

Mad review consultation
Consob's answer

- 1) 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?**

Consob believes that before expanding the definition of inside information for commodity derivatives a supplementary analysis of its enforcement implications is needed.

While the proposed definition could (in theory) be adequate for contrasting abuse of inside information, it would hardly give feasible results for disclosure requirements, due to the particular structure of the underlying markets. In this respect, it seems more practical to demand issuers of commodity derivatives to ensure the public availability of relevant information sources on the underlying assets when they make a request for admission to trading on regulated markets or MTF.

Finally, Consob does not agree with the extension of the proposed definition to “information (...) likely to (...) affect the price of the underlying assets” essentially because relevant information is already included in the wording “information (...) that would be likely to have a significant effect on the prices of such derivatives”.

- 2) 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?**

Consob is quite reluctant to extend the area of market abuse to the “attempt to manipulate the market”, mostly because this solution does not appear to be consistent with the MAD approach, that is effect-based and not intent-based. Assessing an attempt to manipulate the market would necessarily involve an evaluation of the “intent”.

However in case the Commission decides to put forward a definition of “attempt to manipulate the market” the new definition should replace the existing text and namely Article 1 para. (2)(a) of MAD as they are.

As to other possible extensions, Consob suggests also inserting the following general clause: “who employs other fictitious devices likely to give false or misleading signals as to the supply of, demand for or price of financial instruments”. Such conduct differs from that envisaged by Article 1 para (2)(b) of MAD, because it does not require that transactions are carried out or orders to trade are given (while it implies some materiality).

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

Consob is certainly in favour of prohibiting manipulative actions committed through derivatives.

In particular, Consob sustains the proposal of extending the “Prohibition of market manipulation (...) to any financial instrument not admitted to trading on a regulated market or an MTF in a Member State, but which can have an impact on the value of a financial instrument admitted to trading on a regulated market or on an MTF”.

On the contrary, as to the proposal of extending the “Prohibitions of insider dealing and market manipulation (...) to any financial instrument not admitted to trading on a regulated market or an MTF in a Member State, but whose value depends on a financial instrument [admitted to trading on a regulated market or on an MTF]”, Consob would suggest further analysis on the extension related to market manipulation (while the purpose of extending the prohibition of insider dealing seems consistent with current Article 9(2) of MAD).

In fact, the benefits of prohibiting such manipulative action in markets that do not affect financial instruments admitted to trading in regulated markets or MTFs are quite limited, since typically market manipulation occurs in the latter markets; moreover supervisory costs could be relevant, as OTC markets/transactions have uncertain boundaries, which make their surveillance almost unfeasible. In addition, if market manipulation occurs in the former markets, Article 1 para. (2)(b) could often be applied.

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

Consob is in favour of extending the prohibition of abusing inside information and of market manipulation to financial instruments admitted and/or traded on MTF, although some distinctions among MTFs could be thought of, based on criteria such as whether retail investors have access to them or whether financial instruments issuers have given their consent to admission to trading. Regarding other extensions, see the response to question 5. ESMA could be empowered to set up the criteria according to which the relevant MTFs could be selected.

5) 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?

As to disclosure duties for issuers, Consob favours the extension, but again believes that it should not cover any and all MTFs, based on criteria such as those identified under question 4.

Such provision, on the one hand, would facilitate the enforcement by the competent authority and, on the other hand, would give a clear picture in relation to the preventive measures in order to enhance market integrity and investor protection.

To allow some degree of flexibility, Consob thinks that obligations to draw up lists of insiders and to disclose managers' transactions could preferably be waived.

- 6) ***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?***

Consob is quite reluctant to set up an adapted MAD regime for SMEs admitted to trading on regulated markets and/or MTFs because it could be detrimental to investor protection and market fairness.

, Whatever the proposal of the Commission will be, in Consob’s opinion all possible differentiated regimes should be considered optional for the SMEs.

As to the identification of SMEs, market capitalization does not appear to be an adequate parameter, since it is a highly volatile figure linked to market trends. The entities falling within this definition would vary over time, even on a yearly basis. From time to time listed issuers would be subject to different rules and would need to adjust themselves to any such change, with a subsequent increase in administrative costs. The paradox would be that the definition of SMEs would include issuers whose capitalization is affected negatively by a corporate crisis/insolvency. Such issuers would be subject to lower disclosure requirements when they should preferably be required to provide additional information of the market. Therefore, Consob suggests linking the definition to more objective and stable parameters, such as the dimension of the company (e.g.: issuers’ turnover, financial assets).

In relation to the adaptation of the MAD preventive measures, SMEs or, preferably, SEs (depending on the parameters chosen to identify them) could be allowed, at the most, to opt not to draw up the insiders list.

On the other hand there would be an unreasonable decrease of transparency if an issuer were allowed to inform investors every six months about the issuer’s inside information.

Finally in Consob’s opinion the criteria to be fulfilled by SMEs as proposed for such an adapted regime could be further specified through delegated acts.

- 7) ***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?***

Consob shares the proposal of boosting surveillance activities by enhancing transaction reporting requirements and notifications of suspicious transactions, as they are valuable means both in order to detect activities and to develop a preventative culture within intermediaries and market operators.

Finally, the notification of suspicious “orders” would be important to overcome some interpretative difficulties.

- 8) ***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?***

Consob shares the Commission's view on the relevance of an effective sanction system across countries and on the need of increasing deterrence of abusive conduct in the EU.

In this respect, Consob strongly believes that the architecture of administrative sanctions should be flexible, because, as mentioned by CESR in the response to the Call for Evidence, "(...) market abuse (...) are scale-free: the same strategy can be carried out in very small-scale (for instance in an intra-day set-up) or in a very big-scale (for instance during take-overs, IPOs or long-lasting pump & dump schemes). Accordingly, CESR believes that it is necessary that the design of the sanctions should be sufficiently flexible as to be effective, proportionate and deterrent".

Therefore, on the one hand, Consob believes that it is crucial that maximum sanctions be high enough to deter abusive behaviour carried out by entities that act strategically and/or repeatedly to exploit the difference between expected profits and the maximum sanction (possibly adjusted for the probability of being detected and sanctioned). On the other hand, Consob would not endorse approaches based on minimum sanctions, even when linked to abusive profits, because they may not be proportionate; particularly considering that administrative sanctions apply also to unintentional conduct.

Interesting solutions on the architecture of administrative sanctions could be found in the CESR's survey (CESR/08-099).

- 9) ***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?***

Consob supports the proposal to entrust ESMA with a coordination role in cases where violations are of a cross border nature and affect more than one jurisdiction. ESMA should favour an agreement between the authorities involved in view of sanctioning the relevant violations avoiding duplication and overlapping. In such respect it is important that ESMA could intervene by issuing binding mediation decisions. ESMA however, does not need to be informed about every exchange of information unless problems occur or cooperation is denied.

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

ESMA could favour cooperation with third country competent authorities and could play a role in improving cooperation with the so called uncooperative jurisdictions.

11) 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?

Consob agrees with the proposal 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 indicated conditions. However, since it is necessary to make an assessment about the systemic relevance of the issuer, it could be useful to allow, if deemed necessary, an exchange of views with the authorities responsible for systemic stability.

Consob shares the view of the Commission to adapt the MAD by making it compulsory for listed issuers to notify the competent authority - after the event (i.e. the information disclosure) - they had decided to delay the disclosure of inside information. Such rule could help enforcement activities and have deterrent effects on undue disclosure delays of inside information.

Moreover Consob would like to highlight the issue of the open formulation of the inside information definition that can occasionally raise difficulties in terms of interpretation for disclosure purposes. Such issue was discussed in the “Call for evidence - Review of Directive 2003/6/EC on insider dealing and market manipulation 2.2.2. Dissemination of inside information and deferred disclosure mechanism (Article 6 of Directive 2003/6/EC and Article 3 of Directive 2003/124/EC)” launched on 20.04.2009.

In order to achieve a full harmonisation in the EU, Consob considers that MAD should introduce a “dual definition” of inside information that carries out a differentiation between information that should not be abused and information that is disclosable by listed issuers.

In fact, the current “single definition” of inside information could be too narrow for the prohibition on insider dealing if such definition, contemporaneously, has to reach an adequate degree of certainty for requiring listed issuers to be under the duty to disclose it.

On the other hand, the current “single definition” of inside information could be too large for disclosure purposes if such definition, contemporaneously, has to cover information which is liable of being abused through trading activities also before it reaches the adequate degree of certainty for requiring listed issuers to be under the duty to disclose it.

In other words Consob considers that MAD regime should distinguish between information that is disclosable and information that should not be abused.

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

Consob thinks that MAD Level 1 and Level 2 provisions are well defined as to the target variables and compliance criteria. In particular, they allow a suitable compromise between the need to ensure an effective protection of market integrity and the need to address local market needs.

Therefore in Consob’s opinion, on the one hand, it could be desirable to further clarify the definition of “accepted market practices”, in the sense of meaning practices that are reasonably expected in one or more financial markets (covering both regulated markets and MTF). On the

other hand, Consob believes that accepting market practices in accordance with binding technical standards could reduce the capacity to address local market needs.

13) 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?

Consob shares the view to modify the relevant threshold for the notification to regulators of transactions by managers of issuers and in particular to fix a threshold of Euro 20,000. This seems appropriate taking into account the modest significance for such persons of transactions lower than the proposed threshold.

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

At this stage Consob would not suggest to extend the degree of detail of the regulated areas, since there is sufficient scope to proceed at Level 3 on those matters that seem to need a stronger harmonisation, such as that of insiders list.

15) 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?

An effective market abuse regime requires appropriate market surveillance activity. As it is an expensive activity, it seems necessary to create incentives for market operators in order to invest in relevant measures and procedures. Therefore, Consob envisages a more detailed Level 1 or Level 2 regulation on such incentives across the EU.

