# EVENT REPORT

## EUROPEAN CAPITAL MARKETS INSTITUTE


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Incessant innovation in the financial marketplace and new technological developments have increased the degree of sophistication of trading activities and raised new opportunities for abusive practices in global markets. On top of the investments in technology that supervisors and trading venues are bringing into their surveillance mechanisms, a new regulatory framework with harmonised definitions and sanctions is needed to ensure that every marketplace is properly covered by appropriate legal obligations.

The proposed legislation on insider dealing and market manipulation (better-known as the market abuse regulation, MAR[1], and directive, MAD[2]) is aimed at raising the bar on principles and sanctions, equipping Europe with a system comparable to those of other major jurisdictions, including the United States. Market participants and observers have publicly welcomed the initiative, which however raises some controversy from a technical perspective. Contentious issues include for instance the precise definition of inside information. The extension of rules to non-equity markets is also welcomed but raises numerous questions to the extent that fixed-income, derivative and commodity markets are different in nature.

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**Arlene McCarthy** (Member of the European Parliament and Rapporteur for the market abuse legislation) highlighted that "the best way for the EU to proceed on market abuse is not to wait for the US to finish the given investigation and then ask for extradition". Market abuse is a global phenomenon, demanding a global response, based on regulatory convergence and supervisory cooperation at international level. The proposed regulation, being directly applicable in all member states, would put an end to the mild regimes still alive in some member states. Stressing the importance of converging towards the highest standards, Arlene McCarthy elaborated on deterrence and supervisory powers; tough nominal sanctions would not be an effective deterrent unless supervisors have the powers they need to investigate and prove abuse. While difficult in practice, the Parliament is keen to improve the collection and sharing of information.

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**IMPORTANT NOTICE**: The views expressed by the speakers are their own individual views and do not necessarily reflect the views of their companies or institutions. The content of this event report is not a transcription from the speeches delivered by the speakers and should instead be understood as the interpretation of their views by the author. This report was authored on 24 January 2013 by Mirzha de Manuel Aramendía, ECMI-CEPS Researcher. Contact ecmi@ceps.eu with any comments or questions.

[1] Proposal for a regulation on insider dealing and market manipulation (market abuse), COM(2011) 651 final, 2011/0295 (COD).

[2] Proposal for a directive on criminal sanctions for insider dealing and market manipulation, COM(2011) 654 final, 2011/0297 (COD).

On the impact of market abuse rules on SMEs, MEP McCarthy raised the need to balance two objectives: on the one hand, encouraging listings of SMES by reducing the administrative burden imposed on them, and on the other hand, inhibiting strategic behaviour by big players able and willing to set boutique firms to circumvent the rules.

**Carmine Di Noia** (Deputy Director General of Assonime, an association of Italian companies) expressed his concern that the loose definition of inside information proposed, based on a "reasonable investor test" without reference to price sensitivity or other objective criteria, would result in legal uncertainty and is ill-thought for the imposition of criminal sanctions.[3] MEP McCarthy contended that a narrow definition would render the prosecution of market abuse difficult, in the informed view of supervisors. Still, the precise definitions and technical details of the proposal still need to be worked out by the EU co-legislators. Other technical issues raising concern include for instance the supervisory procedure to allow for the delayed publication of inside information or the impact of the proposed rules on takeover activity, in the building-up of a stake before the mandatory bid rule is triggered.

Carmine Di Noia also criticised the principle of EU 'a la carte' whereby certain member states, namely the United Kingdom, Denmark and Ireland could opt-in or out of the proposed directive on criminal sanctions, in spite of its importance for the internal market. Any such moves could run against the primary objective of the legislation and allow circumvention from within the EU. Ireland has however opted-in already.

**Thomas Eriksson** (Board Member of the Commodity Markets Council and Vice-president of Government and Industry Affairs at Bunge North America, a large agri-business and food company) explained that commodity markets are much unlike equity markets. Commodity markets are derivative markets, providing transparency on an underlying physical market, whereas equity markets are primary markets where investors own an interest in a company. This means that information about any one transaction in commodity markets affects only a tiny fraction of the physical market while inside information in equity markets affects the whole value of the company's equity. He argued therefore that the definition of inside information in proposed legislation should be tailored to each market and explained that in the US inside information in commodity markets is restricted to non-published governmental information.

Thomas Eriksson considered the role of hedging in commodity business, arguing in favour of exceptions, backed by appropriate controls, which should demand firms to privately disclose the physical positions that justify any given hedge to the supervisor.

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[3] Article 6.1.e COM(2011) 651 final: Information not falling within paragraphs (a), (b), (c) or (d) relating to one or more issuers of financial instruments or to one or more financial instruments, which is not generally available to the public, but which, if it were available to a reasonable investor, who regularly deals on the market and in the financial instrument or a related spot commodity contract concerned, would be regarded by that person as relevant when deciding the terms on which transactions in the financial instrument or a related spot commodity contract should be effected.