or knowledge and purpose. In contradiction the central objective of the directive is to create an effect-based regime which suppresses the intent. Intent is insofar only a mitigating factor referring to the graduation of sanctions according to Article 14.

The European Association of Public Banks - our association - submitted our views on this issue on the 30 September and 25 November 2002 and the different wide approach of the "autonomous concept" of the Strasbourg Court referring to "criminal sanctions/charges". This carries with it important safeguards. On any ordinary reading of "criminal law" the "intent" of the offender is implicit in the offence itself that the regulator must establish. As far as national law will regard market abuse as a civil offence it is the most controversial aspect of the market abuse regime.

Referring to this issue we suggest doing further regulation within the framework at Level 3.

Mandate 3. 1. (2)
Definition "Inside Information" for derivatives on commodities

We would like to make the following points

The definition of "Inside Information for derivatives on commodities" is not based on the concept of the existence of issues and insofar of announceable information. There is no common concept to dealings in securities and nonsecurities.

Therefore information that is "relevant" information in relation to "derivatives on commodities" and insider dealing provisions priced from commodities and not underlying securities and which "users of these markets" would expect to receive will include information of events effecting the analysis of supply and demand of the commodity on a continuing basis in order to prevent market and trade uncertainties and back risk management activities, for example business operations of major users of the market.

Mandate 3. 2. (1)

"Issuers - Register" - Issuers Responsibility

If inside information relating to an issuer directly (issuer-related information) is selectively disclosed in the normal exercise of employment, profession or duties, the directive requires an issuer to disclose the information publicly unless the recipient owes a duty of confidentially. This ad hoc disclosure obligation is an important preventive measure against the abuse of inside information. It attacks insider trading at the roots. The particular importance of ad hoc disclosure is also stressed by the fact that compliance with the disclosure and notification regime is monitored very meticulously by the regulator. In this context there is the requirement on issuers to maintain a regularly updated list of those persons who have access to issuer-related information and to pass this list to the competent authority on request.

The list should be drafted practicably and restrictively in order to avoid costly and burdensome impacts without significant information for the regulator. In the end this group can be hardly be defined exactly. Normally in order to ensure compliance issuers are advised to reserve or designate an organizational unit within the company with this purpose (e. g. ad hoc disclosure committee with the board, principal financial officer, principal accounting officer or controller, compliance, legal department and others who perform policy making functions).

The scope covers issuers of all transferable financial instruments traded on regulated markets e. g. shares, bonds, derivatives etc. An issuer of shares must publish information which could significantly influence the exchange price due to its effects on the assets and liabilities. An issuer of bonds must publish information which could impair the ability of the issuer to meet its obligations etc. Therefore we would propose to introduce a risk-based approach for issuers applying e. g. to the following criteria e.
g.:

- Access to issuer-related information on a regular basis

- Graduation of the obligation to issuers of shares, bonds etc.
- For small and medium sized issuers a light -touch regime

The provision concerning "persons acting on its behalf" who are primary insiders as a result of their profession or activities defined in this context as insiders who acquire knowledge of issuer-related information in accordance with the designated purpose by virtue of their profession, activities or duties is incertain.

This could include mandated auditors, consultants, lawyers, notaries, credit and financial services institutions and their employees, as well as employees of the issuer itself (see above) and other persons contractually related to the issuer. Which employees of an enterprise are to be considered insiders as a result of their responsibility can be determined only on a case-by-case basis. It is not possible to establish general criteria.

Mandat 3.2. (2)

Implementing measures concerning the categories of persons subject to a duty of disclosure of transactions conduct on their own account and the characteristics of a transaction, including its size, which triggers that duty; implementing measures concerning the technical arrangements for disclosure to the competent authority. (Director dealings).

General remark:

There are different not consistent legal texts of the directive in Member States. It should be expressively clarified that the Market Abuse Directive only covers the "shares, or derivatives or other financial instruments linked to them" and

NOT

"shares or derivates linked to them or other financial instruments".

- Persons discharging managerial responsibilities

The prime responsibility rests with the board of directors. Although these persons who perform policy-making functions deal for many reasons, their action also reflect optimism and pessimism about future prospects in a significant way and provide investors with insight into insiders investment actions.

- Persons closely associated with them

Only close relatives, if possible in the same household. Other family members e. g. adults and/or married can't be controlled effectively (e. g. a married son, living in USA etc.).

- Criteria including interms of size for determining when a transaction triggers the duty of disclosure

The spirit of the law covers executed transactions in the company' s shares and derivatives which can influence the market price but not

trifling matters. Additionally adequate parameters should be set up for shares and derivatives which trigger off the duty of disclosure.

Mandat 3. 2. (3)

Implementing measures concerning, technical arrangements governing notification of suspicious transactions to the competent authority by any person professionally arranging transactions in financial instruments.

How and when persons professionally arranging transactions should notify the authority of suspicious transactions?

Originally the Commissions proposal required that the person shall refrain from entering into transactions, if it reasonably suspects that a transaction would be based on inside information or would constitute market manipulation, both are criminal offences. The European parliament replaced this point through the introduction of the new requirement of submitting suspicious transaction reports to the prescribed regulator. The justification was based on the reason that the person (traders etc.) have neither a regulator' s expertise nor the time to scrutinize in depth every trading order processed by their services. This also applies suspicious reports based on reasonable grounds. But in these cases the person (e. g.
employee) must make the notification "reasonably" believing that it is "substantially true" and in good faith. It must be decided that the disclosure is based on reasonable suspicion, a very difficult judgment which a prospective reporter might be reluctant to make. In particular in the area of market manipulation it is very difficult to set out definitive statements of what is, or is not manipulative or what is "reasonable suspicion" and what counts as a suspicious transaction but not prejudicing an actual or anticipated criminal investigation. For identifying and evaluating a suspicious transaction general or industry specific strong indicators that a transaction is related to the commission of market abuse are not available. The relevant persons has not been asked to go searching for such activities that come to their notice indepent from the timeframe available.

A suspicious report based on reasonable grounds must take into account all the evidence adduced. Just any "suspicion" is not enough imply to the evidence. The reporter doesn't deal with unknown counterparts. Nevertheless the directive requires to inquire into the "correctness" of any report of an offence under the given circumstances at the time of the transaction.

But the most important part in combating insider and market manipulation operations (Art. 6 covers only "market manipulation"?) must be played by market operators by devising trading systems that go as far as possible in introducing and adopting structural provisions making market abuse more difficult. The "suspicious report" has become a concept under which all sorts of professional arrangers can be prosecuted, that means market operators and intermediaries. The latter play only a minor role. They are not obliged to introduce effective order-detection-schemes etc. and to carry out preliminary enquiries.

Additionally the directive is not prohibited expressively in informing the counterpart and abouve that it can't be excluded that the reporter's identity will be revealed. This will lead - even in trivial affairs to an application against the reporter etc.

Therefore drafting special procedures of reports this approach should be taken into account.

The "correctness" of the report favours a "substantive rather than a formal" concept.

Independent of the timeframe the reporter is not obliged to go into depth.

Relating to the characteristics of the transactions to be notified by suspicious reports based on reasonable grounds the relevant implementing measures con only be drafted on Level 3 in accordance with your first advice delivered to the European Commission on a case-by-case basis (Level 2 advise Nr. 47).

Yours sincerely

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