efama

European Fund and Asset Management Association

REPLY TO THE COMMISSION'S CALL FOR EVIDENCE ON THE REVIEW OF DIRECTIVE 2003/6/EC ON INSIDER DEALING AND MARKET MANIPULATION (MARKET ABUSE DIRECTIVE)

As the representative of the European investment management industry, EFAMA[1] welcomes the possibility to comment on the Commission's Call for Evidence on the Review of the Market Abuse Directive. Please see our detailed replies below.

2.1. THE SCOPE OF THE MAD

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

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

EFAMA supports the extension of the scope of the MAD beyond regulated markets, in particular to MTFs. In view of the rapid growth of MTFs after MiFID, and in order to provide equal protection for all markets, we believe the alignment of rules is justified. Market abuse offences should be considered as such regardless of the market where they occur.

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)

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?

EFAMA members support the alignment of the MAD definition of financial instrument to that in MiFID, in order to remove doubts as to which instruments are included (in particular in reference to CFDs and CDSs). Any approach to define financial instruments (particularly those "whose value depends on another financial instrument"), however, should take into account possible future developments.

[1] EFAMA is the representative association for the European investment management industry. EFAMA represents through its 24 member associations and 44 corporate members about EUR 10.7 trillion in assets under management of which EUR 6.1 trillion managed by 54,000 investment funds at end 2008. For more information, please visit www.efama.org.

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

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

EFAMA members have diverging opinions on this subject. Some see no need for the introduction of a framework for physical markets, while others would welcome it, as market abuse would reflect itself in the pricing of derivatives on 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

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?

The majority of EFAMA members agree with the Commission that there is no need to revise the current definition. Some, however, would prefer the Commission adopt the UK superequivalent definition of the MAD.
It would be helpful if CESR made available to market participants on its website references and case law.

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

EFAMA supports the alignment of the definition of inside information for commodity derivatives, to ensure coherence in investor protection.

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

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

We do not believe that changes are necessary to the definition of inside information for disclosure purposes. EFAMA does not support narrower definitions, which could allow abusive practices.

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?**

EFAMA does not believe that an amendment to the MAD is necessary, although we understand issuers' concerns. We would rather support additional Level 3 guidance and encourage a closer contact between issuers and regulators under specific/emergency circumstances. It might also be appropriate for the issuer to make the final decision as to the disclosure of information together with regulators or for the regulators to make the final decision.

2.2.2.2 Disclosure duty in commodity derivatives markets

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?

The obligation should only be reviewed if the provisions have proved to be harmful for such issuers.

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

Question: Would you support this approach?

EFAMA supports the Commission's proposal to await a preliminary ruling by the ECJ before considering clarifying measures.

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)

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

Most of our members find the obligations 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)

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

EFAMA does not see the need for regulatory action.

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)

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

We agree that the rules in question 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)

Question: Do you consider that an amendment of the MAD is necessary?
EFAMA does not consider that an amendment to the MAD is necessary. However, should the Commission decide in favor of an amendment, we believe it should be proportionate, avoid excessive burdens for investment managers, and strike an appropriate balance between the different fundamental rights.

2.3. MARKET MANIPULATION

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

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?

EFAMA does not consider that a change to the definition of market manipulation is necessary.

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

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?

EFAMA does not consider that the rules on accepted market practices should be amended in the MAD. CESR is the right forum to achieve greater convergence amongst regulators: CESR members should share accepted market practices and assess whether further guidance is feasible.

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

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?

Safe harbours should not be reviewed, but greater convergence is desirable in the application of Regulation 2273/2003.

2.3.4. Short selling
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?

EFAMA supports a coordinated international framework for short selling, and therefore does not believe that the European Commission should address it in the MAD. In view of the ongoing work at CESR and IOSCO to align regulatory approaches, the Commission should refrain from proposing regulation and should rather cooperate with IOSCO to develop a globally consistent approach.
We wish to reiterate our view that short selling is a legitimate technique, which plays a beneficial role in the financial markets. Only associated share price manipulation is to be considered as abusive behavior, and dealt with under the MAD. Regulation under the MAD might therefore be seen as implying that short selling constitutes abusive behavior in itself, which is not the case.

 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?

Although EFAMA agrees that competent authorities should be able to take emergency measures, we do not find that outright bans on short selling are necessary or helpful, and empirical evidence from the recent bans confirms our views. Disclosure of short selling positions is a far better alternative.
EFAMA supports disclosure to competent authorities above specific thresholds, although some of our members believe it should be only necessary where market conditions warrant it. Such measures should also be subject to a cost benefit analysis.
EFAMA members believe that extreme care should be exercised regarding disclosure to the market, as the information on short positions can be used to copy proprietary trading strategies or to facilitate front running, and as it can exacerbate selling pressure.
With regard to naked short selling, some of our members consider it a legitimate technique, but settlement of trades must be properly enforced.

□ 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?

Risk management for financial firms is already addressed by EU regulation and should constantly be reviewed, therefore we do not see the need for further provisions under the MAD. EFAMA supports the introduction of measures by regulators to ensure the timely delivery of financial instruments in connection with short sales.

Peter De Proft
Director General

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