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10 August 2012

By E-Mail

Dear Ms. McCarthy

Re: European Commission's Draft Regulation on Insider Dealing and Market Manipulation

The City of London Law Society ("**CLLS**") represents approximately 15,000 City lawyers through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi jurisdictional legal issues.

The CLLS responds to a variety of consultations on issues of importance to its members through its 19 specialist committees. This submission has been prepared by The City of London Law Society Regulatory Law Committee (the "**Committee**"). Members of the Committee advise a wide range of firms across Europe who operate in or use the services provided by the financial markets and in particular advise a wide range of credit intermediaries, investment managers, custodians, private equity, debt and other specialist fund managers.

The CLLS is registered on the European Commission's Transparency Register, and its registration number is **24418535037-82**.

We make this submission in respect of the potential application the European Commission's draft regulation on insider dealing and market manipulation ("**MAR**") to lawyers and other professionals who may "arrange" transactions in investments in a manner that is incidental to the provision of their professional services.

1) The "arranging" activity

Article 11(2) of the 4 July 2012 MAR Presidency Compromise proposal currently provides that "*Any person professionally arranging or executing transactions in financial instruments*" must report suspicious orders and transactions to the competent authority, and also envisages that they should have appropriate arrangements and systems to detect suspicious activity and make such reports (as to which ESMA would be empowered to draft regulatory technical standards) (the "**reporting obligation**").

The concept of "*arranging*" transactions is not defined in MAR or the Markets in Financial Instruments Directive (2004/39/EC) as amended ("**MiFID**"), and is not amongst either the core investment services and activities, or the ancillary services, in MiFID. We recommend that, in order to ensure legal certainty and maximum harmonisation, article 11(2) be clarified by expressly referring to the relevant and familiar MiFID investment services and categories of person as follows:

"*Investment firms or credit institutions engaged in the reception and transmission of orders, or executing transactions, in financial instruments shall report orders and transactions…*"

2) The application of the reporting obligation to lawyers and other professionals

Recital 22 of the 25 May 2012 MAR Presidency Compromise proposal stated that:
"*...persons who professionally arrange or execute transactions, <u>including accountants, auditors and lawyers</u> are required to have and maintain systems in place to detect and report suspicious transactions.*" [emphasis added]

We note that the underlined words above have been omitted from the Presidency compromise proposals published on 11 June and 4 July respectively. While it would seem that the reporting obligation is not intended to apply to lawyers, auditors and accountants, we remain concerned that the breadth of the drafting used in article 11(2) leaves the position uncertain. We consider that it is critically important for the purposes of legal certainty to have clarity around the scope of the application of this obligation, and particularly so because the legislation in this case will have direct effect in Member States.

Specifically, we recommend that article 11(2) be clarified as applying only to persons whose main business it is to perform regulated investment activities (i.e. investment firms and credit institutions that are subject to the provisions of MiFID, as reflected in our suggested wording above).

An alternative to this preferred form of clarification would be specifically to exclude from the reporting obligation persons who are <u>not</u> MiFID investment firms or credit institutions, including any person who performs an "arranging" activity (or one of the relevant MiFID activities noted above) in a manner that is incidental to its main business and is thus exempt from MiFID under article 2(1)(c).

To provide a practical example to illustrate our concern, it should not be the case that an independent solicitor who on occasion needs to instruct a broker to execute transactions in investments (e.g. shares) in the course of that solicitor's administering a deceased

client's estate, should be required to develop and maintain systems and controls for detecting and reporting suspicious trading activity. The application of the reporting obligation to such persons would be disproportionate.

In any event, if any reporting obligations under MAR were to attach to lawyers and/or other professionals, then it would be necessary to consider issues of legal privilege and defences. We do not however believe it was the Commission's policy intention to apply this obligation to professional legal advisers and we therefore request the Commission to consider the clarifications identified above.

We have also copied this response to Camila Saunders at HM Treasury. If you would find it helpful to discuss any of these comments then we would be delighted to do so. Please contact me in the first instance by telephone on +44 (0) 20 7295 3233 or by e-mail at Margaret.chamberlain@traverssmith.com.

Yours sincerely

P.P. 

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