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The European Commission publishes proposals to update the Market Abuse Directive

On 20 October 2011, the European Commission published two proposals intended to update and strengthen the existing framework insuring investor protection under the Market Abuse Directive (2003/6/EC) (Market Abuse Directive). The proposals consist of (i) a regulation on insider dealing and market manipulation (Regulation) and (ii) a new directive on criminal sanctions for insider dealing and market manipulation (Directive). The proposals are currently being negotiated by the European Parliament and Council. Once adopted, the proposals would apply from 24 months after they enter into force. As a result, the proposals will not come into effect until 2015, the earliest.

The aim of the proposals are to (i) ensure a consistent approach to market abuse issues by regulators across the European Union and (ii) strengthen the existing framework to ensure market integrity and investor protection within the European market. The proposals will ensure that regulation keeps pace with market developments, strengthens the fight against market abuse across commodity and related derivative markets and to reinforce the investigative and sanctioning powers of regulators.

The market abuse framework will be extended to cover (i) financial instruments traded on multilateral trading facilities (MTF) and organized trading facilities (OTF) and any related financial instruments traded over-the-counter (OTC) which could impact the covered underlying market; (ii) abusive behavior on spot commodity markets impacting on financial instruments and behavior in relation to financial instruments impacting the related spot markets; and (iii) emission allowances and other related auctioned products based thereon, for which there will be a modified definition of inside information.

The definition of inside information is broadened to include information that is not considered as price sensitive but, if it was generally publicly available would be regarded by a reasonable and investor who regularly makes transactions on the market, as relevant in considering the terms and conditions for investing in a financial instrument. The expansion of the definition of inside information will not increase the quantity of information which must be disclosed to the public, due to the fact that the Regulation provides for an exemption to the obligation to disclose inside information which is not price sensitive.

The Regulation prohibits attempts to engage in insider dealing and clarifies that both actual cancellations and attempts to cancel transactions are considered as use of inside information which constitutes insider dealing. In contrast to the Market Abuse Directive, the Regulation no longer provides for an exemption for market manipulation which can be justified and which is performed in line with a market practice accepted by a national regulator and notified to ESMA. Furthermore, the

prohibition to manipulate the market is explicitly extended to cover spot commodity contracts and provides for descriptions of acts which constitute market manipulation, including specific acts performed through algorithmic trading and with respect to electronic media. As a useful source, the Regulation introduces protection and incentives for whistleblowers in case of suspected market abuse.

The Regulation proposes to permit issuers to delay public disclosure of inside information in order not to prejudice legitimate interests, provided that such delay would not be likely to mislead the public and that the issuer is able to ensure the confidentiality of that information. In addition, the Regulation requires issuers, once the information is finally disclosed, to inform national regulators of their decision to delay such disclosure. National regulators would therefore be systematically informed of delayed disclosure and could impose sanctions for non-compliance.

The Directive will require the member states to strengthen criminal offences for persons for insider dealing and market manipulation. The member states will be required to impose criminal sanctions for inciting, aiding and abetting market abuse, as well as for attempts to commit such offences. The criminal offences will encompass all financial instruments, regardless of if the instrument is admitted to trading on a trading venue or not. In addition, it is explicitly stated that a legal person may be held liable for any of the offences if the offence is committed for their benefit by any person who holds a leading position within the legal person, acting either individually or as a part of an organ of the legal person based on (i) a power of representation of the legal person; (ii) an authority to take decisions on behalf of the legal person; or (iii) an authority to exercise control within the legal person. Legal persons can also be held liable where the lack of supervision or control, by a person who holds a leading position within the legal person, has made the commission of an offence possible for the benefit of the legal person by a person under its authority.

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