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CLLS Regulatory Law Committee comments on proposed Market Abuse Regulation and Market Abuse Directive

The City of London Law Society ("**CLLS**") represents approximately 14,000 City lawyers through individual and corporate membership including some of the largest international law firms in the world.

This paper has been prepared by the CLLS Regulatory Law Committee (the "**Committee**"). Members of the Committee advise a wide range of firms in the financial markets including banks, brokers, investment advisers, investment managers, custodians, private equity and other specialist fund managers as well as market infrastructure providers such as the operators of trading, clearing and settlement systems.

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The European Commission has now published its formal legislative proposal for a new Market Abuse Regulation ("**MAR**") and Market Abuse Directive ("**MAD2**") to replace the existing Market Abuse Directive ("**MAD**") adopted in 2003.[1] This paper is intended to highlight the principal areas where the Committee has identified that the proposed Regulation and Directive raise legal concerns, particularly focusing on areas where the proposals create risks of legal uncertainty. This paper also proposes specific solutions or identifies areas for further consideration.

The Committee would be pleased to discuss any of the above observations and suggestions with interested parties. In the first instance, please contact Margaret Chamberlain of Travers Smith (+44 (0)20 7295 3000, margaret.chamberlain@traverssmith.com) or Chris Bates of Clifford Chance (+44 (0)20 7006 1041, chris.bates@cliffordchance.com).

Key issues

- **Scope of definition of insider dealing (recitals and defences).** MAR and MAD2 should specifically the address the uncertainties raised by European case law as to the scope of the prohibition on insider dealing. In particular, they should reinstate some of the key recitals from MAD and the recently adopted Regulation on Market Integrity and Transparency ("**REMIT**") as these are important in defining the scope of

[1] The legislative proposals are available at: http://ec.europa.eu/internal_market/securities/abuse/index_en.htm

the insider dealing offence. They should also go further by containing additional substantive provisions articulating the circumstances where a person possessing inside information can enter into a transaction on the market without contravening the prohibition on insider dealing in substantive provisions of MAR and MAD2 in line with the recommendations of the Financial Markets Law Committee in November 2010.

- **Extension of scope to MTFs and OTFs.** The scope of MAR should not be extended to all instruments traded on every MTF or OTF. It should be limited to instruments traded on regulated markets and MTFs designated by ESMA under criteria set out in the Regulation.

- **"Relevant information" as inside information**. MAR should not extend the definition of inside information to cover information simply because investors may regard that information as "relevant".

- **Definition of inside information in relation to commodity and similar derivatives.** MAR should limit the definition of inside information in relation to commodity and other similar derivatives to information that is disclosable <u>and</u> price sensitive.

- **Scope of MAD2.** The scope of MAD2 should be limited in the same way as for MAR, i.e. MAD2 should only extend to trading in financial instruments admitted to trading on defined trading venues.

- **MAD2 – intentionality.** MAD2 should address the mental element required for a criminal offence in more detail.

- **Civil liability and invalidity.** MAR should address the civil liability consequences of a violation of its prohibitions in a way that provides legal certainty.

- **Double jeopardy.** MAR should include provisions reducing the extent of overlap and duplication between the enforcement processes for the administrative and criminal sanctioning regimes.

Overall, we are very concerned that the proposals represent a major extension to the current regime. In particular, the proposals may have a considerable and unjustified impact on transactions in instruments that are not publicly traded in any way. If such an extension is to be maintained, a full impact assessment is necessary.

1. Scope of the definition of insider dealing – importance of recitals and substantive provisions defining the scope of the prohibition

The decision of the European Court of Justice ("**ECJ**") in *Spector Photo NV v CBFA (Case C-45/08)*[2] introduced a new approach to the interpretation of the prohibition of insider dealing in MAD. MAD requires Member States to prohibit anyone from using inside information for the purposes of dealing in relevant financial instruments. A number of Member States, including the UK, had implemented MAD on the basis that this meant that the information had to have a material influence on the person's decision to deal. The ECJ rejected that interpretation and decided that a person would be regarded as using inside information if he

[2] Available at: http://curia.europa.eu/juris/liste.jsf?language=en&num=C-45/08

dealt while in possession of that information even if the information had no influence on the decision to deal.

However, the ECJ recognized that this form of strict liability would give rise to injustice and impede the efficient operation of the markets and indicated that a person would be able to establish a defence to a charge in some circumstances. While the decision did not exhaustively enumerate what those circumstances might be, the ECJ stated that the preamble to MAD:

> *"provides several examples of situations in which the fact that a primary insider in possession of inside information enters into a transaction on the market should not in itself constitute 'use of inside information' for the purposes of Article 2(1) of that directive." (see paragraph 56 of the judgment).*

For example, the ECJ stated that:

> *"The 30th recital in the preamble to Directive 2003/6 states that, since the carrying out of a market transaction necessarily involves a prior decision on the part of its author, the carrying out of that transaction 'should not be deemed in itself to constitute the use of inside information'. If that were not the case, Article 2(1) of that directive could, inter alia, lead to a situation in which a person who decided to launch a public take-over bid would be prohibited from executing that decision since it would constitute inside information. Such a result would not only go beyond what may be regarded as appropriate and necessary to achieve the goals of that directive, but could even adversely affect the efficient functioning of the financial markets by preventing public take-over bids." (see paragraph 60 of the judgement)*

The decision also acknowledges that the decision would raise similar issues for other types of market activity, such as the position of market makers and other persons authorized to act as counterparties or who execute orders on behalf of clients.

MAR uses the same formulation as MAD for defining the insider dealing offence (in Article 7). MAR does include a specific defence dealing with Chinese walls (see comment below). However, it omits all the recitals referred to in the decision of the court as being important in establishing the scope of the prohibition of insider dealing. For example, the UK Financial Services Authority ("**FSA**") relied extensively on these recitals when establishing the safe harbours in its code of market conduct implementing MAD.

In addition, there are considerable overlaps between the scope of MAR and REMIT. However, the recitals to REMIT do include one important clarification, which was not included in MAD and should be reflected in MAR. Recital 12 to REMIT states that "information regarding the market participant's own plans and strategies for trading should not be considered as inside information". This is particularly important where disclosure obligations of the kind envisaged by Article 12(2) MAR are placed on all market participants for a particular market. Otherwise, market participants would be required to publish their trading plans and strategies. However, it is also important in other contexts as it reflects the principle set out in recital 30 which confirms that a person dealing on knowledge of his own intentions does not engage in insider dealing.

The Commission's consultation on the proposed revision to MAD (June 2010) and its impact assessment do not address the deletion of the recitals. Nor was this discussed in the Commission's earlier call for evidence (April 2009).

Furthermore, the Committee believes that the operative provisions of MAR (and MAD2) should articulate at least some of the circumstances in which a person who is in possession of inside information should not be regarded as contravening the prohibition on insider dealing. In this regard, the Committee endorses the recommendations in the report of the Financial Markets Law Committee *"Analysis of uncertainty around the insider dealing offence under the Market Abuse Directive arising from the judgment of the ECJ in Spector Photo Group NV v CBFA" (*November 2010)[3]. In particular, that report recommended that, if the revision of MAD did not reverse the decision in Spector, it should at least partially codify its application by making clear that there are a number of specific circumstances where a person who has inside information should not be regarded as using that information by entering into transactions. This could be accomplished either by setting out all the substantive limitations on the scope of the prohibition in the Level 1 measure or by empowering the Commission to adopt delegated acts specifying these limitations.

Recommendations:

a) The text of MAR should be amended to include recitals equivalent to the following recitals in MAD:

> Recital 18 last sentence: market makers, principal traders and persons authorized to execute orders on behalf of others
>
> Recital 29 – takeovers
>
> Recital 30 – dealing on own intentions
>
> Recital 31 – research

b) The text of MAR should also be amended to include a recital equivalent to the relevant passage from recital 12 REMIT.

c) In addition, the text of MAR should be amended to include substantive provisions addressing the uncertainties resulting from the *Spector* decision in line with the recommendations of the Financial Markets Law Committee.

d) Similar issues arise in relation to the criminal offences under MAD2. These should be dealt with by limiting the scope of MAD2 in the manner discussed in section 5 below.

e) As noted below, the Commission should also have power to adopt delegated acts to specify further the definitions of insider dealing and market manipulation so that it can elaborate these defences in a way that gives greater legal certainty, to the extent that these issues are not addressed in the Regulation itself (and in MAD2).

2. Article 2(1) MAR – extension of scope to MTFs and OTFs

The legislative proposal would extend the scope of the insider dealing and market manipulation rules in MAR to any financial instrument admitted to trading on a MTF or OTF. The UK's super-equivalent provisions already extend the scope of its market abuse rules to cover certain prescribed MTFs (those operated by exchanges such as AIM) but even the UK has not sought to extend these rules to cover all MTFs.

[3] Available at: http://www.fmlc.org/papers/Issue154ReportDec10.pdf

Extending the scope of market abuse rules to cover instruments admitted to trading on any MTF or OTF creates a significant legal certainty issue for market participants. Since MAD was introduced the range of regulated markets (and instruments traded on them) has significantly increased. Even today, there is no practical means for market participants readily to identify which instruments are currently traded on regulated markets and it cannot be said with any confidence that it is actually possible to identify all the instruments so traded.

However, the problem will be vastly exacerbated by the extension of these rules to cover any MTF or OTF operated anywhere in the EU. Even if ESMA were given additional powers to gather information from trading venues, it may not be practical for ESMA to create and publish a list of all instruments traded that is accurate in real time, since some venues may admit instruments by class or by general characteristics (e.g. all securities included in certain indexes for third country stock markets). This legal certainty issue will be made more difficult by the fact that increasingly many OTC instruments, such as private derivatives contracts will be traded on OTFs (or MTFs) and these may be defined in ways that mean that it is difficult to identify when trading outside the OTF (or MTF) is covered by the market abuse rules. In some cases it is likely that it is the participants (not the OTF operator) that will decide the specific instruments traded on an OTF, within overall generic classes specified by the OTF operator.

The scope issues are also made more acute by the fact that MAR will also apply to:

- trading in instruments not admitted to trading on a trading venue but whose value depends on instruments which are so admitted (Article 2(2) – see below as to concerns about the scope of this provision); and

- behaviour relating to financial instruments and spot commodity contracts not admitted to trading but where the behaviour is likely to have an effect on instruments admitted to trading (Article 2(3)).

Therefore, market participants will find it very difficult ever to identify when their behaviour is covered by MAR, but they will be strictly liable for contraventions of MAR whether or not they knew or could have known that their conduct was within the scope of the Regulation. If the provisions defining the scope of MAR are to have any substance, it must be possible for market participants to identify which instruments are covered by the Regulation. It is against the most basic concepts of justice to make conduct punishable but not to define the boundary between punishable and legitimate behaviour in a way which enables those affected to determine on which side of the boundary their conduct falls.

In addition, the extension of scope will mean that MAR will impose insider dealing restrictions on markets where no-one is subject to any duties of disclosure and where the market participants almost inevitably have differing information. In those cases, the function of the market is to reflect that information through the price formation process. For example, producers and users trading in commodities and commodity derivatives would not in the normal course disclose information about their own business (such as factors that would affect their supply of or demand for commodities) and indeed if they did so it could be extremely damaging for them. Applying insider dealing concepts that are appropriate for listed equities to such markets could in effect prohibit producers and users of commodities from using those markets for hedging purposes (see also below).

In general, it is also concerning that an operator of OTF should be able to subject market participants to insider dealing and market manipulation rules simply because it is to the operator's private advantage to admit a particular instrument to trading on its OTF, especially where its decision affects market participants trading that instrument outside the OTF. Even under the proposed revisions to the Markets in Financial Instruments Directive, regulated markets will still be subject to more stringent rules as regards admission of instruments to trading (and in practice greater scrutiny and oversight) and admission to trading on a regulated market carries with it other consequences (e.g. under prospectus and transparency legislation) which gives it a public character and makes it more appropriate to impose consequences on other market participants (and more predictable that this will be the case). This is reinforced by the fact that regulated markets are in principle markets that are open, directly or indirectly, to a wider class of market participants, while operators of OTFs will have greater ability to restrict access to their facilities. Furthermore, it is not necessary to apply insider dealing or market manipulation laws to protect users of the OTF anymore than it is necessary to protect parties trading over-the-counter in other instruments that fall outside of the scope of MAR. They benefit from the same customer protections, including protection against front running, as apply under the Markets in Financial Instruments Directive (MiFID) to other clients of investment firms.

Furthermore, the extension of the scope of EU rules in this way vastly increases the extraterritorial nature of EU regulation. EU insider dealing and market manipulation rules would apply to anyone anywhere in the world transacting business exclusively with other non-EU persons (or on non-EU markets) in particular instruments, simply because an EU investment firm has also chosen to trade the same instrument on an EU MTF or OTF. This would be the case even if the non-EU market is the primary market for that instrument and even if the behaviour outside the EU has no effect on EU markets (see Article 2(4)), which raises issues as to its consistency with international law. To some extent these same issues exist today under MAD but the impact is increased by the expansion of the scope of the rules. In contrast, the proposed short selling regulation will limit the extraterritorial scope of its application in cases where the primary trading venue is outside the EU.

The extension of scope also increases the likelihood of there being overlapping enforcement responsibilities within the EU. The competent authority of any jurisdiction in which a regulated market, MTF or OTF is located can claim extraterritorial jurisdiction over conduct anywhere in the EU relating to instruments traded on a venue in its territory (Article 16). Again, this issue arises today under MAD but its impact is increased by the expansion of scope.

The Commission's consultation did not address the possibility that the scope of insider dealing rules could be extended to trading facilities other than MTFs. The impact assessment acknowledges that the proposed extension of scope to OTFs could cause legal uncertainty, but does not address the specific concerns discussed above. The assessment does suggest that legal uncertainty could be addressed "by calibrating the application of MAD, depending on the type of instrument, so that it applies in a proportionate manner". However, the legislative proposal contains no such calibration.

Recommendations:

a) MAR should restrict its scope to instruments admitted to trading on regulated markets and MTFs designated by ESMA on the basis of criteria specified in the Regulation (or though implementing measures). Those criteria should include criteria designed to identify those markets which are significant to the price formation process in particular instruments, where the process regarding admission to trading meets the most stringent standards and where there is adequate transparency as to which instruments are traded on those markets.

b) In any event, the Regulation should put in place provisions that will require ESMA to prepare and publish an up to date list of instruments that are admitted to trading on relevant trading venues and ensure that market participants who rely on this list benefit from a safe harbour.

c) We also recommend that further consideration should be given to the extraterritorial scope of the insider dealing and market manipulation provisions in MAR and MAD2 (see below as to the territorial application of other provisions).

3. Article 6(1)(e) and (3) MAR – "relevant information" as inside information

MAR makes at least two major changes to the current definition of inside information under MAD.

- First, Article 6(1)(e) introduces a free standing category of inside information, which is neither "precise" nor "price sensitive", but which is simply treated as inside information by virtue of the application of a reasonable investor test, i.e. information is inside information if a reasonable investor would regard it as "relevant" when deciding the terms of a transaction.

- Secondly, Article 6(3) states that the concept of a "significant effect on price" used in Article 6(1)(a) to (d) shall mean information that a "reasonable investor would be likely to use as part of the basis of his investment decision" (which is itself another form of the reasonable investor test).

Both of these changes have the result of elevating the reasonable investor test so that it supplants the concept of "a significant effect on price". This is a significant change from the current position under MAD. The current position is reflected in the following statement which appeared in the paper published by the Committee of European Securities Regulators ("**CESR**") in July 2007 (paper 06-562b):

> "*The 'reasonable investor' test set out above assists in determining the type of information to be taken into account for the purposes of the 'significant price effect' criterion. In this context it should be noted Article 17.2 of MAD makes clear that implementing measures do not modify the essential provisions of the Level 1 Directive.*"

The CESR paper then goes on, correctly, to assess how the likelihood of a significant effect on price should be assessed in this context. Therefore, in MAD the "reasonable investor test was intended to supplement and not replace the "significant price effect" test. Indeed a Level 2 measure could not change the substantive effect of a Level 1 measure. In this way, the reasonable investor test provides a useful threshold filter so that it is not necessary to consider the price sensitivity of information which would only be regarded as important by capricious or specially situated investors (although recent UK enforcement decisions[4] and a recent Upper Tribunal decision[5] indicate that the FSA and the Upper Tribunal disagree with the CESR guidance based on the UK implementation of MAD.)

It might be thought that the proposed Article 6(3) merely restates the current position under MAD (because the words are the same as the implementing directive under MAD). However, Article 6(3) would now be part of the primary regulation, not merely part of an implementing directive. Therefore, it would be capable of modifying the essential provisions of Article 6(1)(a) to (d) so that the reasonable investor test in Article 6(3) completely supplants the price sensitivity test set out in Article 6(1)(a) to (d) (although it is difficult to see how the

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[4] See e.g. Photo-Me International plc (21 June 2010), available at: http://www.fsa.gov.uk/pubs/final/photo_me.pdf

[5] Massey v FSA (Upper Tribunal (Tax and Chancery Chamber) Financial Services, FIN/2009/0024, 2 February 2011), available at: http://www.tribunals.gov.uk/financeandtax/Documents/decisions/DavidMassey_v_FSA.pdf.

requirement to dispense with price sensitivity can be reconciled with the requirements of Article 6(2) which contemplates that an effect on price - albeit not a significant one - is an element in deciding when information is precise).

In any event, proposed Article 6(1)(e) is even more radical because it would also dispense with any requirement that the information in question is precise and clearly and explicitly discards any requirement that the information be price sensitive. It would be enough that a reasonable investor would regard that information as "relevant" when deciding the terms of a transaction.

These changes are significant and put firms and individuals in an invidious position if they know any significant information that is not demonstrably already in the public domain. Almost any non-public information could be considered to be the type of information which would be taken into account by a reasonable investor (even, possibly, when that information is merely affirmative of market expectations). The changes leave firms and individuals in a permanent state of peril; their conduct will be judged with hindsight against an imprecise ambiguous test. As a result it is very difficult to see how they could have adequate systems to monitor or detect market abuse of this kind.

For example:

- directors would have significant difficulty ever exercising share options because they always have unpublished information that is likely to be relevant to the formation of an investment decision even if it is not price-sensitive in any way;

- investors will be deterred from engaging with management of an issuer by the concern that they will receive unannounced information that might be considered "relevant" and will thus bar them from dealing in the company's securities (it is unlikely that an investor would be willing to engage with management if the investor considered that it would not be able to receive information that it considers "relevant");

- commodity producers and users would have significant difficulty ever trading in commodity derivatives to hedge their risks since they will inevitably always have unpublished information that is relevant to investors but which they are not required to announce;

- it is also unclear how companies could ever maintain the insider lists required by Article 13 MAR – companies would have to identify all the information that is potentially inside information of this kind (despite its lack of precision) and the persons that have access to that information, without the comfort that the disclosure of this information will terminate the obligation.

It might be thought that the proposal broadly corresponds to the UK's "super-equivalent" market abuse regime in section 118(4) of the Financial Services and Markets Act 2000 ("**FSMA**"). It does not. It is true that the UK's super-equivalent regime is capable of applying to behaviour based on information which is "relevant" but not price sensitive. However, the UK regime does not impose an absolute bar on trading on or disclosing such information. It only imposes sanctions for behaviour on the basis of such information where the reasonable regular market user would consider the behaviour unacceptable. In this regard, it is notable that the FSA's post-MAD Code of Market Conduct only asserts that trading and disclosure based on relevant information is (in its opinion) market abuse if it "relates to matters which a regular user would reasonably expect to be disclosed to users of the particular prescribed market" (MAR 1.5.2E in the FSA's Code of Market Conduct). For listed companies, only information that is price sensitive is disclosable under the FSA's disclosure and transparency rules implementing MAD[6] (although again the FSA appears to have moved away from CESR's interpretation in applying the disclosure obligations). It is true that the Code is not exhaustive. However, proposed Article 6(1)(e) would prohibit all trading on or disclosure of such information regardless of the disclosability of such information or any other factor.

This issue is exacerbated by the limited explicit defences in MAR and the *Spector* case which presumes "trading in possession" of inside information to be insider dealing. While *Spector* does suggest that there may be legislatively unarticulated defences that could be used in some cases, as we mentioned, the absence of key recitals that existed in MAD undermines any comfort that might be derived from that suggestion. It is also exacerbated by the fact that under MAR, analysts, investors and other persons who acquire information in the course of their employment or profession can be fined if they act on the information, even if they did not know and could in no way ever have known that the information was inside information (Article 7(5)(c) MAR).

The exclusion of Article 6(1)(e) information from the disclosure obligations in Article 12 of MAR does not assist greatly. In the first place, Article 6(3) results in the reasonable investor test supplanting the price sensitivity test, which in itself puts issuers in a very difficult situation when they have to determine what they need to announce (similar to the confusion that has been caused by the FSA's shift of approach to the application of the disclosure rules). Secondly, those in possession of relevant information are still effectively precluded from dealing unless they disclose the information – so it effectively forces an overly extensive approach to disclosure nevertheless. For example, as already noted above, this provision is likely to have a chilling effect on investors' willingness to engage with the management of issuers, as the disclosure by management of any "relevant" information to the investor (e.g. by way of "colour" on already published information) might result in the investors being barred from dealing in the issuer's securities (without the issuer being under any corresponding obligation to disclose the information in order to bring those dealing restrictions to an end).

Similarly, recitals (11) and (12) in MAR are helpful but do not resolve the issue of whether information must or must not be price sensitive. The examples in recital (14) of information that is intended to be covered by Article 6(1)(e) mostly relate to matters which are in the course of negotiation. Thus, they would in any event qualify as inside information once they indicate facts that may reasonably be expected to occur if the information is price sensitive. While an issuer would often have legitimate grounds for delaying announcements of such matters, any dealings on information where there is a delay in announcement is already covered by the regime, without extending the definition of inside information in this way.

This extension of the definition of inside information is not discussed at all in the Commission's consultation or impact assessment. Indeed, the Commission stated in its earlier call for evidence that "there does not seem to be a need to revise the concepts used to define inside information for MAD purposes".

Recommendations:

a) Article 6(1)(e) should be deleted or, if it is retained in any form, it should only be on the basis that it is restricted to a much narrower class of information which is significant in relation to price. In addition:

[6] In addition, a limited volume of other information is required to be disclosed under the UK Listing Rules, which may or may not be price sensitive depending on the circumstances (see LR9 of the Listing Rules).

- MAR should only prohibit a person from dealing on the basis of that information if he knew or ought to have known that the information was inside information (amending Article 7(5)); and

- the extended class of inside information should not be treated as inside information for the purposes of the criminal offences in MAD2.

b) MAR should also make clear that Article 6(3) merely supplements Article 6(1)(a) to (d) (so that information must be precise, price sensitive and relevant). This is broadly the approach taken in REMIT.

4. Article 6(1)(b) MAR – definition of inside information in relation to commodity derivatives

The current Directive treats a very limited class of information as inside information in relation to commodity derivatives. Under MAD, it is not necessary that information be price sensitive to qualify as inside information in relation commodity derivatives. However, information is inside information in relation to commodity derivatives only if:

- the information is precise;

- the information is not public;

- the information is information which users of derivatives markets would expect to receive (this concept is defined in Article 4 of implementing Directive 2004/72/EC to cover information routinely made available to market users or which is required to be disclosed in accordance with legal or regulatory provisions, market rules, contracts or customs on the relevant market); and

- those users would expect to receive that information "in accordance with accepted market practices on those markets" (second paragraph of Article 1(1) MAD).

The Market Abuse Directive defines "accepted market practices" quite narrowly, as practices reasonably expected and that are accepted by a national competent authority in accordance with the procedure laid down in implementing Directive 2004/72/EC. We are not aware of any decisions relating to the disclosure of information relating to commodity derivatives being published by a competent authority under that procedure, suggesting that no competent authority has yet accepted any practices as qualifying for that purpose.

In contrast, MAR extends the definition of inside information in relation to commodity derivatives to cover any price sensitive information, whether or not disclosable on derivatives or other markets. In addition, it also appears to extend the definition of inside information to cover all disclosable information, even if it is not precise or price sensitive (by virtue of the wording beginning "notably…"). In particular, some of the information required to be disclosed may not be price sensitive (or even relevant to investors in the sense contemplated by Article 6(3) or 6(1)(e)).

With the exception of wholesale energy products covered by REMIT, there is no general disclosure obligation that requires the disclosure of inside information relating to commodity derivatives. Nor is it conceivable that any such obligation could be imposed given the variety of possible underlying commodities and the global nature of the markets (which means that many relevant market participants are outside the EU and beyond the scope of any disclosure requirement). As a result, it is almost inevitable that producers and users of commodities have differing information. In these circumstances, the function of the market is to reflect that information through the price formation process. Applying insider dealing concepts that are appropriate for listed equities to such markets could in effect prohibit any producer/user of commodities from using those markets for hedging purposes.

Regulators have long recognized that there are differences between commodity derivatives and securities markets that justify different approaches to the regulation of misuse of information. In particular, while the recent IOSCO report on the regulation and supervision of commodity derivatives[7] emphasised the importance of powers to sanction "misuse of information", it stated that this was:

> *"not intended to imply the application to listed commodity derivatives of insider trading principles that have been developed for securities. Regarding commodity derivatives, the focus in many jurisdictions has been on preventing the disclosure of information by exchange officials and government employees with access to certain information generated by virtue of their positions that is normally expected to remain confidential. Accordingly, misuse of information policies should take into account the functional differences between, and the relevant jurisdiction's statutory treatment of, securities and commodity derivatives."*

Similar issues also arise in relation to other derivatives and financial instruments where the disclosure obligations in Article 12 do not apply to the derivative or its underlying security. For example, many of these issues arise in relation to listed derivatives on the underlyings to which Section C.10 of Annex I MiFID apply, e.g. derivatives on freight rates, weather derivatives, real estate prices, etc. In addition, similar issues arise in relation to some financial derivatives where there is no underlying issuer of a security rates e.g. listed derivatives on interest rates, foreign exchange rates, etc. Therefore, any specialized definition of inside information should apply more broadly to cover these additional classes of derivatives, as well as commodity derivatives as such.

Recommendations:

a) MAR should define inside information in relation to commodity derivatives and other similar financial instruments to mean "disclosable" information of the kind referred to in Article 4 of Directive 2004/72/EC implementing MAD. However, it should also limit the scope of the definition so that it only covers information that is itself precise and price sensitive. This would be a preferable way of addressing the uncertainties with respect to the current definition than simply removing the disclosability criterion altogether.

b) This specialized definition of inside information should apply to all financial instruments other than:

- those financial instruments where the issuer is subject to an obligation of disclosure under Article 12 MAR (and financial instruments whose value depends on those financial instruments within Article 2(2) MAR – see below);

- emissions allowances (if market participants are subject to a duty of disclosure under Article 12).

At the very least, it should apply to "commodity derivatives" as defined in the proposed Regulation on Markets in Financial Instruments (MiFIR) which also covers instruments

[7] FR07/11 *Principles for the Regulation and Supervision of Commodity Derivatives Markets*, Report of the Technical Committee of IOSCO (September 2011) available at: http://www.iosco.org/library/pubdocs/pdf/IOSCOPD358.pdf

covered by Section C.10 of the proposed restated Markets in Financial Instruments Directive (MiFID2).

d) It will be important not to undermine the specialized definition of inside information through any extended definition of inside information in Article 6(1)(e).

e) In any event, it should be made clear that no information is inside information in relation to commodity derivatives unless it is precise and price sensitive.

If there was still a strong public policy case for expanding the scope of inside information, it could then be achieved by further sectoral action to increase the scope of disclosure in underlying commodity markets, although there would be issues about the extent to which it is possible to impose these obligations extraterritorially.

5. MAD2 – scope

The proposed directive applies insider dealing and market manipulation rules to all financial instruments, regardless of whether they are admitted to trading on a trading venue. For example, this would have the result of imposing insider dealing sanctions on a wide variety of transactions where no such requirements currently apply and where there are no disclosure requirements which ensure that parties have equality of information. For example, they would apply to M&A transactions in shares in unlisted private companies, even if the parties have accepted that they may have differential information. Similar issues would apply to sales of private funds, OTC derivatives and other transactions in financial instruments that are not on public markets. In contrast, the UK Criminal Justice Act only covers securities that are traded on relevant public markets (and derivatives on those securities).

It would also mean that conduct was criminal under MAD2 even though it falls outside the scope of MAR. This is inconsistent with the stated objective of MAD2 which is to impose criminal sanctions on the most serious breaches of MAR.

This also appears to be inconsistent with the Treaty basis for MAD2. MAD2 is proposed under Article 83(2) TFEU, which provides that:

> "If the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy ***in an area which has been subject to harmonisation measures***, directives may establish minimum rules with regard to the definition of criminal offences and sanctions ***in the area concerned.***" (emphasis added)

As drafted, MAD2 would harmonise criminal sanctions in areas which have not been the subject of harmonization measures, i.e. those areas which fall outside the scope of MAR.

Similar issues arise where insider dealing or market manipulation benefits from a defence under or limitation of the application of MAR, e.g. under Article 7(7) or (8) or the defences referred to in section 1 above.

Recommendations:

a) The scope of MAD2 should be aligned with the scope of MAR. Article 1 MAD2 should state that the Directive only applies to financial instruments and conduct within the scope specified in Article 2 MAR.

b) In addition, MAD2 should make clear that it only requires Member States to ensure that conduct is a criminal offence where that conduct is prohibited by MAR. This would ensure that where there are defences in, or limitations on the application of, MAR these also apply to the criminal offences under MAD2.

c) However, it would be inappropriate to mandate an unlimited extraterritorial scope of the kind specified in Article 2(4) MAR in the context of criminal sanctions. There should be a defined territorial scope which limits the extraterritorial impact within and outside the EU of a Member State's criminal regime. We would recommend that the criminal offence of insider dealing should be limited to conduct taking place in the Member State concerned (including transactions executed in a market in that Member State or entered into with a counterparty in that Member State) and the criminal offence of market manipulation should only apply to conduct having an effect on a market in the Member State concerned. The existing corresponding criminal offences in the UK have a more limited territorial scope than the administrative regime implementing MAD (see the Criminal Justice Act 1993 and s. 397 FSMA).

6. MAD2 – intentionality

The proposed directive requires that it be a criminal offence "intentionally" to engage in insider dealing. However, it is unclear what intentionality means in this context. For example, a person may intend to deal in securities but not know that the information he possesses is inside information.

Similarly, it is proposed that the "intentional" dissemination of false or misleading information is an offence (under Article 4(d)). However, a person may intend to disseminate information but not know that the information is false or misleading.

The proposed Article 7 allowing the imposition of liability on legal persons is far too broad. Many persons of no great seniority will have power to represent a legal person in transactions or take decisions on behalf of a legal person.

The provisions of Article 7(2), which allows the imposition of liability on a legal person for failure to supervise also, seems overly broad. These provisions seem more suited to an administrative rather than a criminal regime.

Recommendations:

a) MAD2 should make clear that a person does not commit the offence of insider dealing in Article 3 unless he also knows that the information in question is inside information.

b) It should also be made clear that a person does not commit the offence relating to the dissemination of information in Article 4(d) unless he also knows that the information is false or misleading.

c) In addition, it should be made clear that only truly price sensitive information is "inside information" for the purposes of the criminal offence. It would be wholly inappropriate to impose criminal liability for use of information covered by Article 6(1)(e) MAR or information that is only inside information because of Article 6(3) MAR.

d) There should be a defence in MAD2 equivalent to Article 7(8) MAR.

e) The scope of corporate liability should be left to national law or at the very least it should be restricted to cases where the persons in question represent the guiding mind and will of the company and are knowingly concerned in the offence.

f) It should also be made clear that the offences in Article 3, 4 and 5 can only be committed by individuals (or, in cases of corporate liability, through the conduct of individuals), so that it is not necessary to include a defence for reliance on Chinese walls.

Note: It may be desirable to introduce an offence of encouraging/inducing corresponding to Article 7(3) MAR (where the act is done intentionally and with knowledge that the information possessed is inside information). Article 7(3) covers cases where a person who has inside information encourages someone else to deal without disclosing the information. Thus, the person in question may not be inciting insider dealing since the person incited will not engage in insider dealing (since he will never possess the inside information).

7. Civil liability and invalidity

There is a risk that contraventions of MAR would result in civil liability for issuers and market participants under general principles of law relevant to directly applicable EU provisions.[8] This is of particular concern since MAR imposes strict liability, at least on professional market participants and issuers. In contrast, the UK has chosen not to impose direct civil liability for market abuse and only to impose civil liability on issuers for false or misleading statements or delayed disclosure where there is knowledge, recklessness or dishonesty (section 90A FSMA).

The impact assessment does not discuss the possible costs of civil liability for issuers and market participants.

Recommendations:

a) The Regulation should make clear that a contravention of its provisions does not generally invalidate any transaction or render any transaction unenforceable or give rise to a claim for compensation (compare the Parliament text of EMIR which contains similar provisions).

b) The provisions of MAR should generally be enforced by means of the administrative sanctions in Article 24. However, it may be possible to create narrow, clear exceptions to this principle (or as a last resort to allow the matter to continue to be addressed in national law[9]).

8. Double jeopardy

Neither MAR nor MAD2 explains the relationship between the two sanctioning regimes. In particular it is unclear whether a person can be subject to both criminal and administrative penalties for the same conduct. It is also unclear whether there can be parallel criminal and administrative proceedings.

Recommendations:

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[8] See e.g. *Antonio Muñoz y Cia SA and Superior Fruiticola SA v Frumar Ltd and Redbridge Produce Marketing Ltd.* (Case C-253/00) available at:http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=62000J0253

[9] Compare Recital (69) to Regulation (EC) No 1060/2009 of the European Parliament and of the Council of 16 September 2009 on credit rating agencies which provides *"Without prejudice to the application of Community law, any claim against credit rating agencies in relation to any infringement of the provisions of this Regulation should be made in accordance with the applicable national law on civil liability."*

a) Article 27 MAR should include provisions which state that, when determining the type of administrative sanctions and measures, the authorities shall also take into account the extent and nature of any criminal sanctions imposed in respect of the breach.

b) In addition, Article 24(2) MAR should be extended to require the competent authorities and the authorities of any Member State responsible for the investigation or prosecution of any criminal offences arising from a breach referred to in Article 25 to cooperate closely to ensure that the administrative and criminal measures and sanctions produce the desired result and to coordinate their action to avoid possible duplication and overlap where the breach may result in both criminal sanctions and administrative measures or sanctions.

9. Other issues (references are to MAR unless otherwise stated):

a) ***Level of harmonization.*** MAR should be clear as to the level of harmonization e.g. as to whether Member States are required to repeal existing measures implementing MAD and the extent to which Member States can maintain any national measures within the scope of application of MAR (compare Article 4 of the proposed Consumer Rights Directive). For example, it is unclear as to whether Member States are permitted to retain special rules relating to takeovers (compare recital 28 MAD which specifically addressed this).

We note that the Treaty basis for MAD2 only allows the Directive to set minimum rules.

b) ***Article 2(2) MAR – application to OTC derivatives***. This provision extends the scope of the insider dealing rules to financial instruments not admitted to trading on a trading venue but whose "value relates to" a financial instrument so admitted (or in relation to credit derivatives, simply a credit derivative that "relates to" an instrument so admitted). This wording differs from Article 9 MAD and other similar provisions in MiFIR (e.g. Article 23(2) MiFIR) which refer to instruments whose value "depends on" a reference instrument.

The current wording of Article 9 MAD is preferable because it suggests a requirement that there be a direct contractual link between the derivative and the underlying instrument. The use of the words "value relates to" suggests that it is simply enough that the value or price of an instrument that is only traded privately or over-the-counter (OTC) is correlated with the value or price of an instrument that is admitted to trading on a trading venue. A test which is simply based on the correlation of prices may, for example, mean that shares in private companies fall within the scope of the insider dealing prohibition simply because their value is correlated with those of listed companies or that a derivative referable to a loan to a company – which is not a financial instrument - would be within the scope solely because the value of the derivative is correlated with that of listed debt.

However, we strongly urge the adoption of wording which explicitly defines the nature of the required link between the OTC instrument and the instrument that is admitted to trading on a trading venue, e.g. by referring to instruments whose subject matter is a relevant financial instrument or instruments whose price or value is expressed by reference to relevant financial instruments. It could be made clear that a credit derivative was covered by the provision where a financial instrument admitted to trading on a relevant venue is a reference obligation or a deliverable obligation or the credit derivative provides for cash settlement by reference to the value of such an instrument.

c) ***Article 2(3)(c) MAR – application to OTC transaction.*** This should be deleted. It would extend the scope of the anti-manipulation rules to conduct relating to all financial instruments simply because they have an effect on spot commodity contracts, even where those instruments are not admitted to trading on a trading venue. This is inconsistent with the overall structure of MAR.

d) ***Article 3(2) MAR – stabilization.*** This should not be limited to trading "in own shares". The scope of the exemption should state that the "… prohibitions in Articles 9 and 10 do not apply to the stabilization of a financial instrument…" (in line with the existing provisions of Article 8 MAD).

The corresponding exemption in Article 1(2) MAD2 should be amended to read: "… does not apply to trading in own shares in buy-back programmes or ~~for~~ the stabilization of a financial instrument, where such trading **or stabilization** …"

e) ***Article 4 MAR – non-EU governments.*** Given the expanded extraterritorial reach of MAR, corresponding exemptions should be available to foreign governments, central banks, etc., especially given that non-EU sovereign debt is likely to be traded on EU venues.

f) ***Article 5 MAR – "derivatives on commodities".*** This term is used in the Regulation (see e.g. Article 1(1)(b)) but not defined. It may not be necessary to include a definition if our proposals in section 4 above are adopted in full. However, it may be necessary to include a definition, which might be based on the definition of "commodity derivatives" in the proposed Regulation on Markets in Financial Instruments (MiFIR).

g) ***Article 5(10) MAR – "spot commodity contract".*** This definition extends beyond spot commodity contracts to include "derivative contracts that must be settled physically". It is unhelpful for a term to be defined to mean something radically different than its natural meaning. We recommend that that the definition is changed to refer to "physical commodity contracts". In addition, it should make clear that it covers forward contracts as well as spot contracts (as many such contracts would not be regarded as derivatives) and that it does not cover contracts which are "financial instruments", since these are covered by other provisions already (e.g. by replacing the words "derivative contracts that must be settled physically" with the words "forward and derivative contracts that must settled physically and that are not financial instruments").

h) ***Article 5(16) MAR – "issuer of a financial instrument".*** The recently proposed amendments to the Transparency Directive will (if adopted) address the issues that arise where depositary receipts (DRs) are admitted to trading on a regulated market. In those circumstances, the disclosure obligations in Article 12 MAR should apply to the issuer of the underlying shares not the custodian bank. However, those amendments do not address how the disclosure requirements in MAR will apply where DRs are admitted to trading on an MTF or OTF. Therefore, there should be specific provisions in MAR dealing with who is regarded as the issuer of DRs.

i) ***Articles 6(1)(a), (b), (c) and (d) MAR – "related derivative financial instrument".*** Like the corresponding provisions in MAD, these provisions refer to "related derivative financial instruments". However, this is not a defined term. It is probably intended to refer to financial instruments referred to in Article 2(2), but that paragraph is not limited to "derivative financial instruments". It would be desirable to include a definition or explicit cross-reference.

j) ***Articles 6(1)(b), 6(3) and 8 MAR – "related spot commodity contracts".*** MAR refers in a number of places to derivatives contracts or financial instruments and "related spot commodity contracts". However, it does not define when a physically settled spot or derivative commodity contract should be regarded as "related to" a derivative contract or financial instrument. We recommend that this link is defined in a way that makes clear when the relationship arises. For example, it could be made clear that a physically settled contract is related to a derivative contract or other financial instrument where the physically settled contract (or its underlying commodity) is the subject matter of the financial instrument or the price or value of the financial instrument is expressed by reference to the physically settled contract (or its underlying commodity), in line with our proposals with respect to Article 2(2) MAR above.

k) ***Articles 5, 6, 7 and 8 MAR - delegated acts.*** Article 31 MAR envisages that there may be delegated acts "concerning the supplementing and amending of … the definitions in this Regulation". However, unlike the other provisions referred to in Article 31, there is no specific provision in Articles 5, 6, 7 or 8 specifying the nature or scope of the power to adopt delegated acts (and it is unclear whether the power to adopt delegated acts with respect to definitions is limited to Article 5 itself or whether it extends to the other provisions as well[10]). Proper powers are needed to further specify some of the definitions, in particular in relation to the definition of insider dealing. However, the scope and nature of those powers should be appropriately defined.

   Delegated acts affecting the definitions in the Regulation should also be taken into account in applying MAD2. This will require amendments to MAD2. Recital (13) to MAD2 would not provide enough legal certainty as to how these implementing measures are taken into account in particular if Member States adopt more stringent measures.

l) ***Article 7 MAR – cancellation of orders.*** A person who acquires inside information should generally refrain from dealing in the affected securities. The proposed extension of the insider dealing prohibition to cover cancellation of orders (or attempts to cancel orders) would for the first time create an offence of "insider not dealing".

   This risks putting a person in an impossible position if he acquires inside information after placing an order. The cancellation of the order would contravene MAR. However, under the current proposal, if the person allows the order to be executed, he also risks carrying out a dealing contrary to MAR, since he now possesses inside information (in particular, because the *Spector* case casts doubt on the ability of someone to rely on a pre-existing trading plan as a defence to insider dealing). At the very least, Article 7(8) should be amended to provide an exemption for transactions resulting from an order to trade placed before the person acquired inside information (compare Article 3(4)(a) REMIT).

   However, that still leaves a person in a very difficult position where he has placed orders that are "good till cancelled" or where the executing broker may need to revert to the person for further or clarifying instructions in changed circumstances (e.g. market disruption). A person who receives inside information and then cancels an order is in much the same position as a person who is about to place an order pursuant to a pre-existing strategy but who refrains from placing that order as a result

[10] Article 8(5) only grants implementing powers to clarify the indicators in Annex I.

of receiving inside information. In both cases, the investor is not dealing in the securities. It would be preferable not to introduce these changes but to make clear the scope and limits of defences that allow a person to carry out dealings pursuant to a pre-existing plan or intention, e.g. restricting the ability to rely on that plan where a person amends an order or plan in a material respect after acquiring the inside information and then carries out a dealing.

Corresponding changes will be needed in Article 3(a) MAD2.

This proposed extension of the insider dealing rules to cover "not dealing" was not discussed in the Commission's consultation paper or impact assessment (or the call for evidence).

m) ***Article 7(2) MAR – attempts***. In the first sentence, the words "use that information" should appear before "to acquire or dispose of" to align this provision with Article 7(1).

n) Articles 7(2) and 8(2) MAR – attempts and mental element. MAR should address the mental element that is relevant for an attempt. For example, REMIT makes clear that an attempt at market manipulation requires intention.

o) Article 7(3) – "on the basis of inside information". The words "on the basis of inside information" appear in the wrong place in this paragraph. Article 7(3) should prohibit a person who possesses inside information, on the basis of that information, recommending or inducing another person to acquire or dispose of financial instruments to which the information relates. The paragraph should prohibit a person making the recommendation or inducement from doing so on the basis of that information. It is immaterial whether the person to whom the recommendation or inducement is made is acting on (or is even aware of) the information.

p) ***Article 7(6) - "or influence the decision".*** MAR (like MAD) makes clear that where a legal person commits insider dealing the individuals who take part in the decision to deal may also be punished. However, MAR goes further than MAD by extending this to cover those individuals who "influence" the decision. This additional wording is unhelpful because it suggests that persons who influence the decision could be liable even if they are not acting on the basis of inside information and regardless of their degree of involvement. It is also unnecessary. MAR already prohibits a natural person recommending or inducing another person to deal on the basis of inside information. The reference to influence should be deleted or it should at least be made clear that natural persons can only be liable under this paragraph where they act on the basis of inside information.

q) ***Article 7(7) MAR - Chinese walls.*** This provision means that a company cannot rely on a Chinese wall if a person on one side of a Chinese wall has "any contact" with the person involved in the dealing. This would mean that firms would need to impose a complete ban on persons on either side of an information barrier ever meeting under any circumstances. This would be impossible to enforce.

The text uses wording similar to provisions in MAR 1.3.3E (3) in the FSA's Code of Market Conduct. However, the Code treats each one of the specified elements as an indicator in itself, so that it is enough to establish that one of the indicators is satisfied – it is not necessary to establish that all of them are satisfied.

We recommend the adoption of the wording proposed by the Financial Markets Law Committee (see above) or, at the very least, the deletion of the phrase "or had any contact …. could have been indicated".

In any event, it should be made clear that firms can rely on procedures "reasonably designed" to ensure that information does not pass across the information barrier.

r) ***Article 8(1)(a) and (b) MAR – "behaviour".*** Article 8(1)(a) and (b) extend the prohibitions against market manipulation to cover behaviour as well as transactions or orders to trade. This introduces an element of strict liability in relation to actions which may have little to do with trading activity and may be conducted for a legitimate purpose. For example, a person might move empty cargo ships and this might be capable of giving a false or misleading impression of supply or demand for a commodity, but the question of whether the behaviour should be sanctioned as market abuse should depend on the intention or purpose for which the action is undertaken and the circumstances in which the behaviour takes place. The movement may be for entirely legitimate reasons and conducted in an wholly acceptable way, so that it would be unjust to impose sanctions because of an unanticipated and undesired market effect. The person in question may not be able even to identify that his behaviour has any connection with market conditions or market activity.

   In addition, the extension of sub-paragraphs (a) and (b) of the definition to cover behaviour introduces an element of overlap with sub-paragraph (c) of the definition which addresses a form of "behaviour" (namely the dissemination of information). However, in contrast to sub-paragraphs (a) and (b), sub-paragraph (c) requires a finding of a mental element, namely that the person in question knew or ought to have known that the information was false or misleading.

   The proposed change has some similarity to the "super-equivalent" UK market abuse regime which also covers behaviours other than transactions or orders to trade. However, the UK regime is much more limited. Under the UK regime, a person's behaviour can only be sanctioned where it can be shown that it would be regarded by a regular user of the market as a failure to observe the standard of behaviour reasonably expected of a person in his position (section 118(8) FSMA).

   We recommend that the references to "behaviour" are deleted or replaced by provisions that more closely limit the circumstances in which someone can be sanctioned for allegedly manipulative behaviour not consisting of entering into transactions or orders to trade.

s) ***Article 8(1)(a) MAR – accepted market practices defence.*** We consider that there has been insufficient discussion about the proposal to delete this defence. The Commission's consultation focused on the clarification of the definition of accepted market practices not its abolition. We note that Article 2(2)(a)(ii) REMIT preserves a somewhat broader version of this defence, albeit limited to one of the limbs of the market manipulation definition.

t) ***Article 11(2) MAR – territorial scope of reporting obligation for suspicious transactions.*** In the light of Article 2(4), this provision should make clear that the duty to report suspicious transactions only applies to persons in the EU. For example, the UK does not currently seek to impose this obligation on persons other than UK authorized persons.

u) ***Article 11 MAR – MiFID2.*** In any event, it would seem more appropriate to move the provisions of Article 11 so that they are integrated with the corresponding provisions in MiFID2. The obligations envisaged by Article 11(1) clearly overlap with the related provisions in Articles 31 and 56 MiFID2. The obligations in Article 11(2) are clearly a type of business conduct rule that should apply to firms authorized under MiFID2.

v) ***Article 12(1) MAR – website disclosure.*** The technical standards to be adopted under Article 12(9) should define what an "appropriate period" is (this may require an amendment to Article 12(9)).

w) ***Article 12(2) MAR – disclosure obligation on emission allowance participants.*** We question the approach of requiring all market participants to effect disclosure of inside information. It is unclear that all participants will be in a position to determine whether the information that they hold is price sensitive or not (especially if MAR extends that to include relevant information under Article 6(3)). At the very least this should be limited to participants conducting a relevant business activity. In any event, the inclusion of this provision reinforces the need for a recital similar to recital (12) of REMIT making clear that information about a person's trading plans and strategies is not inside information that needs to be disclosed (see above).

x) ***Article 12(4) MAR – delayed disclosure.*** We doubt the value of the requirement to notify the competent authority after disclosure (this is not currently required in the UK). In any event, it should be made clear how the identity of the competent authority is determined when an instrument is admitted to trading on more than one venue (or in the case of emission allowance market participants where there is no venue that has admitted the instrument to trading).

y) ***Article 12(9) MAR – delayed disclosure.*** The second indent refers to the "technical means for delaying the public disclosure of inside information" (similar to Article 6(10), second indent MAD). However, this power should make clear that ESMA can also develop technical standards on the circumstances in which delay is permitted, e.g. where matters are the subject of ongoing commercial negotiation.

z) ***Article 14 MAR – reporting obligation for managers' transactions.*** It seems excessively burdensome to require managers of market participants in the emissions allowance market to disclose personal transactions in emissions allowances.

In addition, it should be made clear that a manager can discharge his duty to report transactions by reporting them to the issuer, if the issuer is under a duty to disclose them to the public.

aa) ***Article 15 MAR – territorial scope of research and statistics obligations.*** In the light of Article 2(4), it should be made clear that this provision only applies to persons and public institutions in the EU.

bb)Article 15 MAR – definition of investment recommendations. The provisions of Article 15(1) are similar to Article 6(5) MAD except that they omit the reference to "research concerning financial instruments or issuers of financial instruments" and require "objective" rather than "fair" presentation of the information. This would appear to widen the scope of application of the provisions in a way that could apply to investment advice and other short-term recommendations. In addition, opinions on investments are of their nature subjective. We recommend that the wording of Article 15(1) MAR is conformed to Article 6(5) MAD.

We also recommend that MAR includes a recital based on recital (3) of Commission Directive 2003/15/EC implementing the provisions of Article 6(5) MAD to make clear that investment advice and informal short-term investment recommendations which are not likely to become publicly available should not be subject to the research disclosure rules.

cc) ***Article 24 MAR – due diligence defences.*** Given that the requirements of the Regulation on their face generally impose strict liability and are effects based, the Regulation should specify that a person should not be sanctioned if he can establish that he has taken reasonable steps to avoid the contravention (compare section 123 FSMA).

dd) ***Article 29 MAR - Whistleblowing.*** The Regulation allows (but does not require) Member States to grant financial incentives to whistleblowers. Firms that conduct extensive cross-border business within the EU will be affected any widespread use of this Member State option, which has not been the subject of consultation. In any event, any such proposal should only be included in MAR if it is combined with very strong safeguards.

ee) ***Timing of delegated acts and technical standards.*** The Regulation will simply not work unless the Commission and ESMA have adopted the relevant delegated acts and technical standards (e.g. as to the means of disclosure of inside information under Article 12). The Commission and ESMA should be required to adopt relevant delegated acts in good time (e.g. at least 6 months) before the date of application of the Regulation and, if they are not adopted on time, the application date should be delayed until six months have elapsed after adoption.

ff) ***REMIT.*** Additional consideration should be given to whether it is necessary to make changes to REMIT to bring it into line with the provisions of MAR and MAD2.

gg) ***Incorrect cross-references.*** Article 26(1) introductory paragraph refers to "a breach referred to in paragraph 1" but should refer to a breach referred to in Article 25. Article 36(2) refers to Article 3(2) but should refer to Article 3(3) instead (and should also refer to Article 12(2) last sub-paragraph).

CLLS Regulatory Law Committee
25 January 2012

THE CITY OF LONDON LAW SOCIETY

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