REPORT OF THE CONFERENCE
"REVIEWING MARKET ABUSE REGIME"

Brussels, November 12, 2008

On November 12, 2008 in Brussels the European Commission, DG Internal Market, held a conference on "Reviewing Market Abuse Regime" originally organised with the intention of discussing the Commission review of Market Abuse Directive (MAD), but the Commission had yet to publish its review of MAD. Therefore, the conference brought together senior policy makers, regulators, industry experts and academia to discuss general aspects of MAD instead. One concern discussed throughout the different panels was the divergence in sanctions and legal implementation of MAD. Another recurring theme was the extension of MAD to further instruments and markets.

Emil Paulis, Director General, Directorate for Internal Market and Services, European Commission, opened the conference with some general remarks about the MAD, which had been in place for almost five years. He noticed that the current financial crisis was a new element influencing DG MARKT's directives. He announced that the conference would start with comments by keynote speakers to be followed by expert panels to cover the scope of MAD, inside information, market manipulation and sanctions.

The first keynote speaker **Kurt Pribil**, Executive Director, Austrian Financial Markets Authority (FMA) and Chair, CESR-Pol (Committee of European Securities Regulators) described CESR-Pol as a crucial group in ensuring the common application of the law, emphasising its efforts to become more operational and its aim to render cross-border investigations more effective. Mr Pribil insisted on the need for homogenous implementation of MAD by regulators and underlined the importance of harmonising sanctions and powers, which are quite divergent across Member states. The future steps for CESR-Pol consist in the publication of a third set of guidance, in exchanging views with the European Commission in the context of the review of MAD and in advancing its operational activities. CESR-Pol's operational activities use three main tools: urgent issue groups, the Surveillance and Intelligence Group and the database for MAD Enforcement Cases. Mr Pribil reminded the audience about the CESR Open Hearing on MAD Level 3 to be held in Paris on November 26, 2008.

The second keynote speaker was **Pervenche Berès**, Chairwoman, ECON Committee, European Parliament. She pointed out that the choice of the acronym 'MAD' was quite unfortunate, and criticised the European Commission for having failed to publish its review of MAD at the time of the conference. In her assessment of MAD, Mrs Berès attacked the lack

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of convergence in implementation, proposed the application of MAD to commodity derivatives, and pointed to sanctions as being critical in deterring market abuse. Mrs Berès concluded highlighting the importance of educating citizens, which would be a costly investment at first but would lead to financial stability in the long-run.

Carmine Di Noia, Deputy Director General, Head of Capital Markets and Listed Companies, Assonime and member of the European Securities Markets Expert Group (ESME), considered MAD as an excellent improvement for investor protection and financial market integration despite the lack of harmonisation. He reviewed the MAD framework with its three levels. According to Mr Di Noia, the insider information framework is not working due to different application of the regulation: further clarification is needed concerning the definition of "insider", "market" and "delay." He opposed the list of insiders since there is a difference between insider and confidential and argued to value the costs and benefits concerning the notification of transactions.

Scope of Mad

The first panel focused on the scope of MAD, specifically, the influence of the introduction of MiFID onto the scope of MAD, the application of MAD to regulated and non-regulated markets and the application of MAD to commodity derivatives. Mr Paulis chaired this panel.

Dilwyn Griffiths, Head of Market Monitoring, UK Financial Services Authority (FSA), demanded the extension of MAD to MTFs (multilateral trading facilities) and to derivatives. It is important to cover derivatives and credit default swaps since they are particularly attractive to abusers, Mr Griffiths argued. He added that the UK even has an offense related to attempted market abuse for some types of derivatives.

Ludovic Aigrot, Head of EU Affairs, NASDAQ OMX, emphasised that his company employs 45 employees to check that the market is complying. He suggested the extension of MAD to MTFs, but with specific arrangements, since MTFs are not necessarily the same as regulated markets. Mr Aigrot stressed the differences in the definition of financial instruments between MAD and MiFID and the organisational requirements for regulated markets that differ from MTFs.

Anthony Belchambers, Board Member, Futures and Options Association (FOA), observed that despite some open issues, MiFID had achieved a single financial market. He argued that MAD should treat commodity markets differently from regulated markets due to inherent differences. He proposed the introduction of the principle of proportionality in the offense in MAD. For example, market misbehaviour could be introduced as a lesser offense than market abuse.

Diarmuid O'Hegarty, Executive Director, Regulation & Compliance, The London Metal Exchange (LME) emphasised that commodity markets are different from regulated markets, and argued that the complete harmonisation of markets is dangerous. For instance, unlike securities market, the main problem commodity markets face is "corner and squeeze." Therefore, he proposed regulators to thoroughly study the markets and their instruments to find the specific weaknesses before determining any directive.

Inside Information

The second panel debate concentrated on the definition of inside information, the notion of inside information, the detection of inside trading, possession of inside information and, finally, the delaying of disclosure of inside information. **Bertrand Legris**, National Expert,

Unit G3 Securities Markets, Directorate for Internal Market and Services, European Commission, chaired the panel.

Carlo Milia, Deputy Head of the Market Abuse Office, CONSOB, explained that there are three inside information tests: the mere possession of inside information, the knowledge of inside information and the causing test, where a clear causal link between the possession and the use of insider information is established. He was generally satisfied with present regulation but lamented the difficulty in accessing telecom information.

Jean-Michel Van Cottem, Deputy Director, Commission Bancaire, financière et des assurances (CBFA), said the present definition of insider information was satisfactory and was generally content with the current status. Specifically, Mr Van Cottem said that the definition of insider information should not be changed. In Belgium, the definition is close to the one used before the MAD directive was implemented and the legal system has 20 years of successful experience with it, with only the industry complaining.

Ilona Pieczynska-Czerny, Director, Polish Financial Services Authority (Komisja Nadzoru Finasowego - KNF), explained that Poland established a specific policy cell that deals with insider information. She claimed the general guidelines given by the law allow sufficient flexibility to companies.

Market Manipulation

Following the lunch break, the third panel discussed the prevention and detection of market manipulation. Specifically, the issues addressed were: definition and detection of market manipulation; exemptions for stabilisation and buy-back programmes; accepted market practises; and short-selling. **Margaret Chamberlain**, Head of Financial Services and Markets Department, Travers Smith, moderated the panel. Ms Chamberlain said that the UK will not make any decision concerning market abuse until the publication of the Commission review. Then, she asked the panellists whether short-selling should be considered manipulative in itself and pointed to the differences between regulators and politicians in regard to short-selling. The chair summarised the panel in three points: short-selling should not be considered as market abuse as such; the prohibiting of short-selling was a reaction to the financial crisis; and there should be no more legislation without prior consultation.

Paul-Willem van Gerwen, Head of Securities Markets and Financial Infrastructure Supervision Division, Autoriteit Financiele Markten (AFM), deemed the current definition of market manipulation appropriate. Mr. van Gerwen reminded that the short-selling rules were only in place because of the financial crisis and introduced for a limited amount of time. Mr Gerwen found it important to distinguish between false and wrong rumour and said it was difficult to determine the relationship between the persons who sent the rumour and the person who traded.

Georg Baur, Attorney at Law, Director, Financial Markets, Association of German Banks, Bundesverband deutscher Banken, stated that the definition of market manipulation is working well. However, he supported further moves towards harmonisation.

Andrew Bagley, Managing Director, Equities Legal, Goldman Sachs International, demanded further clarification of accepted market practices. Mr. Bagley drew the attention to the inconsistencies between national regulations concerning short-selling, rules that had to be published within a very short time frame due to the financial crisis. As far as rumours are concerned, Mr Bagley thought the if a rumour moves stock prices, it does not matter whether the rumour was correct or not.

Zdeněk Husták, Of Counsel, Brzobohatý Brož & Honsa Attorneys at law, mentioned the differences between new and old Member states. Czech Republic, for instance, had the first market manipulation investigation in 2000. Mr. Husták said that the accepted market practises regime did not work at all and needed review.

Market Enforcement

The fourth panel, chaired by **Maria Velentza**, Head of Unit G3 Securities Markets, Directorate for Internal Market and Services, European Commission, inquired on whether the market abuse enforcement regime was effective and dissuasive. The moderator argued that the enforcement is not clear enough and diverges across Member states. Ms Velentza also asked the panel whether the French system should be adopted EU-wide by applying sanctions that are proportionate to the offense, e.g. setting the offense at a multiple of the possible profit. Another alternative would be to copy practices from competition law, Ms Velentza said.

Gérard Rameix, Secretary General, Autorité des Marchés Financiers (AMF), regarded MAD as efficient, allowing regulators to enforce its provisions. However, he acknowledged the differences in level of enforcement across countries. Mr Rameix argued that encouraging a settlement like in the UK or US in case of market abuse could be a possible solution,

Glenn Stuart Gordon, Associate Regional Director, US Securities and Exchange Commission, explained that the US is having a discussion on whether there should be further regulation in regard to market abuse. Mr. Gordon said that the U.S. does not have minimal fines but maximum amounts per violation. In the U.S., the SEC has the possibility to go through criminal courts, Mr Gordon claimed. Mr Gordon concluded saying that access to all electronic communication, especially instant messaging, has proved to be very helpful in fighting market abuse.

Jesper Lau Hansen, Professor of Financial Market Law, University of Copenhagen Law Faculty, favoured harmonisation but not complete harmonisation since the goal is the effectiveness of deterrence. Dr. Lau Hansen called for offering due-process trials considering ex ante and ex post offenses.

Thereafter, the three panellists spoke about the powers available in their national jurisdictions and possible conflicts with data protection. The importance of access to e-data was recognized despite the fact that is often too voluminous to be thoroughly analysed.

The Future of Market Abuse Enforcement

Carlos Tavares, Vice Chairman, CESR, and Chairman, Commissão do Mercado de Valores Mobiliarios (CMVM), made a presentation on “Looking to the future of market abuse enforcement.” In order to battle against market abuse, the right order to follow would be to 1) prevent 2) detect 3) investigate and 4) sanction. He presented statistical evidence based on a CESR member-survey indicating that there are great divergences among Member states in enforcement activities. Among the items with strongest divergence are: the power to be informed by issuers; issue regulations in art 6.3; request the freezing of assets; and the public disclosure of sanctions. Further, he drew attention on the greatly diverging levels of pecuniary sanctions and on the duration of imprisonment across Member states. This implies a risk of regulatory arbitrage. Therefore, convergence is an essential condition for an integrated European market, Mr Tavares argued. He also said that doing nothing is not an option. Mr Tavares called for the harmonisation of supervisory powers by reducing the options and the room for discretion of national regulators and with CESR’s level 3 work. Mr

Tavares concluded his intervention asking for harmonisation of sanctions by conciliating different legal systems.

In his closing remarks, **Mr. Paulis** stated that there is a need for consensus on the extension of rules to new markets, but only under the condition of not damaging the system. There should be more enforcement with the least possible burden. The trade-off between objectives of MAD and the cost for the industry require careful weighting. National regulators need more staff with expertise to render the system proactive instead of reactive. It is better to prevent than to cure, Mr Paulis argued. As far as enforcement is concerned, Mr Paulis said that access to proof needs to be more integrated into the system. He added that there need to be more and higher sanctions; more clarity on the definitions of infringements; EU-wide convergence of fines, with the levels of fines dependent upon the probability of the abuse being detected. Mr Paulis also called for both criminal and administrative fines, but he rejected the option of civil litigation.

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