TREASURY, RISK AND FINANCE PROFESSIONALS

The Association of Corporate Treasurers

Interest Representative Register ID: 64617562334-37

Comments in response to
Public consultation on a revision to the market abuse directive (MAD)
Issued by the European Commission

25th June 2010

23 July 2010

The Association of Corporate Treasurers (ACT)

The ACT is a professional body for those working in corporate treasury, risk and corporate finance. Further information is provided at the back of these comments and on our website www.treasurers.org.

Contact details are also at the back of these comments.

We canvas the opinion of our members through our monthly e-newsletter to members and others, *The Treasurer magazine*, and our Policy and Technical Committee.

General

The ACT welcomes the opportunity to comment on this matter.

This document is on the record and may be freely quoted or reproduced with acknowledgement.

The ACT views the MAD as an important piece of legislation that goes a long way towards ensuring financial markets in Europe run with integrity and are not subject to manipulation and abusive behaviours. We therefore welcome the Commission's intentions to extend the scope of its coverage to additional markets and to enhance some of its specific provisions.

Response to specific questions

A Extension of the scope of the directive

(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?

You are proposing to expand the definition of inside information to 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 seems to be a logical step in improving those markets and minimising the risk of false markets arising. We would ask you to consider carefully the exact wording or interpretation of "significant effect" in the context of a derivative. A derivative can be purchased with a nil initial payment such that any price movement could be deemed significant. Perhaps it would be better to refer only to the effect on the price of the underlying reference commodity rather than either that price or the price of the derivative.

(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?

Attempts to manipulate the market are an abusive behaviour even if the attempt fails to fully achieve its aim and therefore it is right to include attempted manipulation (in the same way that attempts at insider dealing are caught by MAD). We support the proposal to amend the definition of manipulative behaviours. However we urge you to bear in mind that a certain pattern of activity need not of itself be manipulation unless there is the intent to manipulate as well. Any extension of the prohibited behaviour should provide that the new pattern of activity should not just have the potential to move the price but be intended to do so.

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

Manipulation through derivatives is still manipulation so should be covered. However in less liquid markets such as apply to certain derivatives, and bearing in mind the geared effect of derivatives, it could be relatively easy to move prices significantly through some bona fide trades. As in (2) above the regulators should be required to prove intent if some activity is to be deemed manipulation.

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

An MTF can be regarded as just another market place, so instruments traded on an MTF should be within the scope of MAD, but again with the caveat that the assessment of "significant" price movements should make allowance for the nature of that instrument / market.

(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?

Assuming that an MTF is supposed to be equivalent to a proper, reputable and honest market the disclosure requirements on inside information should be equally applicable.

(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 the Prospectus Directive? To what extent can the criteria to be fulfilled by SMEs as proposed for such an adapted regime be further specified through delegated acts?

We appreciate the desire to ensure that any new measures that become applicable to an SME are proportionate, and that they do not create an overly burdensome administrative workload and to an extent we welcome that objective.

However if the intent is to ensure that markets have integrity, are safe and fair, then the obligations imposed to prohibit market abuse, or to ensure proper disclosures, are surely applicable whatever the company size? Rather than carve out exceptions effort should be directed to making the processes for reporting etc as streamlined and efficient as possible. If the market for an SME's securities is thin and illiquid then we would remind you to ensure that the definitions of significant price movements should recognise that prices can, even in normal circumstances, move in quite large steps.

B Enforcement powers and sanctions

We do not wish to make comment on your detailed questions save to point out one concern. In 3 - Powers of Competent Authorities - the first paragraph seeks to give regulators powers to obtain "telephone and data traffic records under certain conditions" whereas in the second paragraph the regulators would have to seek court orders before being allowed to seize documents. We consider that judicial authority should be required for access to both documents and telephone and data traffic records.

C Single Rule Book

In your introductory comments on the single rulebook you mention the aim of removing any wide divergences in the rules applicable at national level. This is laudable on the assumption that you are seeking a levelling up to the highest level of integrity, or at any rate not forcing a levelling down in markets that currently operate to the highest standards.

We specifically draw your attention to the requirement in the UK that a person is prohibited from dealing if in possession of Relevant Information Not Generally Available (RINGA). RINGA is similar to inside information but it includes information that is not sufficiently precise to warrant disclosure, for example knowledge that the company is working on a major disposal or acquisition but where the parties have not yet been approached or negotiations are still at a very early stage. We strongly believe that to be dealing whilst in possession of such confidential information is, and should be treated as, a case of market abuse.

In your desire to ensure consistency across member states we would not wish to see this sort of extra safeguard removed, indeed we recommend that you consider applying the RINGA concept and rules throughout the EU.

(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?

By giving the regulator the power to delay disclosures in respect of an issuer in "a grave condition with implications for systemic risk or for a Member State's financial stability" you would be allowing a false market to continue and potentially for anyone dealing in that period to suffer losses as a result. On the other hand by delaying disclosure it may be that a greater evil with serious systemic consequences can be prevented. We therefore, on balance, support your proposal to give the regulator powers to delay disclosure subject to stringent public interest criteria.

In the section on "Obligation to disclose inside information" you are also proposing that if an issuer makes use of a permitted circumstance to delay disclosure it should be obliged to inform its regulator, although you are ambiguous as to whether that is before or after the information has been released publicly. We believe the regulator should be informed once the information is made public rather than in advance.

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

Some degree of consistency of "accepted market practices" is desirable but by their nature there will still be differences between some markets or groups of markets. Just because a practice is accepted in one market should not be an automatic reason for that to be deemed acceptable in another.

(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?

Within the UK we do not operate with a threshold for disclosure but report all dealings by managers. That said we have no objection to a threshold of Euro 20,000 but we do ask you to consider carefully how this is defined when it come to dealings in derivatives. The limits should relate to the value of shares or other instruments underlying the derivative. For example Euro20,000 might buy you an out of the money option over say Euro 200,000 of securities, or in the case of a Contract For Differences a huge 'position' can be acquired for no payment on day one.

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

At the start of this section C we mention the importance of prohibiting dealing whilst in possession of RINGA. This is a concept, or good practice, that we regard as an important part of running an orderly and honest market. We would recommend extending the MAD so that this requirement operates across all the markets covered by the directive. If someone is in possession of important confidential information, even if still subject to some uncertainty, surely they should not be able to exploit that information through dealing? Because of the uncertainty remaining, RINGA does not need to be subject to the publically disclosure rules.

(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?

No comment.

TREASURY, RISK AND FINANCE PROFESSIONALS

ACT

The Association of Corporate Treasurers

The ACT is the international body for finance professionals working in treasury, risk and corporate finance. Through the ACT we come together as practitioners, technical experts and educators in a range of disciplines that underpin the financial security and prosperity of an organisation.

The ACT defines and promotes best practice in treasury and makes representations to government, regulators and standard setters.

We are also the world's leading examining body for international treasury, providing the widest scope of benchmark qualifications and continuing development through training, conferences and publications, including *The Treasurer* magazine and the annual *Treasurer's Handbook*, and online.

Our 3,600 members work widely in companies of all sizes through industry, commerce professional service firms.

Further information is available on our website (below).

Our policy with regards to policy and technical matters is available at http://www.treasurers.org/technical/manifesto

Contacts: Stuart Siddall, Chief Executive (020 7847 2542 ssiddall@treasurers.org) John Grout, Policy and Technical Director (020 7847 2575; jgrout@treasurers.org) Martin O'Donovan, Assistant Director, Policy and Technical (020 7847 2577; modonovan@treasurers.org)	The Association of Corporate Treasurers 51 Moorgate London EC2R 6BH, UK Telephone: 020 7847 2540 Fax: 020 7374 8744 Website: http://www.treasurers.org