Consultation Document of the European Commission
REVISION OF THE MARKET ABUSE DIRECTIVE

The Czech National Bank's opinion

General opinion:

The Czech National Bank supports the revision of the Market Abuse Directive (MAD), aim of which is to make the definitions more accurate and to remove application problems.

In our opinion, however, the proposed revision of MAD does not represent merely technical amendments but also fundamental material changes. We believe that regulation in the area of protection against market abuse proved fully effective during the financial crisis (as stated, by the way, by the European Commission in the introduction to the consultation document). The fundamental material changes in regulation in this area are thus rather surprising for us.

We would like to point out that many of these fundamental material changes are not analysed as deeply as they would deserve. The approach to regulation, where regulation moderates in a single move (during the expansion of the business cycle) and subsequently tightens in a single move (during the recession of the business cycle), does not suit us either. Rapid changes in regulation prevent regulatory authorities from adopting consistent supervisory policy and fail to create a stable business environment for regulated entities.

A. EXTENSION OF THE SCOPE OF DIRECTIVE

1. Definition of Inside Information for Commodity Derivatives

(1) Question: Should the definition of inside information for commodity derivatives be expanded in order to be aligned with the general definition of inside information and thus better protect investors?

We consider the current definition of inside information for commodity derivatives to be vague and raising doubts; we thus support the cancellation of this special definition and a direct application of the general definition of inside information.

2. Attempts at Market Manipulation

(2) Questions: Should MAD be extended to cover attempts to manipulate the market? If so why? Is the definition proposed in this consultation document based on efficient criteria to cover all cases of possible abuses that today are not covered by MAD?

We agree with the European Commission's view and explanation that it would be suitable to extend the definition of market manipulation in Article 2(1)(a), second indent, of MAD to cover attempts at market manipulation, i.e. an attempt to ensure a price of one or more financial instruments at an abnormal or artificial level through a person or persons acting in concert.

3. Market Abuse Committed Through Derivatives and on Primary MTFs

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

The European Commission's proposal is not entirely clear to us. OTC derivatives derived from financial instruments admitted onto the regulated market, where affecting the rate of the underlying asset, are already included in the prohibition of market manipulation by the current version of MAD (Article 1(2)). There is no need to regulate OTC derivatives, which do not affect the rate of underlying financial instruments admitted onto the regulated market (most OTC derivatives do not affect the rate of the underlying assets, some of them cannot affect it at all due to their insignificance). Supervision of OTC derivatives, which have no effect on the underlying assets, would be expensive, hard to perform (there is no overview of all OTC derivatives derived from financial instruments admitted onto the regulated market) and with small practical benefits. We would like to point out that the European Commission proposes to expand combating market manipulation and attempts at market manipulation; combined with the proposed regulation of OTC derivatives, the regulation of market manipulation would be extremely wide.

As regards financial instruments, which are admitted only for a multilateral trading facility (MTF), the discussion concerns the extension of applicability of MAD to MTFs. Please see below for the Czech National Bank's opinion of this issue.

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

We believe that the applicability of MAD might be partly extended to MTFs, but only such MTFs which are comparable to regulated markets in terms of the trading volume or liquidity and where there is a risk of manipulation which the regulation should take into consideration.

But the extension of the applicability of protection against market abuse should be limited to regulation of market manipulation. We cannot agree with a further extension of the applicability of MAD (e.g. to insider trading) since there are concerns that the costs of regulation would exceed benefits arising from it. We believe that the extension of the applicability to MTFs will require further discussions, especially as regards the determination of the criterion (trading volume) which will define MTFs to which MAD will partly apply.

Nevertheless, we suggest that the European Commission consider whether it is really necessary to extend the applicability of MAD. Article 14(1) of the MiFID namely requires "that investment firms or market operators operating an MTF establish transparent and non-discretionary rules and procedures for fair and orderly trading and establish objective criteria for the efficient execution of orders." These rules and procedures should certainly include rules preventing market manipulation, whereby the objective observed by the European Commission will be achieved in a different, more flexible manner. Supervision of whether organisers of MTFs fulfil their duties stipulated by MiFID is performed by competent authorities of Member States (Article 48 of MiFID).

(5) Questions: In particular should the obligation to disclose inside information not apply to issuers who only have instruments admitted to trading on an MTF? If so why?

We fundamentally disagree with the application of the prohibition of insider trading (including disclosure of inside information) to MTFs. Issuers of securities have not been so far required to fulfil the disclosure duty on MTFs, unless a financial instrument admitted also to trading on a regulated market was involved. The extension of information duty to MTFs would result in their actual termination, i.e. their forced transformation into regulated markets.

(6) Questions: Is there a need for an adapted regime for SMEs admitted to trading on regulated markets and/or MTFs? To what extent should the adapted regime apply to SMEs or to "companies with reduced market capitalisation" as defined in Prospectus Directive? To what extent can the criteria to be fulfilled by SMEs as proposed for such an adapted regime be further specified through delegated acts?

Generally, we have no objections to a more moderate regulation for SMEs (issuers referred to in Article 2(1)(f) of Directive No. 2003/71(EC)). On the other hand, note that mitigated duties for SMEs in the area of transparency need not be only beneficial to the SMEs (SMEs may be subsequently considered non-transparent, thus more risky for investors). We consider the proposed introduction of a mandatory six-month disclosure of inside information to be a change with an uncertain positive result for SMEs. A facultative regime for SMEs might be a solution, which would allow the SMEs to choose whether they want to fulfil the same duties as the other issuers.

B. ENFORCEMENT POWERS AND SANCTIONS

1. New Requirements on Transaction Reporting and Powers of Competent Authorities

(7) Questions: How can the powers of competent authorities to investigate market abuse be enhanced? Do you consider that the scope of suspicious transactions reports should be extended to suspicious orders and suspicious OTC transactions? Why?

We agree with the extension of the scope of transaction reports, as it harmonises different approaches of individual Member States.

We believe that the Czech National Bank has enough competences for effective supervision in the area of regulated MAD. However, we support the European Commission's proposal to remove the conflict between personal data protection and authorisations of competent authorities in the area of protection against market abuse. We consider the reports of suspicious insider trading and suspicious market manipulations in the case of OTC derivatives, which have no links to regulated markets or MTFs, to be unnecessary.

2. Sanctions (definition, amounts, publication)

(8) Questions: How can sanctions be made more deterrent? To what extent need the sanction regimes be harmonised at the EU level in order to prevent market abuse? Do you agree with the suggestions made on the scope of appropriate administrative measures and sanctions, on the amounts of fines and on the disclosure of measures and sanctions? Why?

The European Commission's opinion of the extension of sanctioning powers of competent authorities of Member States is not very specific. We do not believe that it is now necessary to unify individual sanctions in relation to individual provisions of MAD (this would be, for instance, contrary to the principle of individualisation of penalty proceedings). Regular discussions between CESR, or ESMA, and the competent authorities of Member States when considering compliance with the rules of protection against market abuse are fully sufficient for gradual convergence. We believe that the regime of disclosure of sanctions pursuant to Article 14(4) of MAD is sufficient.

3. Cooperation Between Competent Authorities and with ESMA

(9) Question: Do you agree with the narrowing of the reasons why a competent authority may refuse to cooperate with another one as described above? Why? What coordination role should ESMA play in the relations among EU competent authorities for enforcement purposes? Should ESMA be informed of every case of cooperation between competent authorities? Should ESMA act as a binding mediator when competent authorities disagree on the scope of information that the requested authority must communicate to the requesting authority?

We believe that the reasons for refusal of cooperation between competent authorities of Member States pursuant to the current wording of MAD are entirely adequate; we do not consider further changes to be necessary. We have no objections to ESMA being informed about cooperation between competent authorities of Member States. However, we strictly refuse the arbitration function of ESMA (the mediation function, as it is referred to in the consultation document, is in fact rather an arbitration function); we only agree that ESMA may support an agreement of competent authorities of Members States (as a real mediator, not an arbitrator).

4. Cooperation With Third Countries

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

We appreciate that the EU supports cooperation among national and third country competent authorities. But we believe that the rules of such support should be set across directives, not only separately in MAD. The Czech National Bank has a positive experience with cooperation within IOSCO. In our opinion, ESMA should support competent authorities of EU Member States in negotiations of agreements with third country competent authorities only if competent authorities of EU Member States request so.

C. SINGLE RULE BOOK

1. Obligation to Disclose Inside Information

(11) Questions: Do you consider that a competent authority should be granted the power to decide the delay of disclosure of inside information in the case where an issuer needs an emergency lending assistance under the conditions described above? Why?

We agree that the issuer should be obliged to inform the competent authority of the delay of disclosure of inside information. However, the competent authority should not decide about this delay for the issuer; we would prefer only informing the competent authority even in the case of an "emergency lending assistance", whereas the competent authority would have the option to order or prohibit the disclosure.

2. Accepted Market Practices

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

We consider greater cooperation between regulators of Member States, while specifying what activity is or is not market manipulation (accepted market practices), to be useful

3. Transactions by Managers of Issuers

(13) Question: Do you consider that it is necessary to modify the threshold for the notification to regulators of transactions by managers of issuers? Do you consider that the threshold of Euro 20,000 is appropriate? If so why?

We agree with the increase in the threshold for the notification of transactions by managers to EUR 20,000 a year; we take into account the reasons given by the European Commission.

4. Problems not mentioned in consultation paper

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

The Czech National Bank's experience shows a different understanding of Commission Regulation (EC) No. 2273/2003 ("Regulation") as regards the buy-back programme among individual competent authorities. The Czech National Bank's practical experience also showed that it is necessary to discuss the application and, as the case may be, the amendment to the Regulation as regards the implementation of the buy-back programme using derivative instruments. We believe that an attempt should be made to find a uniform interpretation at the CESR, or ESMA, level.

5. Market Surveillance

(15) Question: Do you consider that it is necessary to clarify the obligations of market operators to better prevent and detect market abuse? Why? Is the suggested approach sufficient?

We consider the current state of regulation in the area of reporting suspicion of market abuse and the regulated of disclosure in compliance with MAD to be sufficient.