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## **Response to the European Commission's public consultation on a revision of the Market Abuse Directive**

### **Key Points**

- The EBF fully supports the European Commission's fight against market abuse and market manipulation. Market participants should feel comfortable that they operate in sound and clean markets.
- The EBF also encourages greater harmonisation of the MAD rules, where possible. In the field of enforcement powers and sanctions, national rules must at least be closely coordinated to be generally aligned and compatible.
- However, market participants also need legal clarity and certainty about what actions are considered objectionable. The definitions of market abuse and market manipulation must be unambiguous. Greater certainty could for example be achieved by means of 'black' and 'white' lists of actions and transactions that are or are not allowed.
- European banks have not so far identified significant gaps regarding the instruments covered by MAD. If necessary or helpful for market oversight, banks would nevertheless support an extension of the scope of MAD, subject to legal clarity and certainty of such additional rules.
- The proposed definition of attempts to manipulate the market is highly problematic. It is not acceptable to reverse the burden of proof, as seems to be proposed by the Commission.
- Clearly, banks support that under MAD, Multilateral Trading Facilities be treated the same as regulated markets.

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Related documents: COM consultation document:

[http://ec.europa.eu/internal\\_market/consultations/docs/2010/mad/consultation\\_paper.pdf](http://ec.europa.eu/internal_market/consultations/docs/2010/mad/consultation_paper.pdf)

## General remarks

The European banking industry strongly supports the fight against market abuse. Market abuse and market manipulation are harmful for honest investors and undermine confidence in the markets. Banks stand ready to work with the European Commission and the supervisory authorities to find efficient and effective ways to promote market integrity.

The EBF regrets, therefore, the short timeframe of the European Commission's consultation, combined with its timing in the middle of the summer. This makes it difficult to gather a wide range of practitioners' views, which is particularly regrettable for an issue of such fundamental concern to the markets, policy-makers, and the wider public. The Federation also does not understand the need for such a short consultation timeframe, considering that the review of the Market Abuse Directive was long foreseen.

The Federation would underline the **crucial need for legal clarity and legal certainty**. While market abuse must certainly not be tolerated, it must be clearly defined what actions are considered objectionable. Already as it stands today, the legislative text is very wide and raises a number of pertinent questions. European banks would suggest that in the review of MAD, the Commission also consider the ruling of the European Court of Justice in the Spector Photo case of 23 December 2009, which addresses a number of issues regarding legal certainty and predictability of legislation.

The EBF is moreover concerned that some of the Commission's additional proposals would not deliver certainty, especially as regards market manipulation. Banks feel that the concerns raised by the European Commission remain vague in a number of instances and necessitate clarification and supporting examples.

Finally, the Federation would encourage **greater harmonisation in the field of market abuse**, so as to avoid any gaps or loopholes resulting from differences in the implementation of the rules across Member States. In today's fragmented trading landscape, investors have much freedom about where to execute orders. Differences in applicable legislation should remain as limited as possible in order to avoid any scope for regulatory arbitrage.

## Responses to the European Commission's 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?*

The EBF would in principle consider such an extension appropriate.

Nevertheless, the Federation notes that the commodity markets function differently from the equity markets in some important aspects. Also the concept of price-sensitive information differs somewhat for commodities as there are no disclosure obligations for issuers. Instead, price sensitive information often regards the decisions of public authorities (such as permissions or restrictions) or external events (such as earthquakes, nuclear power plant accidents and drilling accidents). The term 'insider information' should therefore be defined

more precisely, including examples to be provided by the future European Securities Markets Authority (ESMA).

Nevertheless, the EBF would suggest that it be considered to also impose certain obligations on commodity dealers that apply on the equity markets, such as the obligation to set up Chinese Walls and the obligation to declare suspicious transactions.

*(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?*

It is a matter of course that attempts to manipulate the market must not be allowed, both in principle and in view of competent authorities' experience that it is easier to prove that manipulation has been attempted rather than that it was successful.

The Federation is however unclear where exactly the Commission has identified gaps in the current legal framework. **The current definition of market manipulation, at least in the reading of most European banks and Member States, already covers manipulative actions which do not result in market price changes.** Should this understanding not be clear or not be implemented in the same way in all Member States, the EBF would fully support clarification and harmonisation.

**Going further than this and making even an attempt of market manipulation liable to prosecution, however, could cause considerable legal uncertainty.** This would be particularly problematic for intermediaries, who would be required to report suspicious behaviour by third parties to the competent authorities.

Further clarification from the Commission as to the perceived gaps and concrete examples would be necessary to consider the most appropriate way to address these gaps.

In addition, the **Commission's proposed definition of 'attempt to manipulate the market' is not acceptable.** The Commission proposes that the person accused of attempting to manipulate the market has to prove the legitimacy of his actions, effectively reversing the burden of proof. Instead, **it should always be the authorities' obligation to prove that a certain action or transaction is manipulative or does not conform with accepted market practice.** Trading patterns that fall within the unavoidable grey area should be considered legitimate until a clear decision to the contrary has been made. This definition should be revised and be adjusted so as to spell out clearly what would be considered an attempt to manipulate the market.

In order to provide clarity, it would also be helpful for the future European Securities Markets Authority (ESMA) to draw up 'black' and 'white' lists, i.e. detailed lists with examples of/decisions about both clearly forbidden and clearly allowed practices.

As noted above, **legal clarity and legal certainty is absolutely crucial.** Already today, the definitions of market abuse and market manipulation are wide and harmfully vague. This situation should at least not be further aggravated.

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

European banks agree that the *use of derivatives for market-abusive purposes must not be allowed*. In the understanding of European banks, that is however **already the case today**, at least in some Member States. Should this not be the case for all Member States or not sufficiently clear in wording, the Federation would certainly support according clarification.

In doing so, the EBF would demand conceptual and legal clarity as to whether the proposed extension of the scope of MAD would eventually leave out any financial instruments. The European Commission's current proposal is very broadly defined, by referring to all OTC derivatives that have an impact on the value of the financial instrument admitted to trading on a regulated market or an MTF.

As regards market manipulation *in OTC derivatives*, European banks would request clarification from the Commission as to what this might mean and as to what should be understood to be market-abusive in this context. Bespoke OTC instruments do not usually have a market which can be manipulated, but are purely bilaterally traded instruments. Recent discussions around Credit Default Swaps have furthermore shown that some bilateral trading activities that are perfectly acceptable for the markets and are even considered to enhance market efficiency might be perceived to be abusive or harmful by some policy-makers or by the wider public.

The Federation would therefore request a **comprehensive approach to look at derivatives legislation**. The Commission is currently already pursuing a number of regulatory initiatives around derivatives markets, which might address some of the recently voiced concerns. These initiatives should be clarified before deciding on the appropriate shape of the MAD regime for derivatives.

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

European banks concur that instruments that are only traded on MTFs but not on regulated markets should also be covered by the Directive. This is already the case today at least in some Member States. The Federation supports full harmonisation of MAD in this respect.

As an aside, the EBF would note that the term 'admitted' to trading on an MTF might be misleading, as there is no formal procedure for admittance to such platforms.

On a related issue, the Federation draws attention to the fact that regulation currently allows third parties to list products on either a regulated market or an MTF, without the involvement of the issuer. In such a situation it would not be appropriate to require the issuer to comply with any regulation in respect of listing.

**(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?***

The EBF does not see any reason to exempt issuers who only have instruments admitted to trading on an MTF from the MAD obligations. Rather, the MAD obligations should apply to all trading platforms in the same way, although they might vary by instrument.

*(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?*

The EBF would suggest that a distinction be made between the requirements on issuers on the one hand, and other provisions of MAD on the other hand. European banks would be concerned if some MAD provisions concerning trading activities or concerning the sanctions were relaxed for trading in SMEs, whether on regulated markets or other trading platforms. Indeed, **market abuse or market manipulation is more likely to occur with regard to smaller issuers**, as it is easier to move less liquid markets. **Relaxation of these rules would therefore deteriorate investor protection, which is as such not acceptable** and would rather discourage investors from trading in shares of smaller issuers.

However, **some of the MAD provisions on issuers could be modified or applied in a more proportionate way**, if small and medium-sized issuers (SMIs) feel that this would be helpful to them. This could for example concern the requirement to draw up lists of insiders. Indeed, European banks feel that these requirements are rather burdensome on all issuers, whilst not proving of great relevance in practice. Alleviations could therefore be considered more widely, rather than just for small and medium-sized issuers.

## **B. Enforcement powers and sanctions**

*(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?*

Supervisory authorities themselves will be best-placed to consider what investigative powers they need to effectively enforce the MAD provisions.

As regards the scope of suspicious transaction reports, banks stand ready to work with supervisors in the best possible way to prevent and help detect market abuse. In principle, the banking industry would also support the extension of the scope of suspicious transaction reports to suspicious orders, as proposed by the European Commission.

Again, however, this is subject to **full legal clarity and certainty**. In their role as intermediaries, **banks need to know exactly what types of orders and transactions they would be required to report**, with a good degree of comfort that such orders or transactions should indeed be flagged to the competent authorities. This is also bearing in mind that intermediaries only have a partial view on the markets and often, on their clients' activities, especially where clients do have market-abusive intentions.

The EBF would therefore in addition suggest that MAD provide a ‘safe harbour’ for transactions concluded via a portfolio management service, under specific conditions to be further defined (for example by ESMA).

*(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?*

Supervisory authorities will be best-placed to consider how sanctions can be made more deterrent. The Federation would however call on the Commission and on supervisors to ensure that **sanctions are proportionate and that criminal sanctions are generally more severe than administrative sanctions.**

Also, the determination of the advantage gained or potentially gained through the misconduct is very difficult and can never be fully objective or exhaustive. The Federation suggests that academic and practical examples be studied in depth to consider how gains or avoided losses should be evaluated, so as to define a sanctioning regime that is comprehensive and consistent across Member States, different authorities, and different circumstances.

As regards pan-European harmonisation, it must be borne in mind that market abuse is often a criminal offence and its prosecution regulated by national law. The Federation therefore recognises that full harmonisation across Member States will not be possible. At a minimum, the EBF would however encourage a **high degree of consistency** of the sanction regimes across Member States.

*(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?*

The EBF does not have any objections to the Commission's proposals in relation to these questions. Supervisory authorities will be best-placed to consider the appropriate arrangements in this respect.

As a general consideration, the EBF would expect ESMA to play a somewhat lesser role than in other areas of financial markets regulation, due to the fact that MAD covers areas of not only administrative law, but also criminal law which is in the exclusive competence of Member States. This distinction must be borne in mind.

*(10) How can the system of cooperation among national and third country competent authorities be enhanced? What should the role of ESMA be?*

European banks strongly encourage cooperation with third-country authorities. As regards the role of ESMA, the EBF would generally expect ESMA to play the most important role where matters of market access for third-country entities or matters of regulatory equivalence/mutual recognition are concerned. This is not the case for MAD, meaning that also in respect of third-country issuers around MAD, the role of ESMA would be of somewhat lesser significance than in other areas of financial markets law.

Nevertheless, the EBF would reiterate its strong support for the creation and a strong role of ESMA. Especially smaller Member States expect that this would also be helpful in respect of cooperation with third countries.

Supervisory authorities will be best-placed to consider in more detail the appropriate supervisory arrangements, bearing in mind the overall framework and principles around ESMA.

### **C. Single rule book**

As a general remark, the EBF strongly welcomes greater harmonisation under MAD and other Directives. As a case in point, the EBF favours eliminating the option of requiring issuers to inform the regulator without delay of their intention to delay disclosure.

On the obligation to disclose inside information, the EBF supports the proposal to make it compulsory for listed issuers to inform their regulator about deferred disclosure of inside information immediately after the disclosure of that information has taken place. There should not be any notification to the regulator before the public disclosure of the sensitive factor, however, in order to protect the information as best as possible.

***(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?***

A decision by competent authorities to delay the disclosure of inside information would be appropriate in the specific cases mentioned by the European Commission, namely ‘where financial institutions are in a grave condition with implications for systemic risk or for a Member State’s financial stability’. Specifically, the Commission expects this to be the case if an issuer requires emergency assistance. The EBF would welcome further clarification about the situations when it would be appropriate for the competent authority to take the decision of delaying the disclosure of inside information.

Clearly, unless these special circumstances apply issuers should continuously have the sole responsibility to decide whether to delay the disclosure of insider information, in compliance with MAD’s general requirements.

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

The European banking industry concurs that as the EU develops towards a single market, cooperation between regulators should become increasingly closer, including with regard to accepted market practices. At the current point in time, however, significant differences between markets remain, which fully justify the divergence of accepted market practices across Member States.

***(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?***

Yes. The EBF agrees that the **threshold for notifications to regulators about managers' transactions is far too low today**. The current threshold is in practice not meaningful: the administrative burden to apply it exceeds any administrative alleviation in terms of possibly avoiding notifications. The Federation would moreover request full harmonisation of this threshold across the EU, in nominal terms.

The Federation recognises that the level at which notifications can be considered relevant might diverge between Member States, and that notifications about managers' transactions are seen to provide great informative value to the markets. Nonetheless, the Federation considers a threshold of EUR 20,000 as proposed by the Commission still too low to be meaningful for either competent authorities, or other market participants.

The EBF notes that the scope of people covered by the notification requirement is appropriate as it stands and does not warrant any adjustments.

Some negative experiences have been made with the public disclosure of managers' trades. The media uses such information frequently, for purposes that are entirely out of the scope of MAD. In some cases, information about managers' transactions has become the source of false rumours in the markets. The EBF would encourage the European Commission to consider the proportionality and usefulness of the rule, also taking into account general privacy rules.

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

None. As a general remark however, the EBF would encourage the Commission to aim at the highest possible degree of convergence of national laws and regulations, as an essential element to enhance the efficiency of the European capital market.

***(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?***

In general, it should be borne in mind that market operators are better placed to detect suspicious orders or transactions than are intermediaries, due to their wider view on market developments.

Going forward, it can however be expected that market fragmentation will continue, meaning that market operators' tools and possibilities to monitor market integrity will also diminish. At the same pace, regulators' role in monitoring the markets will become yet more important. Regulators are developing additional tools to prepare for this challenge, including transaction reports, requirements for the reporting of suspicious trades, and trade repositories. It will be essential for regulators to develop the right tools to exchange reported data in an efficient way, as well as to speedily and effectively analyse this wealth of information.