

Az Európai Unió Hivatalos Lapjában (2011. október) kihirdetett jogforrások listája, illetve a pénzügyi szolgáltatások szektorral kapcsolatban az Európai Bizottság honlapján közzétett hírek

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Sajtóbejelentések

1.

MEMO/11/738

Brussels, 25 October 2011

Statement from EU Commissioner for Internal Market and Financial services, Michel Barnier and EU Commissioner for Development, Andris Piebalgs

"During the African Union Summit with African Ministers of Finance last January in Addis Ababa, we committed to lead on the fight for more transparency of European extractive and forestry industries active in Africa. Today, by adopting legislative proposals for the transparency and accounting directives, requiring the disclosure of payments to governments on a country and project basis by listed and large non-listed companies with activities in these sectors, the Commission is delivering on its commitments.

These new measures will improve sustainable business among multinationals active in the oil, gas, mining or logging sectors. It will play a groundbreaking role in the better management of natural resources and in the increase of domestic fiscal resources available to provide basic social services to the citizens. This new legislation will be a strong contribution to the Agenda for Change of European

Development policy which aims at equipping Developing countries with the tools to foster sustainable and inclusive growth.

Today, the Commission establishes itself as an avant-garde in promoting transparency and goes well beyond the US Dodd-Frank act, putting the interests of developing countries at the forefront of this European domestic legislation. This will help to achieve a new step in the quality of our relations with Africa, based on mutual accountability and transparency.

We will now continue to take the lead on the international agenda and promote country-by-country reporting in global forum to ensure a coherent level playing field".

More information:

http://ec.europa.eu/internal_market/securities/transparency/index_en.htm

http://ec.europa.eu/internal_market/accounting/sme_accounting/index_en.htm

See [MEMO/11/730](#), [MEMO/11/732](#) and [MEMO/11/735](#)

[IP/11/1238](#)

2.

EUROPEAN COMMISSION - PRESS RELEASE

New rules for more efficient, resilient and transparent financial markets in Europe

Brussels, 20 October 2011 - In recent years, financial markets have changed enormously. New trading venues and products have come onto the scene and technological developments such as high frequency trading have altered the landscape. Drawing lessons from the 2008 financial crisis, the G20 agreed at the 2009 Pittsburgh summit on the need to improve the transparency and oversight of less regulated markets – including derivatives markets - and to address the issue of excessive price volatility in commodity derivatives

markets. In response to this, the European Commission has today tabled proposals to revise the Markets in Financial Instruments Directive (MiFID). These proposals consist of a Directive and a Regulation and aim to make financial markets more efficient, resilient and transparent, and to strengthen the protection of investors. The new framework will also increase the supervisory powers of regulators and provide clear operating rules for all trading activities. Similar discussions are taking place in the United States and other major global financial centres.

Commissioner for Internal Market and Services Michel Barnier said: "Financial markets are there to serve the real economy – not the other way around. Markets have been transformed over the years and our legislation needs to keep pace. The crisis serves as a grim reminder of how complex and opaque some financial activities and products have become. This has to change. Today's proposals will help lead to better, safer and more open financial markets."

Background

In force since November 2007, the original Markets in Financial Instruments Directive (MiFID) governs the provision of investment services in financial instruments (such as brokerage, advice, dealing, portfolio management, underwriting, etc.) by banks and investment firms and the operation of traditional stock exchanges and alternative trading venues (so-called multilateral trading facilities). While MiFID created competition between these services and brought more choice and lower prices for investors, shortcomings were exposed in the wake of the financial crisis.

Key elements of the proposal:

More robust and efficient market structures: MiFID already covered Multilateral Trading Facilities and regulated markets, but the revision will now bring a new type of trading venue into its regulatory framework: the Organised Trading Facility (OTF). These are organised platforms which are currently not regulated but are playing an increasingly important role. For example, standardised derivatives contracts are increasingly traded on these platforms. The new proposal will close this loophole. The revised MiFID will continue to allow for different business models, but will ensure all trading venues have to play by the same transparency rules and that conflicts of interest are mitigated.

In order to facilitate better access to capital markets for small- and medium-sized enterprises (SMEs), the proposals will also introduce the creation of a specific label for SME markets. This will provide a quality label for platforms that aim to meet SMEs' needs.

Taking account of technological innovations: Furthermore, an updated MiFID will introduce new safeguards for algorithmic and high frequency trading activities which have drastically increased the speed of trading and pose possible systemic risks. These safeguards include the requirement for all algorithmic traders to become properly regulated, provide appropriate liquidity and rules to prevent them from adding to volatility by moving in and out of markets. Finally, the proposals will improve conditions for competition in essential post-trade services such as clearing, which may otherwise frustrate competition between trading venues.

Increased transparency: By introducing the OTF category, the proposals will improve the transparency of trading activities in equity markets, including "dark pools" (trading volumes or liquidity that are not available on public platforms). Exemptions would only be allowed under prescribed circumstances. It will also introduce a new trade transparency regime for non-equities markets (i.e. bonds, structured finance products and derivatives). In addition, thanks to newly introduced requirements to gather all market data in one place,

investors will have an overview of all trading activities in the EU, helping them make a more informed choice.

Reinforced supervisory powers and a stricter framework for commodity derivatives markets: The proposals will reinforce the role and powers of regulators. In coordination with the European Securities and Markets Authority (ESMA) and under defined circumstances, supervisors will be able to ban specific products, services or practices in case of threats to investor protection, financial stability or the orderly functioning of markets. The proposals also foresee stronger supervision of commodity derivatives markets. It introduces a position reporting obligation by category of trader. This will help regulators and market participants to better assess the role of speculation in these markets. In addition, the Commission proposes to empower financial regulators to monitor and intervene at any stage in trading activity in all commodity derivatives, including in the shape of position limits if there are concerns about disorderly markets. The G20 Summit in Cannes on 3 and 4 November will also address the issue of commodity derivatives.

Stronger investor protection: Building on a comprehensive set of rules already in place, the revised MiFID sets stricter requirements for portfolio management, investment advice and the offer of complex financial products such as structured products. In order to prevent potential conflict of interest, independent advisors and portfolio managers will be prohibited from making or receiving third-party payments or other monetary gains. Finally, rules on corporate governance and managers' responsibility are introduced for all investment firms.

Next steps: The proposals now pass to the European Parliament and the Council (Member States) for negotiation and adoption. Once adopted the Regulation, the Directive, and the necessary technical rules implementing these will apply together as of the same date.

See also [MEMO/11/716](#)

More information:

http://ec.europa.eu/internal_market/securities/isd/index_en.htm

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3.

EUROPEAN COMMISSION - PRESS RELEASE

European Commission seeks criminal sanctions for insider dealing and market manipulation to improve deterrence and market integrity

Brussels, 20 October 2011 – Investors who trade on insider information and manipulate markets by spreading false or misleading information can currently avoid sanctions by taking advantage of differences in law between the 27 EU Member States. Some countries' authorities lack effective sanctioning powers while in others criminal sanctions are not available for certain insider dealing and market manipulation offences. Effective sanctions can have a strong deterrent effect and reinforce the integrity of the EU's financial markets. That is why the European Commission proposes today EU-wide rules to ensure minimum

criminal sanctions for insider dealing and market manipulation. For the first time, the Commission is using new powers under the Lisbon Treaty to enforce an EU policy through criminal sanctions. The proposed Directive requires Member States to take the necessary measures to ensure that the criminal offences of insider dealing and market manipulation are subject to criminal sanctions. Member States will also be required to impose criminal sanctions for inciting, aiding and abetting market abuse, as well as for attempts to commit such offences. The Directive complements today's proposal for a Regulation on Market Abuse, which improves the existing EU legislative framework and reinforces administrative sanctions.

EU Justice Commissioner Viviane Reding said: "In these times of crisis, it is essential that citizens regain confidence in our markets. This is why, as a complement to effective supervision of the markets, the Commission proposes today to strengthen the enforcement of EU rules against insider trading and market manipulation by means of criminal law. Criminal behaviour should have no place in Europe's financial markets!"

Internal Market and Services Commissioner Michel Barnier said: "Sanctions for market abuse today are too divergent and lack the necessary deterrent effect. By imposing criminal sanctions for serious market abuse throughout the EU we send a clear message to deter potential offenders – if you commit insider dealing or market manipulation you face jail and a criminal record. These proposals will heighten market integrity, promote investor confidence and level the playing field in the internal market."

Defining criminal offences at EU level

Insider dealing occurs when a person who has price-sensitive inside information trades in related financial instruments. Market manipulation takes place when a person artificially manipulates the prices of financial instruments through practices such as the spreading of false or misleading information and conducting trades in related instruments to profit from this. Together these practices are known as market abuse.

The proposal for a Directive defines the two offences – insider dealing and market manipulation – which should be regarded by Member States as criminal offences if committed intentionally. In line with the scope of the proposed Market Abuse Regulation, transactions for certain purposes are excluded from the scope: buy-backs and stabilisation programmes, monetary policy and debt management activities and activities concerning emission allowances in pursuit of climate policy.

The proposal also requires Member States to criminalise inciting, aiding and abetting insider dealing and market manipulation, as well as attempts at these forms of market abuse. Criminal or non-criminal liability should also be extended to legal persons.

Member States should ensure that criminal sanctions imposed for these offences are effective, proportionate and dissuasive. The proposal includes a review clause requiring the Commission to report to the European Parliament and Council, within four years of the Directive's entry into force, on its application and, if necessary, on the need to review it, in particular with regard to the appropriateness of introducing common minimum rules on types and levels of criminal sanctions. If appropriate, the report shall be accompanied by legislative proposals.

This is the first legislative proposal based on the new Article 83 paragraph 2 of the Treaty on the Functioning of the European Union, which provides for the adoption of common minimum rules on criminal law when this proves essential to ensure the effective implementation of a harmonised EU policy. Current sanction regimes applied in the Member States for market abuse offences have proven not to be sufficiently effective. They

do not always use the same definitions of these crimes and are too divergent, allowing perpetrators to benefit from loopholes.

Today's proposal follows the approach set out in the Commission's Communication "Towards an EU criminal policy – Ensuring the effective implementation of EU policies through criminal law" of 20 September 2011 (see [IP/11/1049](#)). This included an assessment, based on clear factual evidence, of the national enforcement regimes in place and the added value of common EU minimum criminal law standards, taking into account the principles of necessity, proportionality and subsidiarity.

Today's proposal is also part of the follow-up to the Commission's Communication on "Reinforcing sanctioning regimes in the financial services sector" of 8 December 2010 (see [IP/10/1678](#)). This envisaged the introduction of criminal sanctions for the most serious violations of financial services legislation if and where this would prove essential to ensure the effective implementation of such legislation.

Next steps

The proposal now passes to the European Parliament and the Council for negotiation and adoption. Once adopted, Member States will have two years to transpose the Directive into national law.

See also [IP/11/1217](#) and [MEMO/11/715](#)

For more information:

Homepage of Vice-President Viviane Reding, EU Justice Commissioner:

http://ec.europa.eu/commission_2010-2014/reding/

Homepage of Michel Barnier, Internal Market and Services Commissioner:

http://ec.europa.eu/commission_2010-2014/barnier/

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4.

EUROPEAN COMMISSION - PRESS RELEASE

Getting tough on insider dealing and market manipulation

Brussels, 20 October 2011 - In recent years financial markets have become increasingly global, giving rise to new trading platforms and technologies. This unfortunately has also led to new possibilities to manipulate these markets. As part of its work to make financial markets more sound and transparent, the European Commission today adopted a proposal for a Regulation on insider dealing and market manipulation (i.e. market abuse). The proposal aims to update and strengthen the existing framework to ensure market integrity and investor protection provided by the Market Abuse Directive ([2003/6/EC](#)). The new framework will ensure regulation keeps pace with market developments, will strengthen the fight against market abuse across commodity and related derivative markets, reinforce the

investigative and sanctioning powers of regulators and reduce administrative burdens on small and medium-sized issuers.

Internal Market and Services Commissioner Michel Barnier said: "Market abuse is not a victimless offence. By distorting market prices, insider dealing and market manipulation undermine investor confidence and market integrity. By extending and reinforcing our legislative framework, as well as toughening up the powers and sanctions available to regulators, today's proposals will equip them with the tools to keep markets clean and transparent."

Today's proposal seeks to adapt EU rules to the new market reality, notably by extending their scope to financial instruments only traded on new platforms and over the counter (OTC), currently not covered by EU legislation, and adapting rules to new technology. The proposal clarifies that market abuse occurring across both commodity and related derivative markets is prohibited, and reinforces cooperation between financial and commodity regulators. The proposal includes a number of measures to ensure regulators have access to the information they need to detect and sanction market abuse. Since the sanctions currently available to regulators often lack a deterrent effect, the proposal introduces tougher and greater harmonisation of sanctions, including possible criminal sanctions which are the subject of a separate but complementary proposal (see also [IP/11/1218](#)). To address concerns that the costs of EU legislation represent a barrier to accessing financial markets which is too high for small and medium sized issuers, the proposal also tailors the rules for SME issuers in several respects.

Objectives of the review:

Keeping pace with market developments: The regulatory framework provided by the original Market Abuse Directive has been outpaced by the growth of new trading platforms, OTC trading and new technology such as high frequency trading (HFT). The proposal extends the scope of existing EU legislation to financial instruments only traded on multilateral trading facilities (MTFs), other organised trading facilities (OTFs) and OTC so that trading on all platforms and of all financial instruments which can impact them will now be covered by market abuse legislation. It also clarifies which HFT strategies constitute prohibited market manipulation, such as submitting orders without an intention to trade but to disrupt a trading system ("quote stuffing"). Commodity markets have become increasingly global and interconnected with derivative markets, leading to new possibilities for cross-border and cross-market abuse. The scope of the legislation is therefore extended to market abuse occurring across both commodity and related derivative markets.

Reinforcing regulators' investigative and sanctioning powers: The proposal extends the current reporting of suspicious transactions also to suspicious unexecuted orders and suspicious OTC transactions. It grants regulators the power to obtain telephone and data traffic records from telecoms operators or to access private documents or premises where a reasonable suspicion exists of insider dealing or market manipulation. A prior judicial warrant is also required for access to private premises. It also requires Member States to provide for the protection of whistleblowers and sets common rules where incentives are offered for reporting information about market abuse. Finally a new offence of "attempted market manipulation" is introduced to make it possible for regulators to impose a sanction in cases where someone tries to manipulate the market but does not succeed in actually trading.

Common principles are proposed, notably that fines should not be less than the profit made from market abuse where this can be determined, and the maximum fine should not be less than two times any such profit. In parallel, a proposal for a Directive on criminal sanctions

for market abuse requires Member States to introduce criminal sanctions for the offences of insider dealing and market manipulation where these are committed intentionally.

Reducing administrative burdens on SME issuers: The disclosure requirements for issuers on SME markets will be adapted to their needs, and issuers on such markets will be exempt from the requirement to draw up lists of insiders, unless the supervisor demands otherwise. The threshold for the reporting of managers' transactions will also be raised.

Next steps

The proposal now passes to the European Parliament and the Council for negotiation and adoption. Once adopted the regulation would apply from 24 months after its entry into force.

On market abuse

Insider dealing consists of a person trading in financial instruments when in possession of price-sensitive inside information in relation to those instruments. Market manipulation occurs when a person artificially manipulates the prices of financial instruments through practices such as the spreading of false information or rumours and conducting trades in related instruments. Together these practices are known as market abuse.

See also [MEMO/11/715](#)

More information:

http://ec.europa.eu/internal_market/securities/abuse/index_en.htm

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5.

MEMO/11/719

Brussels, 20 October 2011

Review of the Markets in Financial Instruments Directive (MiFID) and Proposals for a Regulation on Market Abuse and for a Directive on Criminal Sanctions for Market Abuse: Frequently Asked Questions on Emission Allowances

General

1. Why is the Commission taking action to enhance oversight of the carbon market?

The lion's share of transactions in emission allowances are in the form of derivatives (futures, forwards, options), which are already subject to EU financial markets regulation. However, transactions for immediate delivery of allowances (also called "spot" transactions) are currently not subject to equivalent rules at the EU level and are not supervised. In the past, some carbon exchanges even "packaged" emission allowances as financial instruments (futures with a few days delivery period) which showed that many

market participants expected protections and benefits of trading in financial instruments and had a clear preference for allowances offered in such form over instantly available allowances (spot) traded on other venues. To address this gap, the Commission has decided to come forward with proposals for a suitable regulation of this segment of the carbon market.

2. What does the Commission expect to achieve by applying financial markets rules to all segments of the carbon market?

The carbon market has experienced significant growth in size and sophistication. The European carbon market is the EU's flagship policy to reduce greenhouse gas emissions and has a crucial role to play over the coming decades in the transition to a low-carbon economy. As the Commission's low-carbon roadmap has indicated, this transition requires significant investments in the coming decades. The carbon market therefore needs a robust level of oversight in order to facilitate investments in this low-carbon transition.

The Commission's proposals also aim to provide a safe and efficient trading environment to enhance confidence in the carbon market in the wake of a series of unfortunate fraudulent activities which the market has experienced in recent years.

The Commission wants to enhance this market's overall transparency both in terms of data publicly available to all participants and the information submitted to supervisors. We also want to ensure the ability of supervisors to act swiftly and decisively on cases of misconduct, unfair treatment of clients and threats to orderly functioning of the market. All this will be to the benefit of other market participants and clients of professional traders and intermediaries (often EU Emissions Trading Scheme (ETS) compliance buyers relying on professional help to buy and sell emission allowances). The rules of the Markets in Financial Instruments Directive (MiFID) and Regulation (MiFIR) will deal with all those matters.

It is furthermore necessary to minimise the risk of market abuse – comprising both insider dealing and market manipulation - in the carbon market. The proposed rules on market abuse – more specifically the proposals for a Market Abuse Regulation (MAR) and a Criminal Sanctions for Market Abuse Directive (CSMAD) – will deliver that.

Last but not least, professional intermediaries in the carbon market would be required to apply customer due diligence measures as provided by the Anti-Money Laundering Directive¹. Such verification would complement the measures foreseen already at the level of the EU ETS registries and would contribute to overall enhanced protection of the market from money laundering risks.

3. Has the Commission consulted stakeholders?

The Commission has been able to benefit from a useful and informative dialogue with industry, carbon traders, Member States, academics and other stakeholders on this issue in the context of the consultation reviewing MiFID² launched in December 2010, the Commission Communication³ of 21 December 2010 "Towards an enhanced market oversight framework for the EU Emissions Trading Scheme", a dedicated stakeholder meeting organised by the Commission services⁴ on 4 May 2011, the open invitation to stakeholders to submit comments and position papers between May and October 2011 and numerous discussions with individual stakeholders through to September 2011. We have taken into due account all stakeholders' arguments for and against classifying emission allowances as financial instruments.

4. Has the Commission prepared an impact assessment?

The Commission has duly considered the impacts of classifying emission allowances as financial instruments and submitting them to financial markets rules. Those impacts are presented in the impact assessment report accompanying the MiFID/MIFIR review proposals.

5. Why has the Commission opted for coverage of all segments of the carbon market by financial market rules instead of proposing a separate, tailor-made regime or the coverage of the carbon market by energy market rules?

Any emerging regime for the spot carbon market would need to be fully coherent with the regulation of financial markets, in particular as the lion's share of the carbon market today consists of derivatives trading and is hence covered by financial market rules. Furthermore, the regulatory framework for the auctioning of emission allowances as of 2013 is closely aligned in key respects with the rules applicable for the secondary market in financial instruments. Any regime would also need to embrace adequate measures against market abuse, based on the MAR/CSMAD.

Coverage by the financial market rules further stabilises the carbon market and ensures its robustness. It also gives a clearer regulatory status to emission allowances. In only five years, the European carbon market has grown from around €6 billion annual turnover to €90 billion. According to analysts, it is expected to continue to grow tenfold by the turn of the decade. As the market grows, the coverage by financial market rules will provide a comprehensive regulatory framework that will still be adaptable to carbon market specificities.

The Commission has examined the merits of a tailor-made regime. However, as all stakeholders acknowledge, even a tailor-made regime would have to reproduce the overall approach and most of the technical solutions already found in the MiFID/MAD. It is also questionable whether the coverage of the spot segment (currently a very small part of the overall carbon market activity) would actually justify development of a fully separate regime, which would also bear the risk of inconsistencies with the rules that already govern the largest part of the market.

Lastly, placing the spot carbon trade under a potentially less stringent set of rules than is the case for carbon derivatives trade may eventually be detrimental to the spot segment's prospects.

The proposed rules are coherent with the Regulation on Energy Markets Integrity and Transparency REMIT, where appropriate, for example as regards the duties to disclose inside information. The REMIT established a suitable framework for transparency and integrity in the electricity and gas markets. However, there are many quite specific elements in the REMIT which build on past legislation developed exclusively for the energy sector. At the same time, there are many other sectors covered by the EU ETS – the application of energy markets specific rules would not be appropriate in their case.

Supervision of market participants is another area where the approach of REMIT would not be optimal for the carbon market: wholesale energy markets activity would be subject to supervision of energy regulators while carbon derivatives markets are within the competence of financial regulators. Coverage of the spot carbon market by financial markets legislation rather than by the REMIT makes it possible to attribute market oversight competences for both spot and derivatives trading to just one category of public authorities – financial supervisors, under the coordination of the European Securities Markets Authority (ESMA).

6. How has the MiFID/MAD regime been tailored to EU ETS specificities?

The new market abuse regime will include several carbon-specific elements for example, a specific definition of inside information, a tailored inside information disclosure duty, and a complete coverage of the primary market (auctioning).

Individual ETS compliance buyers buying and/or selling emission allowances on own account as well as entities like trade associations which will provide investment services in emission allowances will be exempted from authorisation and compliance duties under the new MiFID as long as (i) this activity will be ancillary and (ii) they are not part of a financial group. If those two conditions are fulfilled, this exemption will also be available to companies other than financial intermediaries providing investment services to the group they are part of.

Trading venues will not be required to set position limits with regard to emission allowances.

Specific pre- and post-trade transparency requirements will be developed in due consideration of the specificities of emission allowance as an instrument of trade and the genuine carbon market features.

7. What carbon market instruments are effectively included in the scope of MiFID and MAD?

In addition to derivatives, the new MiFID/MiFIR and MAR/CSMAD rules will apply to emission allowances and other units recognised for compliance under the EU ETS (i.e. also including secondary market transactions in Certified Emission Reductions (CERs) and Emission Reduction Units (ERUs) which have been issued pursuant to the relevant process and are held on registry accounts in the EU).

In the same way as public authorities are exempt for monetary and public debt management activities, the Member States, the Commission and other authorities in charge of climate policy will be exempt from the application of MAR/CSMAD.

8. Who will be required to disclose inside information regarding emission allowances?

The duty to disclose inside information will be placed not on the issuer (as is the case of traditional financial instruments such as shares and bonds), but on the emission allowance market participant. The information to be disclosed – satisfying all essential criteria of inside information listed in MAR – will normally concern the physical activity of the disclosing party (e.g. on capacity and utilisation of installations).

At the same time, an exemption is foreseen for those emission allowance market participants the activity of which (expressed in terms of annual emissions or thermal input or a combination thereof) would be below a certain minimum threshold. That threshold would be determined by the Commission by means of a delegated act.

As a result, the disclosure duty would apply to only those entities, the activity of which on an individual basis can have material impact on the price formation of emission allowances or the (consequential) risks of insider dealing. In practice, only information concerning the activity of the largest emitters in the EU ETS (typically belonging to the EU power sector) can be expected to have a significant impact on the carbon price formation.

Impact of the proposal

9. If financial market rules are extended to all segments of the carbon market, are we not exposing the carbon market to the risk of increasing speculation, and as a result, price volatility and disorderly pricing of carbon?

The European carbon market has grown substantially from around €6 billion turnover in 2005 to €90 billion in 2010. However, empirical evidence shows that historically high levels of volatility in carbon prices in 2005 to 2007 are due to some very specific reasons and since 2008 prices are fairly stable and less volatile than, for example, most energy commodities. There is no evidence of any pattern between the influx of investors and volatility in carbon prices.

Furthermore, financial intermediation is a necessary part of a market. Market intermediaries typically fill supply or demand voids by standing ready to buy or sell from market end-users (EU ETS compliance buyers) on a continuous basis. Such participants also may enhance the price discovery process by collecting and bringing information to the market. The lion's share of the carbon market today already consists of futures and other derivatives trading and is hence covered by financial market rules. That dominance of the financial segment has not led to any particular disturbances neither in the carbon market nor for the compliance by the EU ETS compliance buyers. It is the unregulated spot segment that has attracted illicit behaviour over the past years.

10. Can we be confident that new demanding rules will not curb liquidity and thus hurt the carbon market?

Yes. Otherwise futures and forwards would not have become the dominant segment of the European carbon market. Stricter regulatory standards will provide for a safer and more reliable trading environment. Carbon market participants already now display a clear preference for concluding transactions in emission allowance derivatives on MiFID-licensed exchanges and mostly have their transactions cleared by a clearing house.

How will the new framework apply to...

11. ...ETS compliance buyers?

The application of MiFID and MAD will not limit the possibilities of ETS compliance buyers to buy or sell allowances on the market, be it on exchange or over-the-counter. In most cases, where their emission allowances trading activity would be ancillary to their main business, they will be dispensed from the duty to have a MiFID-licence normally required from investment firms (e.g. professional commodity derivatives traders). Even without such a licence, exempted ETS compliance buyers would still be able to hold membership of or direct participation in exchanges offering carbon trading (as long as they satisfy the conditions for membership or direct access set by that venue).

Pursuant to the new market abuse regime, all ETS compliance buyers will need to respect the prohibitions of insider dealing and market manipulation, and where applicable, follow the related obligations like disclosure of inside information and holding an insiders' list.

12. ... professional traders in emission allowances?

As a rule, entities providing investment services specialising in emission allowances (e.g. reception and transmission of orders and their execution, safe-keeping and administration of clients' assets) would be required to hold a MiFID licence and comply with all MiFID organisational and operational requirements (including know-your customer checks, transactions reporting, record keeping and investor protection rules). It is only normal for

companies with this kind of activity to be covered by financial market organisational and conduct of business rules and be subject to the supervision of financial regulators.

Traders in emission allowances may try to obtain an exemption from MiFID authorisation (e.g. on the basis of restricted and ancillary character of a firm's investment services activity relating to emission allowances). However, in a large majority of cases, these traders also provide services involving derivatives of emission allowances or of commodities, and are hence already required to hold a MiFID licence, independent of the new framework for the spot carbon market.

13. ...carbon exchanges?

Trading venues offering contracts for spot trade in emission allowances and not currently subject to the MiFID, would be expected to obtain a MiFID authorisation in accordance with their specific profile (as a regulated market, a multilateral trading facility (MTF), or the new category of organised trading facility (OTF)).

The application of the revised MiFID in their case would mean that in order to continue spot trading activity they would need to make necessary adaptations to be in a position to seek a MiFID authorisation.

Relation with other measures

14. Will financial services legislation cross-referring to MiFID also apply to the spot trade in emission allowances?

A number of other EU financial-market measures cross-referring to the MiFID would also be applicable to transactions and other market activity involving emission allowances. Those impacts would include, for example:

- Market Abuse Regulation and Criminal Sanctions for Market Abuse Directive ;
- Anti-Money Laundering Directive;
- Settlement Finality Directive⁵:

At the same time emission allowances trade would fall outside the scope of the following EU financial market measures:

- Prospectus Directive,⁶
- Transparency Directive,⁷
- Undertakings for Collective Investment in Transferable Securities (UCITS) Directive⁸;
- Financial Collateral Directive⁹.

15. Will the classification] have a knock-on effect on the grounds of capital requirements legislation?

Legislation on capital requirements¹⁰ only applies to credit institutions and investment firms. Most ETS compliance buyers which have limited trading activity, ancillary to their main business will be exempt from the MiFID and thus also exempt from such capital requirements.

Professional traders with investment services or activities involving emission allowances are typically also active in the trading of derivatives of emission allowances or of commodity derivatives. As a result, and without prejudice to currently applying transitional exemptions¹¹, they are therefore anyhow covered by capital requirements stemming from

the MiFID and the Capital Requirements Directive. This means that any future coverage of emission allowances by the MiFID would not impact their treatment under the Capital Requirements Directive. Such impacts could materialise in the unlikely case that a professional trader specialises solely in the spot trade of emissions allowances and is covered by the MiFID registration duties only on those grounds.

16. Will the clearing and settlement systems replace the system of EU ETS registries?

No, the system of EU ETS registries will not be redundant as a result of coverage of emission allowances by financial markets rules. Clearing houses and settlement systems will continue to provide support services to the trading pursued on- or off-exchange and will be complementary to the functions performed by the single Union registry. The registry does not record market transactions, but does record any resulting physical delivery of allowances. Furthermore, it also performs other (supporting) functions, such as recording the creation of allowances, surrendering for compliance with the EU ETS and their deletion, as well as free allocation and auctioning.

17. Will classification of emission allowances as financial instruments mean that they are to be treated as financial assets?

The proposals on carbon market oversight will not alter the fundamental purpose of the emission allowances. Their classification as financial instruments is made for the purposes of application of the EU financial markets regulation and is not aimed to deal with the legal nature of emission allowances (on the grounds of private law) or their accounting treatment.

18. Will the classification have an impact on the accounting treatment of emission allowances?

No, the classification of allowances as a financial instrument would have no direct impact on the accounting treatment of emission allowances under the Union law. Classification of emission allowances for accounting purposes depends on the criteria set by accounting standards only. There are currently no harmonised accounting standards for emission allowances at international level. National approaches in a few Member States may already require companies to recognise them as regular (financial) assets. In absence of a harmonised accounting treatment of emission allowances at international level, which is under the authority of the International Accounting Standards Board, the Member States take individual responsibility in this regard.

¹ :

Directive 2005/60/EC on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:309:0015:0036:EN:PDF>

² :

http://ec.europa.eu/internal_market/consultations/2010/mifid_en.htm

³ :

http://ec.europa.eu/clima/events/0034/com_2010_yyy_en.pdf

⁴ :

http://ec.europa.eu/clima/events/0034/index_en.htm

⁵ :

Directive 98/26/EC on settlement finality in payment and securities settlement systems:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1998:166:0045:0050:EN:PDF>

⁶ :

Directive 2003/71/EC on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:345:0064:0089:EN:PDF>

⁷ :

Directive 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:390:0038:0057:EN:PDF>

⁸ :

Directive 2009/65/EC on the coordination of laws, regulations and administrative provisions relating to UCITS: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:302:0032:0096:EN:PDF>

⁹ :

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2002:168:0043:0050:EN:PDF>

¹⁰ :

Capital Requirements Directive, comprising Directive 2006/48/EC and Directive 2006/49/EC: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:2006L0048:20100330:EN:PDF>

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:2006L0049:20091207:EN:PDF>

¹¹ :

The application of capital requirements does not automatically flow from being caught under MiFID. There is an exemption for commodity dealers in the Capital Requirements Directive (CRD) due to be reviewed before end of 2014. As a result the capital requirements these firms should be subject to will be dealt in a separate review of the CRD exemptions. See Article 48 of Directive 2006/49/EC)

6.

MEMO/11/716

Brussels, 20 October 2011

Review of the Markets in Financial Instruments Directive (MiFID): Frequently Asked Questions

1. What is MiFID?

MiFID is the Markets in Financial Instruments Directive (Directive [2004/39/EC¹](#)). It replaces the Investment Services Directive (ISD) which was adopted in 1993. It was agreed unanimously by the Member States and by a large majority in the European Parliament, and came into force in 2008. It is a cornerstone of the EU's regulation of financial markets. It seeks to improve the competitiveness of EU financial markets by creating a single market for investment services and activities, and ensuring a high degree of harmonised protection for investors in financial instruments, such as shares, bonds, derivatives and various structured products. MiFID has brought greater competition across Europe in the provision of services to investors and between trading venues. This has helped contribute to deeper, more integrated and liquid financial markets. It has also driven down costs for issuers, delivering better and cheaper services for investors, and contributing to economic growth and job creation in Europe.

2. Why is MiFID being reviewed only four years approximately after its entry into force?

In keeping with its intended objective, MiFID has contributed to a more competitive and integrated EU financial market. However, recent events and market developments have demonstrated weaknesses in some of the underlying principles of MiFID, and highlighted

areas needing reinforcement or revision, for example it has arguably led to the development of new trading platforms and activities which fall outside of its scope and thus outside any regulations. Closing such a gap is necessary in order to bolster investor confidence and achieve all of MiFID's original objectives. Ensuring a more robust framework of regulation will also serve to address the more complex market reality we are now faced with, a reality which is characterised by increasing diversity in financial instruments and new methods of trading. Similar discussions are taking place in the United States and other major global financial centres.

3. Did MiFID contribute to the crisis?

The financial crisis was caused by multiple factors. The original objectives of MiFID were to improve the resilience of EU financial markets through free competition and high levels of market transparency and investor protection. To some extent these have been achieved. However, the full effects of MiFID are yet to play out. While it is true that the Directive has not entirely delivered on its objectives, it is mistaken to assign all developments, such as the growth of trading in newer trading functionalities (for example high frequency trading) and dark environments (for example all dark pools – see question 11) to MiFID. These have more to do with technological developments.

4. What are the anticipated costs and benefits of the proposals?

The MiFID review is estimated to impose one-off compliance costs of between €512 and €732 million and ongoing costs of between €312 and €586 million per year. This represents an impact for one-off and ongoing costs of 0.10% to 0.15% and 0.06% to 0.12% respectively of total operating spending in the EU banking sector. This is only a fraction of the costs imposed at the time of the introduction of MiFID. The one-off cost impacts of the introduction of MiFID were estimated as 0.56 per cent (retail and savings banks) and 0.68 per cent (investment banks) of total operating spending. Recurring compliance costs were estimated at 0.11 per cent (retail and savings banks) to 0.17 per cent (investment banks) of total operating expenditure. The main benefits of MiFID will be very tangible, but are not readily quantifiable. The benefits of an improved level playing field, of increased market transparency, of better transparency towards regulators and stronger powers for regulators, of increased investor protection and the implied confidence investors have in financial markets, and reduction of the risk taken and the related impact on the financial stability of EU financial markets are real benefits, on which it is almost impossible to place a number.

5. How is the scope of MiFID extended and why?

Revising MiFID is an essential part of ongoing structural reforms in the aftermath of the financial crisis. These are aimed at establishing a safer, sounder, more transparent and more responsible financial system that works for the economy and society as a whole. The main objectives of the revision are:

More robust and efficient market structures: MiFID already covered Multilateral Trading Facilities and regulated markets, but the revision will now bring a new type of trading venue into its regulatory framework: the Organised Trading Facility (OTF). These are organised platforms which are currently not regulated but are playing an increasingly important role. For example, standardised derivatives contracts are increasingly traded on these platforms. The new proposal will close this loophole. The revised MiFID will continue to allow for different business models, but will ensure all trading venues have to play by the same transparency rules and that conflicts of interest are mitigated.

In order to facilitate better access to capital markets for small- and medium-sized enterprises (SMEs), the proposals will also introduce the creation of a specific label for SME markets. This will provide a quality label for platforms that aim to meet SMEs' needs.

Taking account of technological innovations: Furthermore, an updated MiFID will introduce new safeguards for algorithmic and high frequency trading activities which have drastically increased the speed of trading and pose possible systemic risks. These safeguards include the requirement for all algorithmic traders to become properly regulated, provide appropriate liquidity and rules to prevent them from adding to volatility by moving in and out of markets. Finally, the proposals will improve conditions for competition in essential post-trade services such as clearing, which may otherwise frustrate competition between trading venues.

Increased transparency: By introducing the OTF category, the proposals will improve the transparency of trading activities in equity markets, including "dark pools" (trading volumes or liquidity that are not available on public platforms). Exemptions would only be allowed under prescribed circumstances. It will also introduce a new trade transparency regime for non-equities markets (i.e. bonds, structured finance products and derivatives). In addition, thanks to newly introduced requirements to gather all market data in one place, investors will have an overview of all trading activities in the EU, helping them make a more informed choice.

Reinforced supervisory powers and a stricter framework for commodity derivatives markets: The proposals will reinforce the role and powers of regulators. In coordination with the European Securities and Markets Authority (ESMA) and under defined circumstances, supervisors will be able to ban specific products, services or practices in case of threats to investor protection, financial stability or the orderly functioning of markets. The proposals also foresee stronger supervision of commodity derivatives markets. It introduces a position reporting obligation by category of trader. This will help regulators and market participants to better assess the role of speculation in these markets. In addition, the Commission proposes to empower financial regulators to monitor and intervene at any stage in trading activity in all commodity derivatives, including in the shape of position limits if there are concerns about disorderly markets. The G20 Summit in Cannes on 3 and 4 November will also address the issue of commodity derivatives.

Stronger investor protection: Building on a comprehensive set of rules already in place, the revised MiFID sets stricter requirements for portfolio management, investment advice and the offer of complex financial products such as structured products. In order to prevent potential conflict of interest, independent advisors and portfolio managers will be prohibited from making or receiving third-party payments or other monetary gains. Finally, rules on corporate governance and managers' responsibility are introduced for all investment firms.

A. More robust and efficient market structures

6. What is proposed on clearing and access to post-trade infrastructures?

The issue at stake is about competition and the integration of EU market infrastructures. Although the vertical integration model of trading and post-trading infrastructures may present advantages in terms of coordination, it may also introduce inefficiencies with respect to competition and price transparency. The introduction of access requirements in the proposed Regulation on OTC derivatives, central counterparties and trade repositories (EMIR) is a response to these potential negative effects. While EMIR covers only OTC derivatives, MiFID will cover all financial instruments.

Access and fee provisions, requirements which prohibit the use of discriminatory prices or the imposition of unnecessary requirements, are the tools which are proposed to foster efficient competition and integration of EU markets infrastructures. They will ensure that new providers can compete for the provision of trading or central clearing services and full price transparency at each level of the post-trading chain.

7. How are developments in trading outside of venues categorised in MiFID being dealt with? How are crossing networks and the trading of standardised OTC derivatives being addressed?

Much of the trading currently being carried out outside of the MiFID venues, on a so-called over-the-counter basis, takes place on alternative types of platforms operating in the market such as broker crossing networks. The MiFID review proposes to introduce a new category of platform to adequately regulate all kinds of organised trading and to level the playing field in the EU. More specifically, the Commission proposes to introduce the new category of an organised trading facility (OTF), which will be subject to the same core requirements for the operation of a trading venue as other existing platforms. This new type of platform is defined in a broad way, so that it captures all forms of organised trading not matching the existing categories.

So-called crossing networks (systems operated by investment firms which mainly internally match client orders) would be one of the venues captured under this new category.

As a result, all organised trading, in other words trading which takes place in a system, which currently takes place outside of regulated venues will in the future be conducted on regulated venues.

Systematic internalisers also make up a share of trading outside platforms. They are investment firms who deal with their clients in an organised way, in other words any trading which goes beyond ad hoc deals. For standardised derivatives, there will be a requirement to trade them on organised venues. Trading in such derivatives will thus no longer take place outside of regulated venues. Only ad hoc trading in shares, bonds, and non-standardised derivatives will continue to be allowed to take place OTC.

See also Annex 1.

8. How will trading in standardised OTC derivatives be moved onto organised venues in line with G20 commitments?

The G20 commitment states that "all standardised OTC derivatives contracts should be traded on exchanges or electronic trading platforms, where appropriate, and cleared through central counterparties by end 2012".

In order to appropriately meet this commitment in Europe, all trading of derivatives which are eligible for clearing and which are sufficiently liquid will move to either regulated markets, Multilateral Trading Facilities (which already exist in the current MiFID framework), or to the new organised trading facilities (OTFs).

ESMA shall assess and decide when a derivative which is eligible for clearing is sufficiently liquid to be traded exclusively on the various organised venues i.e. regulated markets, MTFs or organised trading facilities. Appropriate criteria for such assessment will need to be taken into consideration by ESMA.

This approach should be pragmatic and progressive enough to factor in the trading specificities of each derivative while meeting the commitment of the G20.

9. How are you taking into consideration the need to improve SME access to capital markets?

Small- and medium-sized enterprises (SMEs) across Europe make a significant contribution to economic growth, employment, innovation and social integration. Two main sources of funding for such companies are private financing by banks or other institutions or raising finance through capital markets (e.g. the issue of shares). SME markets aim at providing smaller, growing companies with a platform to raise capital both through initial offerings and ongoing fund raisings. However, not all these markets have been successful. In order to make SME markets more attractive to small companies and to investors, the Commission proposes a proportionate regime specifically designed for SME markets. This specialised regime could promote the creation of a network of markets specialised in SMEs. The rules applicable to these markets will ensure that investors have sufficient information about the listed companies at all times.

B. Taking account of technological innovations

10. What proposals are being suggested to deal with issues raised by algorithmic and high frequency trading? For example, the potential risk that increased use of automated trading could contribute to a crash such as the one that occurred in the US?

Algorithmic trading is a form of trading where a computer algorithm automatically decides to place an order with minimal or no human intervention. An important form of algorithmic trading is high frequency trading, where a trading system analyses the market at high speed and then sends large numbers of orders very quickly.

The proposals plan to introduce a series of safeguards both on market participants who use algorithms as part of their trading strategies as well as on trading venues where algorithmic and high-frequency trading takes place:

- Information requirements towards regulators on the strategies of various algorithmic traders will be enhanced, and stricter checks will be imposed on arrangements whereby members of trading venues allow other firms employing high-frequency algorithms to access public markets through their systems. Currently, regulators do not know which kinds of strategies are being used, by which strategy an order is generated, and members may not check what sort of strategies the persons using their systems are using and how those persons control their strategies.
- Trading venues will also be required to have robust controls against problems such as disorderly trading, erratic price movements, and capacity overload. To mitigate the latter, limits will be placed on how many orders per transaction participants can place as well as on how far venues may compete in attracting order flow for example by reducing the size by which prices may rise or fall ("tick size") or through the design of their fee structures. The order to transaction ratio and the minimum tick size will be determined in subsequent measures.
- Additionally, requirements for algorithmic traders to trade on a continuous basis are foreseen to reduce volatility and contribute to more orderly trading.
- Finally, we will require venues to be able to halt trading in case of significant price movements ("circuit breakers") in a harmonised fashion.

C. Increased transparency

11. What are the proposals for enhancing equity market transparency, including the issue of "dark pools"?

In all markets, buyers need to know what sellers are asking and vice versa. However, wholesale transactions are frequently carried out at non-public prices. The same applies to financial instruments. Therefore, "dark pools", or platforms where trading interests interact without full pre-trade disclosure to other users or the public, are a common feature of financial markets. It is proposed to continue to allow them but only as long as they do not cause competitive distortions and reduce the overall efficiency of the price discovery process. Limited cases where transparency can be waived, and for how long, will need to be precisely defined. Such waivers are necessary, for instance, protect investors selling large quantities of shares. Having to disclose such a large order would move the market down, which would mean they would sell at worse prices. As transparency rules are extended to other instruments, it is foreseen to also introduce the possibility, in the regulation, of waivers specific to these, taking account of the nature of trading and of the participants in the different asset classes. The specific conditions under which waivers may operate would, as for shares today, be defined in implementing measures once the regulation is approved.

Finally, the introduction of the new organised trading facility category will vastly improve pre-trade transparency in the case of trading activity currently taking place in the dark, by subjecting these platforms to the same transparency conditions as other venues.

12. Is the introduction of a mandatory consolidated tape for trade data being considered?

The reporting, publication and consolidation of trade data needs to be addressed due to problems with its formatting, cost, quality and reliability. Trade data helps investors to find the right price when looking to buy or sell, and to check whether they got the best price by comparing the price that they got with other market prices. The Commission proposes to improve the situation by introducing measures to ensure data quality and consistency as well as measures to reduce the costs of data. A mandatory consolidated tape providing a consistent and reliable record of trades will be established by data providers authorised to do so under harmonised standards set out in MiFID. Based on this trading data for the whole EU, investors will be able to make a more informed choice.

13. How will pre- and post-trade transparency requirements be extended beyond shares and why?

Currently, MiFID imposes harmonised pre- and post-trade transparency requirements only on shares admitted to trading on regulated markets. The Commission proposes to introduce pre- and post-trade transparency requirements for other instruments as well. Due to the different structure of markets in non-equity instruments compared with those in equities, it is proposed to tailor the exact transparency regime to the instrument in question. Post-trade requirements, to be specified in further detail in implementing legislation, are suggested for all bonds and structured finance products with a prospectus as well as all derivatives eligible for central clearing and those submitted to trade repositories regardless of where the trades take place. Pre-trade requirements, also to be further detailed in implementing legislation, are suggested for the same instruments both when traded on organised venues as well as when offered by investment firms in over-the-counter trading.

The reason for the introduction of pre- and post-trade transparency requirements for these instruments is that the absence of harmonised transparency requirements in non-equity markets (e.g. bonds, structured products, derivatives) has been perceived by many,

including EU securities regulators, to lead to lower market efficiency and higher risks than would otherwise be the case.

14. Does MiFID constitute the start of price regulation in the area of market data?

Market participants need data on trading activity, prices and volumes in order to make decisions about how and when to invest. The data should be available on an equal and easily accessible basis. At present various incentives exist for data providers and vendors to sell their data at rates or in a way which do not correspond to the "reasonable commercial basis" or to the straightforward "consolidation of data with similar data from other sources" which MiFID envisioned. A series of steps are thus proposed to deliver on these objectives. Failing that, it is proposed that the Commission could define more precisely what constitutes a "reasonable commercial basis".

D. Reinforced supervisory powers and a stricter framework for commodity derivatives markets

15. What role will ESMA play in relation to the revised MiFID?

ESMA already plays an important role in advising the Commission on possible regulatory changes and in ensuring convergent application of the rules across Member States. Many of the proposed changes in the MiFID review stem from advice received from ESMA, and it is foreseen that it will play a major part in developing most of the technical implementing measures necessary to ensure the full functioning of the regulatory framework. In terms of specific supervisory tasks, ESMA will have an increased role in, for example, determining the conformity with MiFID of individual cases where venues propose to waive pre-trade transparency ("dark pools"). In accordance with the mandate defined in the ESMA regulation and in line with the proposed powers for ESMA in the Commission proposal for a regulation on short-selling and certain aspects of credit default swaps, It will also take any steps necessary to coordinate actions by national competent authorities regarding products considered risky from the point of view of investor protection or financial stability as well as regarding positions in derivatives by specific market participants deemed excessively large.

16. What purpose does transaction reporting serve and what measures are being proposed?

Investment firms have to report to competent authorities all their trades in all financial instruments that are admitted to trading on a regulated market. This obligation applies regardless of where the trade takes place. This system of transaction reporting enables supervisors to monitor the activities of investment firms, which helps them to ensure compliance with MiFID, and to monitor for abuses under the Market Abuse Directive (MAD). The proposals contain the following changes.

First, because market supervision is the main reason for transaction reporting, *the requirements under MiFID need to mirror the scope of the MAD*. This is not fully the case at the moment and the ongoing review of the MAD makes further changes necessary. The Commission proposes to extend the scope of transaction reporting to all financial instruments, with the exception of instruments which are not susceptible to or cannot be used for market abuse.

Second, reporting requirements today diverge between Member States, which adds costs for firms and limits the use of trade reports for competent authorities. By including the reporting requirements in the regulation, the requirements will be further harmonised, notably the information that identifies who is trading and for whom a trade is being

executed. Also, the Commission will be empowered to propose technical standards on a common European transaction reporting format and content.

Finally, for cost and efficiency purposes, double reporting of trades under MiFID and the reporting requirements to trade repositories should be avoided. The Commission proposes that a trade already reported to a repository would not need to be reported again under MiFID, provided all the necessary information is thereby available to competent authorities.

E. Stronger investor protection

17. How will the revised MiFID better protect investors?

MiFID includes a number of measures aimed at protecting investors in the context of the provision of investment services. Those rules take into account the type of services (for instance, investment advice or execution of orders) and the classification of clients, with higher protection granted to retail clients. The MiFID rules include both conduct of business requirements (for instance, collecting sufficient information to ensure that the products provided are suitable or appropriate for the client) and organisational requirements (for instance, requirements to identify and manage any conflicts of interest).

However, modifications and improvements are clearly needed to strengthen the framework for the provision of services.

First, the scope of the directive should be broadened in order to cover financial products, services and entities which are currently not covered (for instance, structured deposits in line with the Commission's forthcoming initiative on Packaged Retail Investment Products early next year).

Second, conduct of business requirements should be modified in order to grant additional protection to investors. The rules for investment advice should be improved both when advice is provided on an independent basis and in the long term. Advisers declaring themselves as independent should need to match the client's profile and interests against a broad array of products available in the market while investors should be informed whether they can expect firms to monitor the suitability of advised products in the longer term. Independent advisers and portfolio managers should be prohibited from making or receiving third-party payments or other monetary benefits. The conditions for services where investors receive less protection from firms should be more limited and information to different categories of client should be enhanced, particularly when complex products are involved.

Third, organisational requirements for the provision of services to investors should be strengthened. For instance, the involvement of senior management in the design of the firm's policies as to how products and services may be sold or provided to their clients, and the adoption of adequate internal controls should be consolidated.

ESMA should also help to ensure an equal application of investor protection requirements across Europe

18. What proposals will MiFID make regarding commodity derivatives?

In light of recent developments and concerns expressed over the functioning of commodity derivatives markets, and as outlined by the Commission in its Communication of 2 February on tackling the challenges in raw materials and commodity markets (see [IP/11/122](#)), there is a clear need, in line with G20 commitments, to reinforce the regulation of commodity derivatives markets beyond the current policy initiatives for other derivatives

markets. Efficient and well functioning physical and derivatives commodity markets are crucial for the EU economy.

The review of MiFID will be a key pillar of a comprehensive and ambitious regulatory overhaul on improving commodity market transparency and oversight.

First, it is proposed to increase transparency of trading activity on all organised trading venues by introducing a position reporting obligation by category of trader. This harmonised and more disaggregated information will help regulators and market participants to better assess the role of financial flows in these markets.

Second, the Commission proposes to give harmonised and comprehensive powers to financial regulators to monitor and intervene at any stage in trading activity in all commodity derivatives, including in the shape of position limits if there are concerns in terms of market integrity or orderly functioning of markets. Venues offering trading in commodity derivatives will also be required to adopt suitable limits on trading activity by traders active on their platform, to safeguard market integrity and efficiency, to be harmonised in technical implementing measures.

Third, fewer commodity firms will be exempt from MiFID when they deal on their own account in financial instruments or provide investment services in commodity derivatives on an ancillary basis as part of their main business and when they are not subsidiaries of financial groups. It is proposed to narrow down existing exemptions in the interests of greater regulatory oversight and transparency taking into account the need for continued exemptions for commercial firms and the risks posed by these players.

Finally, the proposals applicable to other derivatives regarding increasing pre- and post-trade transparency and mandatory trading on organised venues will also apply to commodity derivatives.

19. Why are emission allowances now brought under the scope of MiFID and the Market Abuse Directive?

On the emission allowances market, not only are the allowances themselves traded, but allowance derivatives are also traded. It is the latter that forms the largest part of the market. Trading in allowance derivatives already falls under the scope of MiFID and the Market Abuse Directive. By now bringing emission allowances under the same framework, the regulation on emission allowances trading (EUA) on the spot market would finally be aligned with what is already applicable to the EUA derivatives market. Together, MiFID and the rules on market abuse provide a comprehensive framework for the trading in financial instruments and the integrity of the market. The extension to EUAs will introduce greater security for traders of EUAs but without interfering with the purpose of the market, which remains emissions reduction. For more information on this point, see also [MEMO/11/719](#).

20. Will UCITS be included under MiFID as a result of the MiFID review? Will the classification of some UCITS as complex instruments change their status under the UCITS directive?

UCITS (Undertakings for Collective Investments in Transferable Securities) are financial instruments and therefore are already fully covered under MiFID. The issue which is touched upon in the MiFID review concerns their classification as complex or non-complex instruments.

The distinction is relevant in order to establish the application of the "execution-only" regime, under which banks selling certain instruments are subject to less stringent rules for

the protection of the retail investors. In particular they are not obliged to assess whether the client has sufficient knowledge to understand the financial instrument – the so-called appropriateness test. The execution only regime only applies to non-complex financial instruments.

So far, all UCITS have been classified as non-complex instruments. In the meantime, however, certain UCITS have become more complex. In particular "structured UCITS" are permitted to adopt certain kinds of complex investment strategies which can raise additional challenges for investors to understand how they operate.

For this reason - for the mere purpose of the execution only regime - the MiFID review confirms the general classification of UCITS as non-complex instruments but it introduces the exception of "structured UCITS" which will now be classified as complex instruments. The consequence is that investment firms will have to apply the appropriateness test when they sell "structured UCITS".

One of the arguments against this choice was that this can affect the UCITS "label". However, the two are different issues. Indeed, any possible change in the MiFID will only affect the MiFID selling rules of certain funds by banks and not the classification of "structured UCITS" under the UCITS legislation.

Other

21. Why are some elements of MiFID placed in a directive and others in a regulation? Which parts will be in which instrument?

As in other pieces of EU financial services regulation, the split reflects the need to achieve a uniform set of rules in some areas, while allowing for national specificities in others. The De Larosière report highlighted that one of the problems leading to the crisis was an inconsistent implementation of financial services rules leading to a fragmented internal market.

As a result, *a regulation* is proposed setting out requirements on:

- the disclosure of data on trading activity to the public and transaction data to regulators and supervisors;
- the mandatory trading of derivatives on organised venues;
- removing barriers between trading venues and providers of clearing services to ensure more competition,
- and specific supervisory actions regarding financial instruments and positions in derivatives.

Such a harmonised approach will help avoid confusion in the daily functioning of markets, and minimise opportunities for harmful regulatory arbitrage between Member States.

The directive amends existing provisions on authorisation and organisational requirements for providers of investment services, and all rules regarding investor protection, including for firms located in third countries but actively engaged in EU markets. Also included in the directive are the authorisation and organisational rules applicable to different types of trading venue, providers of market data and other reporting services, as well as the complete powers to be granted by Member States to national competent authorities, including the framework of sanctions for breaches of the rules. These provisions are best situated in a directive to account for differences in national markets and legal structures as well as the profile of local investors.

22. How do the proposals to review MiFID fit with other European legislation, such as the Market Abuse Directive, Over-the-Counter derivatives, short-selling, and Packaged Retail Investment Products (PRIPs)?

The proposed review of the Market Abuse Directive (MAD) and MiFID are published at the same time because together they guarantee the competitiveness, efficiency and integrity of EU financial markets. In order to ensure that they are fully coherent and support each other's objectives and principles, they need to be updated in tandem. Moreover, the pan-EU competition facilitated by MiFID has given rise to new challenges in terms of cross-border supervision, and maximum harmonisation of the rules and competent authorities' powers in relation to offences are a necessary step.

MiFID applies to the provision of investment services or activities by banks and investment firms in relation to financial instruments and to the operation of regulated markets. The objective is to support the development of a more integrated, competitive and efficient EU market in financial instruments with appropriate rules regarding conditions for authorisation as investment firms, organisational requirements to ensure they are managed appropriately, market transparency and investor protection.

The EU legislation on OTC derivatives, central counterparties and trade repositories on the one hand, and on short-selling and credit default swaps on the other, have different objectives but complement MiFID. The first aims to minimise counterparty credit risk and operational risk, while the second works to increase harmonisation and transparency, and mitigate risks associated with short selling and the use of credit default swaps.

PRIPs are common products in the retail investment market, with broadly comparable functions for investors. Although there is no rigid definition of PRIPs, they take a variety of legal forms. While offering benefits for investors, PRIPs are often complicated and opaque. The objective of the Commission in the coming months will be to better address the problems identified in the PRIPs market by creating a robust and coherent framework in two key areas:

1. the rules on the form and content of disclosures about the product, and
2. the rules governing the sales process for PRIPs, such as the conduct of business and the conflicts of interest requirements for intermediaries distributing the products.

This is achieved by adopting a horizontal approach in the two areas, which builds on the most effective and efficient elements of existing Community legislation. In the case of selling practices, MiFID has been identified as the clear benchmark as it contains comprehensive rules covering these aspects.

23. How does MiFID compare to what other jurisdictions in the world are doing, in particular the United States? Where are the similarities and differences with the Dodd-Frank Act?

Many provisions of MiFID reflect core precepts in the regulation of securities markets globally. However, different jurisdictions have rules specific to their own markets. As regards the US, MiFID touches upon various pieces of US financial markets regulation such as the Securities Exchange Act and the Commodity Exchange Act, as well as many of the technical regulations stemming from these: Regulation National Market System, Regulation Alternative Trading System, the Investment Advisers' Act and rules applied by "self-regulatory organisations" such as the main securities exchanges and the Financial Industry Regulatory Authority.

Like the Dodd-Frank Act, which amends and supplements these texts in several ways, the review of MiFID both amends provisions already in force and adds to them in light of the financial crisis and other market developments. The most visible area of common ground concerns the overhaul of regulation of derivative markets, including commodity derivatives. In many areas, such as comprehensive regulation for professional participants in derivative markets and the regulation of alternative electronic exchanges, the changes in MiFID are less significant than those in the US, as similar provisions did not yet exist before the Dodd-Frank Act. In other areas, such as the regulation of commodity derivative markets, US regulation was more developed and the revision of Mifid allows Europe to catch up.

The Commission's proposals are in line with the principles of regulation established by the International Organisation of Securities Commissions (IOSCO). This will ensure convergence with other jurisdictions, including Australia, Asia, and South America.

The proposals in the revised MiFID complement those in the Commission's September 2010 proposals for increasing transparency and safety in derivative markets (EMIR) and, once in force, will ensure comparable rules for trading, clearing and reporting derivatives in the EU and US.

24. How is the treatment of firms and market operators from outside the EU being considered?

Currently the access of third country firms to the EU markets is not harmonised under the MiFID. Each Member State can introduce its own third country regime, subject to the general principles of the TFEU and provided that national provisions do not result in treatment more favourable than that given to EU firms. In order to overcome the existing fragmentation and to ensure a level playing field in the EU for third country players, the Commission proposes to introduce a harmonised third country equivalence regime in MiFID for the access of third country investment firms and market operators to the EU.

A firm which is authorised in a third country will be able to provide services directly to professional investors on condition that the country where it is based is deemed by the Commission to have equivalent rules and supervision. Equivalence will be granted only if the third country provides access to EU-based firms on a reciprocal basis.

In order to be allowed to provide services to retail investors, the establishment of a branch is required. A third country firm will be able to provide services to investors in other European countries from its branch, provided that it notifies the supervisors of those countries.

25. What impact will MiFID/MiFIR have on the proposed merger between Deutsche Börse and NYSE Euronext?

While the review of MiFID, as well as the roll-out of other regulatory changes such as EMIR in the EU and Dodd-Frank in the US, coincides with the proposed merger, the proposed changes are not targeted at or conditioned by any one commercial venture. Since the beginning, a key objective of MiFID has been to ensure robust competition on a level playing-field between trading platforms. This includes removing obstacles to essential post-trade services such as clearing, which may otherwise frustrate competition between venues. The proposed changes in the review thus seek to further tackle existing barriers to effective competition between trading venues and clearing service providers.


The examination of the merger on competition grounds is carried out independently of the review of MiFID by the Commission's Directorate-General for Competition.

More information is available at:

http://ec.europa.eu/internal_market/securities/isd/index_en.htm

MiFID – level playing field

	Regulated Market	MTF	OTF	Systemic internaliser	OTC
	<i>Platform trading ("multilateral")</i>			<i>OTC trading ("bilateral")</i>	
Pre-trade transparency	✓	✓	✓	✓	✗
Post-trade transparency	✓	✓	✓	✓	✓
Non-discretionary execution	✓	✓	✗	✓	✗
Transparent access rules	✓	✓	✓	✓	✗
Market surveillance	✓	✓	✓	✗	✗
Conduct of business	✗	✗	✓	✓	✓

European Commission  Internal Market & Services DG

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¹:

The MiFID regulatory framework consists of a framework Directive (Directive 2004/39/EC), an Implementing Directive (Directive 2006/73/EC) and an Implementing Regulation (Regulation No 1287/2006)

7.

MEMO/11/715

Brussels, 20 October 2011

Proposals for a Regulation on Market Abuse and for a Directive on Criminal Sanctions for Market Abuse: Frequently Asked Questions

1. What is market abuse and how is it currently regulated?

Adopted in early 2003, the Market Abuse Directive (MAD)¹ has introduced a comprehensive framework to tackle insider dealing and market manipulation practices, jointly referred to as "market abuse". The Directive aims to increase investor confidence

and market integrity by prohibiting those who possess inside information from trading in related financial instruments ("insider trading"), and by prohibiting the manipulation of markets through practices such as spreading false information or rumours and conducting trades that result in abnormal prices. ("market manipulation").

In essence, market abuse may occur when investors have been unreasonably disadvantaged, directly or indirectly, by others who:

- have used information that is not publicly available to trade in financial instruments to their advantage (insider dealing);
- have distorted the price-setting mechanism of financial instruments; or
- have disseminated false or misleading information.

The MAD creates some tools to prevent and detect market abuses, like insiders' lists, suspicious transaction reports and the disclosure of managers' share transactions. It also obliges issuers of financial instruments traded on a regulated market to make public as soon as possible inside information that they possess, with limited possibilities to delay.

In order to promote enforcement, the Directive gives national competent authorities powers of investigation (such as access to data or on-site inspections) and the power to take administrative measures or impose "effective, proportionate and dissuasive" sanctions.

2. Why is the MAD being reviewed?

The MAD introduced a framework to harmonise core concepts and rules on market abuse and strengthen cooperation between regulators. However, a number of problems have been identified by the Commission and these can be broadly categorised in five groups:

- I.gaps in regulation of new markets, platforms and over-the-counter (OTC) trading in financial instruments
- II.gaps in regulation of commodities and commodity derivatives
- III.regulators cannot effectively enforce the MAD
- IV.lack of legal certainty undermines the effectiveness of the MAD, and
- V.administrative burdens, especially for small and medium-sized companies (SMEs).

This is why the Commission has adopted proposals to replace the MAD with a Regulation on Market Abuse (MAR) and a Directive on criminal sanctions for market abuse.

[Proposal for a Market Abuse Regulation \(MAR\)](#)

3. What are the main objectives of the proposal for a Regulation?

The proposal for a Regulation aims to update and strengthen the existing framework to ensure market integrity and investor protection provided by the Market Abuse Directive. The new framework will ensure regulation keeps pace with market developments, strengthens the fight against market abuse across commodity and related derivative markets, reinforces the investigative and administrative sanctioning powers of regulators and harmonises certain key elements while reducing administrative burdens on SME issuers where possible.

4. How do the MAR proposals fit in with the MiFID review proposals, and other recent initiatives such as those on OTC derivatives and short-selling?

Together, MAD and MiFID guarantee the competitiveness, efficiency and integrity of EU financial markets. They need to be updated in tandem to ensure that they are fully coherent and support each other's objectives and principles. Moreover, the pan-EU competition facilitated by MiFID has given rise to new challenges in terms of cross-border supervision. Harmonisation of the rules and competent authorities' powers is a necessary step.

The importance of market integrity has also been highlighted by the current global economic and financial crisis. In this context, the Group of Twenty (G20) agreed to strengthen financial supervision and regulation and to build a framework of internationally agreed high standards. In line with the G20 findings, the report by the High-Level Group on Financial Supervision in the EU recommended that "a sound prudential and conduct of business framework for the financial sector must rest on strong supervisory and sanctioning regimes".

The importance of the efficient functioning of the MAD was underlined in the Commission Communication "Driving European recovery"², which intends to tackle the most important shortcomings in the markets that have been observed in the current financial crisis. In its Communication on "Ensuring efficient, safe and sound derivatives markets: Future policy actions", the Commission said it would extend MAD's relevant provisions to comprehensively cover derivatives markets³. The importance of efficient coverage of OTC transactions in derivatives has been stressed also in discussions at various international fora⁴ including the G20 and the International Organisation of Securities Commissions as well as in the recent US Treasury Financial Regulatory Reform programme⁵.

5. What changes does the proposal make so that market abuse legislation keeps pace with market developments?

The MAD is based on the concept of prohibiting insider dealing or market manipulation in financial instruments which are admitted to trading on a regulated market. However, since the adoption of MiFID⁶, financial instruments have been increasingly traded on multilateral trading facilities (MTFs), on other types of organised trading facilities (OTFs), such as swap execution facilities or broker crossing systems, or only traded OTC. These new trading venues and facilities have provided more competition to existing regulated markets, gaining an increased share of liquidity and attracting a broader range of investors. But the increase in trading across different venues has made it more difficult to monitor for possible market abuse. Therefore the proposal extends the scope of the market abuse framework to apply to any financial instrument admitted to trading on an MTF or organised trading facility, as well as to any related financial instruments traded OTC which can have an effect on the covered underlying market. This is necessary to avoid any regulatory arbitrage among trading venues, to ensure that the protection of investors and the integrity of markets are preserved on a level playing field in the whole Union, and to ensure that market manipulation of such financial instruments through derivatives traded OTC, such as credit default swaps (CDS), is clearly prohibited.

6. What does the proposal do to tackle market abuse occurring across both financial and commodity markets, which are international by nature?

Commodity spot markets and related derivative markets are highly interconnected and market abuse may take place across these markets. This raises special concerns for spot markets because transparency rules and market integrity apply to derivatives markets but not to the related spot markets. It is beyond the scope of the Regulation to govern directly those non-financial markets, which should be subject to specific and sectoral regulation and supervision as provided for in the field of energy by the recently adopted European Parliament and Council Regulation on energy market integrity and transparency (REMIT)⁷.

However, the lack of a clear and binding definition under the existing MAD of inside information in relation to commodity derivatives markets may allow information asymmetries in connection with those related spot markets. This means that under the current market abuse framework, investors in commodity derivatives may be less protected than investors in derivatives of financial markets.

Therefore, since a person can benefit from inside information in a spot market by trading on a financial market, the proposal for a regulation on market abuse aligns the definition of inside information in relation to commodity derivatives to the general definition of inside information, by extending it to price sensitive information which is relevant to the related spot commodity contract as well as to the derivative itself. This will ensure legal certainty and better information for investors.

Moreover, the MAD only prohibits any manipulation which distorts the price of financial instruments. As certain transactions in the derivatives markets can also be used to manipulate the price of the related spot markets, and transactions in the spot markets can be used to manipulate derivatives markets, the definition of market manipulation is extended in the Regulation to also capture these types of cross-market manipulation.

The Regulation also introduces an obligation to cooperate and exchange information between financial regulators and the regulators of spot commodity markets where they exist to ensure a consolidated overview of financial and spot markets and to detect and sanction cross-market and cross-border abuses. It gives financial regulators the power to require that data on spot markets be submitted directly to them in a specified format.

7. How does the proposal deal with emission allowances?

Emission allowances are reclassified as financial instruments as part of the proposal for a regulation on markets in financial instruments (see [MEMO/11/716](#)). As a result, they will also fall into the scope of the market abuse framework. As it is typically not the issuer of an emission allowance who possesses inside information, the standard definition of inside information does not sufficiently ensure disclosure of relevant inside information. Therefore, a specific definition of inside information for emission allowances is introduced. The obligation to disclose inside information will be effectively placed on companies with large installations regulated by the EU Emissions Trading System, as it is they who possess the relevant information. For more information on emission allowances, see also [MEMO/11/719](#).

8. How does the proposal reinforce the powers of competent authorities to detect market abuse?

The proposal includes a number of measures to ensure regulators have access to the information they need to detect and sanction market abuse. The proposal extends suspicious transaction reporting to orders and to OTC transactions. It clarifies that regulators can obtain existing telephone and data traffic records from telecoms operators where there is a reasonable suspicion of insider dealing or market manipulation (as defined in the proposal for a Directive) in violation of the Regulation or the Directive. It also grants competent authorities access to private documents or premises where there is a reasonable suspicion of insider dealing or market manipulation (as defined in the Directive) in violation of the Regulation or the Directive, subject to a judicial warrant. It also requires Member States to provide for the protection of whistleblowers and sets common rules where incentives are provided to them for reporting information about market abuse. Finally a new offence of "attempted market manipulation" is introduced to make it possible for regulators to impose

a sanction in cases where someone tries to manipulate the market but does not succeed in actually trading.

9. How does the proposal strengthen the administrative sanctions that can be imposed for market abuse?

Since the sanctions currently available to regulators are often weak and lacking a deterrent effect, the proposal introduces greater harmonisation of administrative sanctions. Common principles are proposed, notably that fines should not be less than the profit made from market abuse where this can be determined, and the maximum fine should not be less than two times any such profit. For natural persons, the maximum fine should not be less than €5 million, and for legal persons it should not be less than 10% of annual turnover, with Member States being free to exceed these limits. In imposing sanctions, competent authorities should take account of other aggravating or mitigating factors, such as the gravity of the offence, previous offences or a suspect's cooperation with an investigation.

In parallel, a proposal for a Directive on criminal sanctions for market abuse requires Member States to introduce criminal sanctions for the offences of insider dealing and market manipulation as defined in the Directive, where these are committed intentionally (see below).

10. What does the proposal do to reduce administrative burdens, especially on SME issuers?

Insiders' lists are an important tool for competent authorities when investigating possible market abuse. However, differences in national laws implementing the MAD have imposed unnecessary administrative burdens on issuers. The Regulation aims to eliminate these by providing that the precise data to be included in such lists should be defined in delegated acts and implementing technical standards adopted by the Commission.

Applying the new market abuse framework of the Regulation in an undifferentiated manner to all SME growth markets may deter issuers on those markets from raising capital on the capital markets. Without prejudice to the objectives of preserving the integrity and transparency of financial markets and of protecting investors, the proposal therefore adapts the market abuse framework to the characteristics and needs of issuers whose financial instruments are admitted to trading on SME growth markets. The scope and size of the business of those issuers is more restricted and the events giving rise to the need to disclose inside information are typically more limited than those of larger issuers. The Regulation therefore requires those issuers to disclose inside information in a modified and simplified market-specific way. Such inside information may be published by those SME growth markets, on behalf of those issuers, in accordance with a standardised content and format defined in implementing technical standards adopted by the Commission. Those issuers are also exempt, under certain conditions, from the obligation to keep and constantly update insiders' lists.

The Regulation clarifies the scope of the reporting obligations in relation to managers' transactions. These reports serve important purposes by deterring managers from insider trading and providing useful information to the market about the manager's view on the price movements of the shares of the issuers. The Regulation clarifies that any transaction made by a person exercising discretion on behalf of a manager of an issuer or whereby the manager pledges or lends his shares must also be reported to the competent authorities and be made accessible to the public. Moreover, it introduces a threshold of €20 000, uniform in all Member States, which triggers the obligation to report such manager's transactions. This higher threshold will contribute also to reducing the administrative burden on SMEs.

11. What are the next steps in the adoption of the proposal for a Regulation?

The proposal now passes to the European Parliament and the Council for negotiation and adoption. Once adopted the regulation would apply from 24 months after its entry into force.

Proposal for a Directive on Criminal Sanctions for Market Abuse

12. Why propose a separate Directive on Criminal Sanctions for Market Abuse?

The Market Abuse Directive currently requires Member States to adopt administrative sanctions which are effective, proportionate and dissuasive, and leaves them free to decide whether or not to impose criminal sanctions. An assessment of existing sanctions regimes by the Commission shows that the current sanctions are lacking impact and are insufficiently dissuasive, which results in ineffective enforcement of the Directive. In addition, the definition of which forms of insider dealing or market manipulation constitute criminal offences diverges considerably from Member State to Member State.

For example, five Member States do not provide for criminal sanctions for disclosure of inside information by primary insiders and eight Member States do not do so for secondary insiders. Since market abuse can be carried out across borders, this divergence undermines the internal market and leaves a certain scope for perpetrators of market abuse to carry out such abuse in jurisdictions which do not provide for criminal sanctions for a particular offence.

The Commission considers that minimum rules on criminal offences and on criminal sanctions for market abuse are essential for ensuring the effectiveness of the EU policy on market integrity. Criminal sanctions demonstrate social disapproval of a qualitatively different nature compared to administrative sanctions or compensation mechanisms under civil law. Common minimum rules on the definition of criminal offences for the most serious market abuse offences would also facilitate the cooperation of law enforcement and judicial authorities in the Union, especially considering that the offences are in many cases committed across borders.

13. Which offences will be subject to criminal sanctions?

The proposal for a Directive defines the two offences, insider dealing and market manipulation, which should be regarded by Member States as criminal offences if committed intentionally. In line with the scope of the proposed Market Abuse Regulation, transactions for certain purposes are excluded from the scope: buy-backs and stabilisation programmes, monetary policy and debt management activities and activities concerning emission allowances in pursuit of climate policy.

The proposal also requires Member States to criminalise inciting, aiding and abetting insider dealing and market manipulation, as well as attempts at these forms of market abuse. Liability should also be extended to legal persons.

14. What are the requirements for criminal sanctions?

The Directive requires Member States to ensure that the criminal offences defined in the Directive are punishable by criminal sanctions which are effective, proportionate and dissuasive.

The proposal includes a review clause requiring the Commission to report to the European Parliament and Council within four years of the Directive's entry into force on the application of this Directive and, if necessary, on the need to review it, in particular with

regard to the appropriateness of introducing common minimum rules on types and levels of criminal sanctions. If appropriate, the report shall be accompanied by legislative proposals.

15. What are the next steps in the adoption of the proposal for a Directive?

The proposal now passes to the European Parliament and the Council for negotiation and adoption. Once adopted, Member States will have two years to transpose the Directive into national law.

More information is available at:

http://ec.europa.eu/internal_market/securities/abuse/index_en.htm

1.

Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003, on insider dealing and market manipulation. OJ L, 12 April 2003, p 16.

2.

COM (2009)114 of 4th March 2009.

3.

COM(2009) 563 final, 20.10.2009

4.

IOSCO notes that "[The high level of interconnectivity between credit derivatives, the obligations of the underlying reference entities e.g., corporate bonds, equities and cash markets means market misconduct \(manipulation and insider trading\) and disruptions in one market can affect another.](#)", [Consultation Report on Unregulated Markets and Products, May 2009, p. 28.](#)

5.

["Market integrity concerns should be addressed by making whatever amendments to the CEA and the securities laws which are necessary to ensure that the CFTC and the SEC, consistent with their respective missions, have clear, unimpeded authority to police and prevent fraud, market manipulation, and other market abuses involving all OTC derivatives." Financial Regulatory Reform. A New Foundation: Rebuilding Financial Supervision and Regulation, Dept. of Treasury, June 2009. p.48;](#)

6.

Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments. OJ L 145, 30.4.2004.

7.

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0726:FIN:EN:PDF>

8.

MEMO/11/713

Brussels, 19 October 2011

Regulation on Short Selling and Credit Default Swaps - Frequently asked questions

What is short selling?

Short selling is the sale of a security that the seller does not own, with the intention of buying back an identical security at a later point in time in order to be able to deliver the security. Short selling can be divided into two types:

1. "*Covered*" *short selling* is where the seller has borrowed the securities, or made arrangements to ensure they can be borrowed, before the short sale.

2. "*Naked*" or "*uncovered*" *short selling* is where the seller has not borrowed the securities at the time of the short sale, or ensured they can be borrowed.

Who engages in short selling and why?

Short selling is used by a variety of market participants including hedge funds, traditional fund managers such as pension funds and insurance companies, investment banks, market makers and individual investors. Short selling can be used for the following reasons:

- for speculative purposes (e.g. to profit from the expected decline of a share price);
- to hedge a long position (e.g. to limit losses in comparable shares in which a long position is held);
- for arbitrage (e.g. to profit from the difference in price between two different but inter-related shares); and
- for market making (e.g. to meet customer demand for shares which are not immediately available).

What is a Credit Default Swap?

A *Credit Default Swap* (CDS) is a derivative which is sometimes regarded as a form of insurance against the risk of credit default of a corporate or government (or sovereign) bond. In return for an annual premium, the buyer of a CDS is protected against the risk of default of the reference entity (stated in the contract) by the seller. If the reference entity defaults, the protection seller compensates the buyer for the cost of default.

In addition to short selling on cash markets, a *net short position* can also be achieved by the use of derivatives, including Credit Default Swaps (CDS). For example, if an investor buys a CDS without being exposed to the credit risk of the underlying bond issuer (a so-called "naked CDS"), he is expecting, and potentially gaining from, rising credit risk. This is equivalent to short selling the underlying bond.

Who trades in CDS and why?

There are four main groups of market participants in the CDS market: dealers, non-dealer banks, hedge funds and asset managers. The dealers are by far the largest players on the market. The aims of these market participants are diverse and they employ different strategies.

CDS can be used for the following purposes:

- *hedging*: CDS can be used to neutralise or reduce a risk to which the CDS buyer is exposed from another position. An example of such an "insurable interest" would be a bondholder's exposure to the credit risk of the issuer of the bond; by buying a CDS he can reduce that risk by passing it on to the CDS seller;
- *arbitrage*: The typical arbitrage operation that involves CDS is the combination of buying a CDS and entering into an asset swap where the fixed coupon payments of a bond are swapped against a stream of variable payments; or
- *speculation*: CDS can also be used to take a position in order to exploit price changes by trading in and out. For example, a CDS seller has taken on risk (in exchange for the regular payments he receives from the CDS buyer); he will gain

from the contract if the credit risk does not materialise during the contract's term or if the compensation received will exceed a potential payout.

Why did the Commission propose legislation on short selling and CDS?

During the financial crisis and more recently in the context of market volatility in euro denominated sovereign bonds, Member States reacted differently to the issues raised by short selling and credit default swaps. A variety of measures have been adopted using different powers by some Member States while others have not taken action. There is currently no legislative framework at European level to deal with these issues in a coherent way. A fragmented approach to these issues can limit the effectiveness of the measures imposed, lead to regulatory arbitrage (which basically means shopping around for the least onerous regime) and create additional costs and difficulties for investors.

While the Commission acknowledges that short selling has economic benefits and contributes to the efficiency of EU markets, notably in terms of increasing market liquidity, more efficient price discovery and helping to mitigate overpricing of securities, it also presents risks.

While reducing the scope for regulatory arbitrage and compliance costs arising from a fragmented regulatory framework, the three main risks of short selling which the Commission sought to address in the Regulation are:

- *transparency deficiencies*: the current lack of transparency in relation to short selling prevents regulators from being able to detect at an early stage the development of short positions which may cause risks to financial stability or market integrity. Greater transparency to the market on short selling would deter aggressive short selling and give useful information to the market about how short sellers view the performance and prospects of companies.
- *the risk of negative price spirals*: many regulators have expressed concerns about the risks of short selling amplifying price falls in distressed markets, and that this could lead to systemic risks. It was due to these concerns that a number of Member States introduced emergency measures to restrict or ban short selling in some or all shares in autumn 2008. Concerns have also been expressed by some Member States that short positions through CDS transactions could in some circumstances contribute to a decline of sovereign bond prices.
- *the risks of settlement failure associated with naked short selling*: when a short seller sells a financial instrument short without first borrowing the instrument, entering into an agreement to borrow it, or locating the instrument so that it is reserved for borrowing prior to settlement ("naked short selling"), there is a risk of settlement failure. Some regulators consider that this could endanger the stability of the financial system, as in principle a naked short seller can sell an unlimited number of shares in a very short space of time.

The Regulation agreed by the European Parliament and Council addresses both short selling and CDS because CDS can be used to secure a position economically equivalent to a short position in the underlying bonds. The buyer of a naked CDS benefits from the deterioration of the credit risk of the issuer in a very similar manner to the benefit which the seller of the bonds derives from this same deterioration which decreases the prices of the bonds.

What are the objectives of the Regulation?

The objectives of the proposal are to:

- increase transparency on short positions held by investors in certain EU securities;
- ensure Member States have clear powers to intervene in exceptional situations to reduce systemic risks and risks to financial stability and market confidence arising from short selling and credit default swaps,
- ensure co-ordination between Member States and the European Securities Markets Authority (ESMA) in exceptional situations;
- reduce settlement risks and other risks linked with uncovered or naked short selling; and
- reduce risks to the stability of sovereign debt markets posed by uncovered ("naked") CDS positions, while providing for the temporary suspension of restrictions where sovereign debt markets are not functioning properly.

How does the Regulation enhance the transparency of short selling?

Transparency is key in ensuring the efficient functioning and monitoring of financial markets. So the Regulation provides for several measures to enhance transparency in short selling for shares and government debt.

- for shares:

For EU shares the provisions to enhance transparency are largely based on the two tier model recommended by CESR (the Committee of European Securities Regulators, the predecessor of ESMA) in its report in March 2010. At a lower threshold (0.2% of the issued share capital) notification of a short position will be made only to the regulator and at a higher threshold (0.5%) short positions will be disclosed to the market. Notification to regulators will enable them to monitor and, if necessary, investigate short selling that may pose systemic risks or be abusive. Publication of information to the market will provide useful information to other market users and act as a disincentive to aggressive short selling strategies.

The Regulation also calls for consideration to be given by the Commission, in the context of the revision of the Markets in Financial Instruments Directive (MiFID), to whether inclusion by investment firms of information about short sales in transaction reports to competent authorities would provide useful supplementary information to enable competent authorities to monitor levels of short selling.

- for sovereign bonds:

A specific regime for notification to regulators only of significant net short positions in EU sovereign bonds is set out in the Regulation. This includes notification of significant credit default swap positions relating to sovereign debt issuers. Disclosure to regulators of significant net short positions relating to EU sovereign bonds will provide important information to assist regulators to monitor whether such positions are creating disorderly markets or systemic risks or are being used for abusive purposes. The provisions on sovereign bonds provide for information to be disclosed only to regulators rather than to the market, as public disclosure could have negative consequences for the operation of sovereign bond markets, notably in terms of liquidity. The evidence from the existing short selling disclosure regimes for shares at national level is that these have not had an undue impact on the liquidity of share markets.

In order to avoid any circumvention of the short selling disclosure rules through off-exchange derivative transactions, the transparency requirements for EU shares and EU sovereign bonds also cover the use of derivatives to obtain a net short position relating to the shares or bonds. The Regulation also requires that short positions should be subtracted

(or 'netted off') from long positions, as notification of a net short position provides more meaningful information to regulators and/or the market.

What powers will regulators have in exceptional situations?

In distressed markets when short selling can amplify a downward price spiral, transparency alone may not be enough. The Regulation provides that in exceptional situations, competent authorities (i.e. financial regulators) will have powers to impose temporary measures, such as to require further transparency or to restrict short selling and credit default swap transactions. These powers extend to a wide range of instruments. The Regulation harmonises the powers and defines the conditions and procedures that must be complied with when the powers are exercised. ESMA is given a central role in coordinating action in exceptional situations and ensuring that powers are only exercised where necessary (see section below on the role of ESMA).

The powers of intervention of competent authorities relating to short selling and credit default swaps in exceptional situations are temporary (for up to a three month period). A temporary measure can be extended for further periods not exceeding three months at a time, but this must be fully justified.

To ensure a consistent approach to the use of regulators' powers of intervention, the Commission is given the power to further define criteria for determining when an exceptional situation arises. The Commission will act by the adoption of delegated acts, and the Council and Parliament can revoke this delegation of powers or object to a delegated act within two months.

Competent authorities are also given the power, in the case of a significant fall in the price of a financial instrument on a trading venue in a single day, to impose a restriction on short selling of the financial instrument until the end of the next trading day. If despite the measure there is a further significant fall in value of the financial instrument, the competent authority may extend the measure for up to a further two trading days. Regulators imposing such a restriction shall inform ESMA. ESMA shall inform other authorities of Member States whose trading venues trade the same instrument so that they can apply the same measure. In case of disagreement, ESMA shall assist the authorities concerned to reach an agreement and if this fails, ESMA may take a decision itself in accordance with Article 19 of the ESMA Regulation ("binding mediation").

What role will ESMA have to ensure coordination in exceptional situations?

ESMA is given an important role in coordinating action in exceptional situations. Competent authorities must notify ESMA of the measures they propose to take (or renew) in such a situation, not less than 24 hours before the entry into force of the measures (this period may be shorter in exceptional circumstances). ESMA shall consider the information received and issue an opinion (within 24 hours) on whether the measure or proposed measure is appropriate and proportionate to address the threat, and whether measures by other competent authorities are necessary. Where a competent authority takes action contrary to ESMA's opinion it shall publish a notice giving its reasons for doing so. In such a situation ESMA shall consider whether the conditions are met for it to use its powers of intervention.

In relation to financial instruments other than sovereign debt or sovereign CDS, ESMA may itself take action where two conditions are fulfilled: there is a threat to the orderly functioning and integrity of financial markets or the stability of the whole or part of the financial system in the Union and there are cross border implications; and measures have not been taken by competent authorities, or are not sufficient, to address the threat. The

measures which ESMA can take and the requirements to notify regulators are the same as those foreseen for national competent authorities. When taking a measure, ESMA shall consider the extent to which the measure will significantly address the threat, will not create a risk of regulatory arbitrage and will not have a detrimental effect on the efficiency of financial markets that is disproportionate to the benefits of the measure. A measure adopted by ESMA in accordance with its powers of intervention shall prevail over any previous measures taken by a competent authority.

In the case of an emergency situation related to sovereign debt or sovereign CDS, Articles 18 and 38 of the ESMA Regulation shall apply. These articles empower ESMA to act when Council declares an emergency situation, subject to the fiscal safeguard clause (article 38).

What restrictions are provided for on naked short selling?

In order to reduce the risks of settlement failures and increased price volatility which can be associated with naked short selling of shares and sovereign debt, certain requirements are introduced. These are distinct for shares and for sovereign debt.

For shares: In order to enter a short sale, an investor must have borrowed the instruments concerned, entered into an agreement to borrow them, or have an arrangement with a third party under which that third party has confirmed that the share has been located and has taken measures vis-à-vis third parties necessary for the investor to have reasonable expectation that settlement can be effected when it is due. This is known as a 'locate rule'. ESMA shall develop draft implementing technical standards to determine the types of agreements, arrangements and measures that adequately ensure that the share will be available for settlement. In determining what measures are necessary to have a reasonable expectation that settlement can be effected when it is due, ESMA shall take into account among others intraday trading and the liquidity of the shares. To deter settlement failures, trading venues must also ensure that there are adequate arrangements in place for buy in of shares where there is a settlement failure, as well as for fines.

For sovereign debt: In order to enter a short sale an investor must have borrowed the instruments concerned, entered into an agreement to borrow them, or have an arrangement with a third party under which that third party has confirmed that the share has been located or has otherwise reasonable expectation that settlement can be effected when it is due. The restrictions do not apply if the transaction serves to hedge a long position in debt instruments of an issuer, the pricing of which has a high correlation with the pricing of the given sovereign debt. In addition, the competent authority may temporarily (for 6 months, renewable) suspend these restrictions where the liquidity of the sovereign debt falls below a pre-determined threshold, to be set by the Commission in a delegated act. ESMA shall develop draft implementing technical standards to determine the types of agreements, arrangements and measures that adequately ensure that the sovereign debt will be available for settlement.

What are the enforcement powers of regulators?

The proposal provides for competent authorities to have all the powers necessary, as well as rules on administrative measures, sanctions and pecuniary measures, to enforce the proposals. ESMA is also given the power to conduct inquiries into specific issues or practices relating to short selling and to publish a report setting out its findings. As certain measures may involve monitoring or enforcement against persons outside the European Union, EU regulators are required to reach cooperation agreements with regulators in third countries where EU shares or sovereign bonds and associated derivatives are traded.

Are any exemptions set out in the Regulation?

Yes, for market making activities, for primary market operations and for shares whose principal market is outside the EU. Market making includes providing price quotes for financial instruments to provide liquidity to the market or to fulfil client orders. Market making activities are exempt because they play an important role in providing liquidity, and restricting their ability to short sell would have a significant adverse effect on the liquidity of markets. Primary market operations are transactions performed by dealers to provide liquidity to issuers of sovereign debt and for the purposes of stabilisation schemes (i.e. share issues intended to stabilise a share price) under the Market Abuse Directive. Primary market operations are legitimate functions that are important for the proper functioning of primary markets. Shares whose principal market is outside the European Union are exempt, because it would not be proportionate to apply short selling requirements where most trading of the share takes place outside the Union.

How and why does the Regulation ban so called "naked" sovereign CDS?

The Regulation bans naked sovereign CDS, under the conditions described below, to address concerns that naked sovereign CDS can destabilize the sovereign debt markets in a similar way to short selling.

A "naked" sovereign CDS refers to the situation where the CDS is acquired by the buyer not to hedge against the risk of default of the sovereign issuer where the buyer has a long position in the sovereign debt of that issuer, or the risk of a decline of the value of the sovereign debt where the buyer of the CDS holds assets or is subject to liabilities the value of which is correlated to the value of the sovereign debt. In other words, the buyer of the CDS is "naked" if he does not have an exposure which he is seeking to hedge either to the sovereign debt itself, or to assets or liabilities whose value is correlated to the sovereign debt.

The assets or liabilities are broadly defined to include financial contracts, a portfolio of assets or financial obligations. Exposures to a sovereign which shall not be considered a "naked" CDS include any exposures to [the central, regional and local administration, public sector entities or any exposure guaranteed by any referred entity. Furthermore, exposure to private sector entities established in the Member State should be also included. All exposures shall be considered in this context including among others loans, counterparty credit risk \(including potential exposure when regulatory capital is required to such exposure\), receivables and guarantees. It also includes indirect exposures to any of the referred entities obtained through among others exposure to indices, funds or special purpose vehicles.](#)

The Regulation includes a requirement for a permanent ban on naked CDS, in order to address the risk that such positions could have a destabilising effect on sovereign debt markets. However, in order to address concerns that such restrictions could negatively affect the liquidity of sovereign debt markets, a competent authority may temporarily suspend the restrictions where it believes, based on objective elements, that its sovereign debt market is not functioning properly and that such restrictions might have a negative impact on the sovereign credit default swap market, especially by increasing the cost of borrowing for sovereign issuers or affecting the sovereign issuer's ability to issue new debt.

These objective elements shall be based on the following indicators:

- high or rising interest rate on the sovereign debt;
- widening of interest rate spreads on the sovereign debt compared to the sovereign debt of other sovereign issuers;

- widening of the sovereign credit default swaps spreads compared to the own curve and compared to other sovereign issuers;
- timeliness of the return of the price of the sovereign debt to its original equilibrium after a large trade;
- amounts of sovereign debt that can be traded.

A competent authority may use additional indicators to those set out above. Prior to suspending the restrictions, a competent authority shall notify ESMA and other competent authorities about the intended suspension or renewal of the suspension and the objective elements on which it is based. ESMA shall issue an opinion within 24 hours on the intended suspension and where this is based on an indicator other than those listed above, shall include in its opinion an assessment of the indicator. The ban on naked CDS can be suspended for an initial period not exceeding 12 months, renewable for further periods of up to 6 months if the grounds for suspension continue to be applicable.

Is the Regulation in line with international principles and the regulatory frameworks of the EU's main international partners?

The International Organisation of Securities Commissions (IOSCO) adopted in June 2009 a 'Final report on regulation of short selling'¹ which sets out the following four principles for the regulation of short selling:

1. Short selling should be subject to appropriate controls to reduce or minimise the potential risks that could affect the orderly and efficient functioning and stability of financial markets;
2. Short selling should be subject to a reporting regime that provides timely information to the market or to market authorities;
3. Short selling should be subject to an effective compliance and enforcement system; and
4. Short selling regulation should allow appropriate exceptions for certain types of transactions for efficient market functioning and development.

The Commission believes that the short selling Regulation is fully compatible with the principles outlined by IOSCO.

The United States has had in place a number of measures in relation to short selling which have been revised several times over the years, notably an uptick rule (which was abolished in 2007). In 2004, the SEC adopted Regulation SHO² which introduced the following requirements for short selling: a 'locate' rule for short sellers, a flagging regime and a "close-out" requirement for short positions. On 24 February 2010 the SEC adopted the "revised uptick" or "circuit breaker" rule. This rule restricts short sales of a share whose price has fallen by more than 10% compared to its closing price the previous day.

During the financial crisis, the SEC introduced a number of temporary emergency measures restricting short selling. Since 1 August 2009, the SEC has been working with self-regulatory organisations to make short selling volume and transaction data available to the public through the latter's web sites. The Wall Street Reform Act enacted into law by the US President on 21 July 2010 includes certain provisions on short selling, notably it requires the SEC to adopt rules for public disclosure, at least monthly, of the amount of short sales by institutional investment managers.

Regarding CDS and especially sovereign CDS, no specific measures have been adopted by the US authorities for the time being. However, CDS fall within the scope of the Wall

Street Reform Act, and the CFTC and SEC will be expected to produce joint rules to implement this.

Hong Kong also has in place measures relating to short selling: a flagging requirement with daily publication of aggregate data on short selling volume, an uptick rule, a locate rule and buy in procedures and fines in case of non-settlement.

The Commission considers that the adoption of the Regulation on short selling and CDS will increase the convergence of the EU's regulatory framework with that of the United States and Hong Kong. A comparison of the EU's proposals with the measures in force in the United States and Hong Kong is included in table 2 below.

What is the timing for final adoption of the Regulation and its entry into force?

Having been agreed by the European Parliament, the Council and the Commission in the trilogue, the Regulation now has to be adopted in its agreed, amended form by the European Parliament in first reading. This adoption is expected to take place during the plenary session in the third week of November. The Council must then adopt the Regulation in exactly the same amended form at a subsequent meeting. Once adopted by the European Parliament and the Council, the text will then be finalised in all languages by the legal linguists before being published in the Official Journal. Publication is expected to take place by 1 January 2012. The Regulation is expected to enter into force in November 2012, by which time the Commission delegated acts and implementing and regulatory technical standards of ESMA will have to be adopted.

How does this Regulation fit in with other initiatives related to the financial crisis?

In the context of the proposals to revise the Markets in Financial Instruments Directive (MiFID), due on 20 October 2011, the Commission will consider options including transaction reporting, position reporting and the possibility of position limits, which could complement the short selling proposals by providing additional tools to detect and guard against possible systemic risks and risks to market integrity.

In the context of the proposals to revise the Market Abuse Directive, due at the same time as the MiFID, the Commission will consider the option to extend the prohibition of market manipulation to all over the counter instruments, including derivatives, which could impact the prices of financial instruments traded on a regulated market, Multilateral Trading Facility or other organised trading facility. This option would complement the short selling regulation by providing regulators with the tools to sanction possible market manipulation of underlying bond markets through CDS.

Statement by Commissioner Michel Barnier: [MEMO/11/712](#)

Comparison of Short Selling Regulation EU – US – Hong Kong – September 2010

	US	EU	Hong Kong
<i>Name</i>	<ul style="list-style-type: none"> Regulation SHO 	<ul style="list-style-type: none"> Regulation of the European Parliament and the Council on Short Selling and Credit Default Swaps 	-
<i>Transparency</i>	-	<ul style="list-style-type: none"> Private disclosure to the Regulator of any net economic short position 	-
<i>Private</i>	-		-

*Disclosure to
Regulators of
Short
Positions*

*Public
Disclosure of
Short
Positions*

(over a certain threshold)
in –

- - **Equity (inc derivatives);** or
 - **Sovereign Debt (inc uncovered CDS).**
- Public disclosure to the Market of net economic short position (over a certain, higher, threshold) in –
- - **Equity (inc derivatives).**

*Order
Marking*

- Applies to **exchange listed equity instruments**, traded on exchange.

- Commission invited to consider, in the context of the revision of the Markets in Financial Instruments Directive (MiFID), whether inclusion by investment firms of information about short sales in transaction reports to competent authorities would provide useful supplementary information to enable competent authorities to monitor levels of short selling.

- Applies to **exchange listed equity instruments**, traded on exchange.

*Public
Disclosure of
Market Orders*

- SEC appointed Self Regulatory Organisations ("SROs") does –

- Hong Kong Stock Exchange (HKSE) currently does –

- Publish **daily aggregate short-selling volume** in each **individual equity security** for that day; and
- On a **one-month delayed** basis, publish anonymised

- Publish **daily aggregate short-selling volume** in each **individual equity security** for that

information regarding **individual short sale transactions in all exchange-listed equity securities.**

day.

- [SROs are typically exchanges and related parties e.g. NYSE, FINRA, NASDAQ.]

<i>Circuit Breaker/Up Tick Rule</i>	<ul style="list-style-type: none"> • Applies only to Covered Securities (select equities). • Triggered if the price falls 10% below the previous day's close. • Implements an up tick rule for the remainder of the day and the following trading day. 	<ul style="list-style-type: none"> • Applies to all financial instruments. • Triggered, at the discretion of the Competent Authority, in case of a significant price fall from the previous day's close (for liquid shares 10%. For illiquid shares and other financial instruments, threshold to be determined by the Commission in a delegated act). • Implements a temporary short selling prohibition for the remainder of the day and the following trading day. Can be extended for up to two further trading days in case of a further significant price fall. 	<ul style="list-style-type: none"> • Applies to exchange listed equity instruments. • No Circuit Breaker. • Permanent up tick rule in place on HKSE.
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<i>Locate Rule (restrictions on uncovered short sales)</i>	<ul style="list-style-type: none"> • Applies only to equities, and requires: <ul style="list-style-type: none"> • "Reasonable grounds"; <p>[Reasonable Grounds is not defined, however the SEC has provided guidance stating that it may include a security's appearance on an "easy to borrow list" where the list is based on recent</p>	<ul style="list-style-type: none"> • For equities requires: <ul style="list-style-type: none"> • Borrowing, • an agreement to borrow, or • an arrangement with a third party by which the share has been located and measures vis-à-vis third parties necessary to have a reasonable 	<ul style="list-style-type: none"> • Applies only to equities and traded on exchange, and requires: <ul style="list-style-type: none"> • an exercisable and unconditional right.
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data (<24 hours).]

expectation that settlement can be effected when it is due.

- For **EU sovereign debt** instruments requires:
 - Borrowing,
 - an **agreement** to borrow, or
 - an **arrangement** with a third party by which the sovereign debt has been **located or otherwise has reasonable expectation** that settlement can be effected when it is due.

Close Out/Buy In Requirements

-
- Applies only to the specially defined equity **threshold securities**.
 - Requires **brokers and dealers** that are participants of a registered clearing agency to "close-out" failure-to-deliver positions in **threshold securities**.
 - The **broker or dealer must buy in securities of a like kind or quality** and close out the position if –
 - failure to deliver occurs on the designated settlement date. E.g. on T+3 settlement, close out initiated on T+4.
 - Until the position is closed out, the broker or dealer
- Applies to all **equities**.
 - Requires the **CCP** which provides clearing services for shares to ensure they have in place **appropriate buy in procedures**.
 - The **CCP must buy in** the instruments if the person who has the short position is unable to settle within –
 - **four business days** after the day on which settlement is due.
 - If the CCP is **unable to buy in** the instruments then it **must settle the position in cash**, including an **amount for any losses** incurred by the buyer as a result of the settlement failure.
 - **The person who was unable to settle** must **reimburse** the CCP for all amounts paid out above.
 - The CCP shall ensure that the person who fails to deliver by the settlement date is subject to daily
- Applies to all **equities** cleared by HKSCC's clearing system.
 - The **broker or dealer may be required to buy in the securities** and close out the position –
 - **At any point** past the day after the settlement date (e.g. at T+3).
 - **HKSCC may also impose fines** on the stockbroker from T+2 onward.
-

and any broker or dealer for which it clears transactions **may not effect further short sales in that threshold security** without borrowing or entering into a bona fide agreement to borrow the security.

finances.

<p><i>Emergency Powers</i></p>	<ul style="list-style-type: none"> • Applies to exchange listed securities. • Gives SEC plenary authority to regulate short sale transactions. 	<ul style="list-style-type: none"> • Applies to all financial instruments. • Contains a pre-defined action framework. • Enables Member States or ESMA to prohibit or impose conditions relating to short selling. • For sovereign debt or sovereign CDS, ESMA can only act in accordance with the ESMA Regulation when an emergency is declared by the Council, and subject to the fiscal safeguard clause. 	<ul style="list-style-type: none"> • There are no specific emergency powers.
<p><i>Other</i></p>	<ul style="list-style-type: none"> • The 2010 Dodd-Frank act provides provisions on short selling. • Section 929X specifies the rule writing authority of the SEC on - <ul style="list-style-type: none"> • Disclosure, manipulative short selling, and notification by brokers to their customers allowing them to prevent their securities to be used for short selling or to receive 	<p>Ban on naked sovereign CDS which can be temporarily suspended by competent authorities where they believe, based on objective elements, that the ban may prevent the sovereign debt market functioning properly</p>	<p>-</p>

compensation if they do.

- Section 417X requires the SEC, by 2010, to undertake a review and evaluation of the following-
 - Delivery time, failure to deliver, disclosure of short positions to market or regulator and expanded order marking requirements

¹ :

For the text of the final report see:

<http://www.iosco.org/library/pubdocs/pdf/IOSCOPD292.pdf>

² :

Regulation SHO, Securities and Exchange Commission, 17 CFR PARTS 240, 241 and 242 [Release No. 34-50103; File No. S7-23-03]

http://www.sec.gov/rules/final/34-50103.htm#P19_2741

9.

MEMO/11/712

Brussels, 19 October 2011

Commissioner Michel Barnier welcomes trilogue agreement by Council and Parliament on new rules for short selling and Credit Default Swaps

"Last night's agreement by the European Parliament and the Council represents a significant step towards greater transparency, stability and responsibility in short selling transactions and sovereign Credit Default Swap (CDS) markets. It will now need to be formally endorsed by the European Parliament, Council and Commission. When this regulation enters into force, regulators will be able to respond in a more coordinated and effective way when short selling poses a risk to the stability of markets.

For shares, the new requirements to disclose significant short positions to regulators and the market will provide transparency on transactions which are currently opaque. Clear powers

for regulators, and under certain conditions the European Securities and Markets Authority (ESMA), to temporarily restrict short selling in exceptional situations will promote stability through coordinated action where necessary. And restrictions on naked short selling will limit the scope for transactions not being completed (settlement failures) and will provide for buy-in procedures when necessary.

In the current difficult economic circumstances, I particularly welcome Parliament and Council's endorsement of proportionate measures concerning sovereign debt and sovereign CDS, to ensure that regulators have access to the data they need and can act to restrict short selling of sovereign debt and limit sovereign CDS transactions when stability is at risk.

In a welcome improvement to our original proposal, so-called "naked" sovereign CDS positions will be prohibited where sovereign CDS are not acquired to hedge an exposure which is correlated to the value of the sovereign debt. The restriction will not apply to primary dealers and market makers. A competent authority will be able to temporarily suspend these restrictions where it believes, based on objective elements, that its sovereign debt market is not functioning properly and that such restrictions might have a negative impact on the sovereign credit default swap market. These balanced measures will ensure that sovereign CDS are used for the purpose for which they were designed, hedging against the risk of sovereign default, without putting at risk the proper functioning of sovereign debt markets.

Short selling did not cause the crisis, but can aggravate price declines in distressed markets. The events of autumn 2008 and those of recent months amply demonstrate the urgent need for a common European framework for short selling and CDS. By agreeing the Commission's short selling regulation just over a year after it was proposed, the European Parliament and the Council have risen to the challenge."

Full Q&A detailing the agreement reached : [MEMO/11/713](#)

A sajtóbejelentések elérhetőek:

<http://europa.eu.int/rapid/searchResultAction.do?search=OK&query=markt&username=PROF&advanced=0&guiLanguage=en>