



Maria Velentza
Head of Unit G3 (Securities markets)
European Commission
Directorate-General Internal Market and Services
B - 1049 Bruxelles/Brussels
Belgium

By e-mail submission to: markt-consultations@ec.europa.eu

23rd July 2010

Dear Maria

European Commission Public Consultation on A Revision of the Market Abuse Directive (MAD) (June 2010)

Thank you for the opportunity to provide comments on the Commission's consultation on revisions to the Market Abuse Directive ("MAD"). We have set out below our views in relation to: the extension of the scope of MAD to shares only admitted to trading on a Multilateral Trading Facility ("MTF"); attempts at market manipulation and the extension of the Suspicious Transaction Reporting ("STR") regime to include orders; enforcement powers and sanctions; and market surveillance. We have also provided in the Annex to this letter responses to the Commission's specific questions.

By way of background, BATS Trading Limited¹ ("BATS Europe") is based in the UK and is authorised and regulated by the UK Financial Services Authority ("FSA") as the operator of an MTF.² We offer trading in major European cash equities and other equity-like instruments. **We have limited our comments in this response to these instruments, as well as shares only admitted to trading on an MTF (which we refer to as "primary market MTF shares").** We have not made any comments with respect to, for example, commodities derivatives, where other market participants are better placed to comment.

Extension of the scope of MAD to shares only admitted to trading on an MTF

We agree that the aims of MAD remain valid; that is, harmonising core concepts and rules on market abuse and strengthening co-operation between regulators. **We are supportive of the Commission's**

¹ BATS Trading Limited is a fully owned subsidiary of BATS Global Markets Inc. Owners of BATS Global Markets Inc include affiliates of Citigroup, Credit Suisse, Deutsche Bank, GETCO, JPMorgan, Lime Brokerage, Morgan Stanley, Merrill Lynch and Wedbush.

² BATS Europe launched its market for the trading of pan-European equity securities on 31st October 2008 and regularly matches more than 10% of the notional value traded in FTSE 100 securities and 5-7% of other major European indices.



proposals to effectively modernise the language used in MAD to include both Regulated Markets (“RMs”) and MTFs.

In our experience as the operator of an MTF, there is some confusion regarding the regulatory status of MTFs and the obligations applicable to them.³ It is important to draw a distinction between primary market and secondary market activities with respect to RMs and MTFs; often collectively referred to as “organised markets”. In particular, primary market MTF activities and secondary market MTF activities.

BATS Europe, like a number of other MTFs, operates a secondary market trading facility for shares that have their primary listing (i.e. have been admitted to trading) on an RM (or a comparable market in a third country). **Such instruments, which are admitted to trading on an RM but are also subsequently traded on multiple MTFs are already within the scope of MAD.** It is also important to note that, when conducting the same activity (that is, secondary market trading), investment firms operating an MTF and Market Operators (i.e. exchanges) already have substantially the same obligations, if not identical in some areas, including with respect to fair and orderly trading⁴, pre- and post-trade transparency⁵, and the identification of disorderly trading, rule breaches and potential market abuse⁶.

Market Operators are those persons who can operate an RM, including a primary market function for the listing of shares which are subject to a broad range of European directives (including the Prospectus Directive and the Transparency Directive). However, both Market Operators and investment firms can offer a primary market for shares that are not admitted to trading on an RM. Such shares are only admitted to trading on an MTF, i.e. their primary listing is on an MTF. They are not, therefore, covered by the provisions in a number of European directives. In the UK, examples of primary market MTFs (run by exchanges) are smaller companies markets, such as AIM (operated by the London Stock Exchange) and the PLUS-quoted market (operated by PLUS Markets). BATS Europe does not offer such a (primary market MTF) facility, nor do we offer trading in shares which only have a primary listing on an MTF.

We support the Commission’s proposal to extend the scope of MAD to include shares which only have a primary listing on an MTF and are not also listed (“admitted to trading”) on an RM. The extension of MAD to shares only admitted to trading on primary market MTFs will affect, amongst others, two areas: obligations placed on issuers (including the obligation to disclose information); and obligations placed

³ As an example, see comments in Financial Times article: <http://www.ft.com/cms/s/0/f220343a-419d-11df-865a-00144feabdc0,s01=1.html> and our response: <http://www.ft.com/cms/s/0/f5090d30-45ca-11df-9e46-00144feab49a.html>.

⁴ Article 14 (Trading process and finalisation of transactions in an MTF); Article 42 (Access to regulated markets).

⁵ Article 29 (Pre-trade transparency requirements for MTFs) and article 30 (Post-trade transparency requirements for MTFs); Article 44 (Pre-trade transparency requirements for regulated markets) and article 45 (Post-trade transparency requirements for regulated markets).

⁶ Article 26 (Monitoring of compliance with the rules of the MTF and with other legal obligations); Article 43 (Monitoring of compliance with the rules of the regulated market and with other legal obligations).



on persons dealing in primary market MTF shares (including prohibitions on insider dealing and market manipulation).

With respect to the obligations placed on those dealing in primary market MTF shares, the UK has previously extended the scope of the FSA's Code of Market Conduct⁷ to include such shares. Given the importance of MAD in ensuring market confidence and the protection of investors, we agree that the extension of MAD's scope to such instruments is an important measure.

In terms of the obligations placed on issuers whose shares are only admitted to trading on a primary market MTF, we agree that it is necessary to achieve an appropriate balance between investor protection and ensuring that SMEs, or indeed other issuers, who have not chosen admission to trading on an RM and compliance with all of the obligations attached with that status, continue to have access to capital and are not prevented from doing so by overly onerous administrative burdens.

That said, **with respect to the requirement on issuers to disclose inside information, we strongly believe that this should apply to all issuers, regardless of whether they have been admitted to trading on an RM or only to a primary market MTF.** The general principle of disclosure of such information⁸ is imperative to the operation of a clean, fair and efficient market. Whilst we agree that it should be explored whether there are certain more administrative provisions in MAD that could be disapplied to SMEs, we believe that allowing SMEs to effectively withhold the disclosure of such information would pose unacceptable risks to investors and damage market confidence.⁹ With respect to any exemption from the more administrative burdens, we believe that such an exemption should only apply to issuers where they are admitted to trading only on a primary market MTF and are not, therefore, subject to the full spectrum of the European directives applicable to admission to an RM.

As a broader point, we are interested in proposals to bring primary market MTFs within the scope of European directives currently focussed on admission to an RM. In July 2007, the FSA published a Discussion Paper on the trading of primary market MTF shares.¹⁰ As noted above, at present, such shares are not covered by the scope of European directives relating to shares admitted to trading on an RM.

⁷ By including markets and investments which have been prescribed by HM Treasury.

⁸ Please see our comments in the Annex to this letter in response to Question 1, which support the suggestion made by the UK FSA and HM Treasury in their joint response to the Commission's 2009 Call for Evidence to have a dual definition of inside information.

⁹ Indeed, we would note that the issuers of primary market MTF shares on AIM and the PLUS-quoted market are currently subject to disclosure obligations. See AIM Rule 11 (see: <http://www.londonstockexchange.com/companies-and-advisors/aim/advisers/rules/aim-rules-for-companies.pdf>) and PLUS-quoted Rule 35 (see: http://www.plusmarketsgroup.com/pdf/PLUS_RulesForIssuers.pdf).

¹⁰ DP 07/03 Trading of MTF shares: impact of proposed stamp duty changes (see: http://www.fsa.gov.uk/pubs/discussion/dp07_03.pdf).



As noted by the FSA in its Discussion Paper, under the current arrangements, there is very little competition for the secondary market trading of primary market MTF shares.¹¹ We are supportive of any measures that would allow for greater competition in the secondary market trading of a broader spectrum of financial instruments, and the benefits of competition, including on lowering transaction costs and increasing efficiency.

The FSA highlighted three key areas¹² when considering the impact of competition in the secondary market trading of primary market MTF shares:

1. The imposition of disclosure requirements on issuers.
 - At present, initial and ongoing disclosure requirements are imposed on issuers by the operator of the primary market MTF.
2. The pre- and post-trade transparency regime.
 - There is no harmonised pan-European transparency regime for primary market MTF shares, unlike the comprehensive MiFID transparency regime for RM shares.
3. The application of the market abuse regime.
 - Whilst the FSA has extended the scope of the Code of Market Conduct to include primary market MTF shares, MAD does not apply nor do the transaction reporting obligations for non-UK investment firms in other EEA states.

The Commission's proposal to extend the scope of MAD to include primary market MTF shares would address point (3) above, with respect to both the regime itself and the transaction reporting obligation. Similarly, by imposing the obligation to publish inside information on the issuers of primary market MTF shares, the expansion of the scope of MAD could address point (1) above. That is, at present, the disclosure obligation is currently imposed and enforced by the operator of the primary market MTF. However, this area of issuer oversight would move to the relevant Competent Authority, in much the same way as the current arrangements for RM shares.

Whilst we are not suggesting this is a complete solution, we would **ask the Commission to consider whether alternative measures should be included, for example, in the context of the MiFID review, to facilitate competition in the secondary market trading of primary market MTF shares** and not just shares admitted to trading on an RM. For example, provided the areas highlighted in points (1)-(3) above are addressed, including an appropriate transparency regime (pre- and post-trade transparency and the consolidation of transparency data), we would argue that articles 14(6) and 40(3) of MiFID¹³

¹¹ See paragraphs 2.14 –2.18 of FSA SP 07/03.

¹² See paragraphs 2.11, 2.12 and 2.13 of FSA DP 07/03.

¹³ Article 14(6) of MiFID: "Where a transferable security, which has been admitted to trading on a regulated market, is also traded on an MTF without the consent of the issuer, the issuer shall not be subject to any obligation relating to initial, ongoing or ad hoc financial disclosure with regard to that MTF."

Article 40(3) of MiFID: Member States shall require the regulated market to establish and maintain effective arrangements to verify that issuers of transferable securities that are admitted to trading on the regulated market comply with their obligations under Community law in respect of initial, ongoing or ad hoc disclosure obligations."



could be expanded to include both shares that have been admitted to trading on an RM (as is currently the case) and shares that have only been admitted to trading on an MTF (i.e. primary market MTF shares).

Such measures would enable shares admitted to trading on primary market MTFs to benefit from being capable of being traded on multiple venues, which may result in greater competition and, therefore, lower transaction costs and greater efficiency. Clearly it is important that such competition is underpinned by an appropriate regulatory framework. However, we do not see why such shares should be excluded from the type of competitive trading environment created by MiFID for RM shares.

Attempts at Market Manipulation and extension of STR regime to include orders

We agree that attempts at market manipulation should be included within the scope of MAD, such that Competent Authorities are able to take action where there is intent to manipulate the market but no actual impact on the market.

We believe that the proposed amendments to the current STR regime to include orders could provide useful information in this regard. However, we believe it is important that sufficient guidance is given by regulators or ESMA to ensure that firms have greater certainty on what should be reported and that regulators are not inundated with Suspicious Order Reports which provide little information.

As the operator of an MTF, we have in place mechanisms to identify potential market abuse, including market manipulation. Whilst it is important that organised markets monitor for potential market manipulation and report such instances to the relevant Competent Authority, we would note that monitoring by organised markets for such behaviour is more complex where there is no actual impact in the market. Some attempts at market manipulation will be identifiable. However, we would expect that reports of suspicious activity by brokers will provide a particularly useful source of information.

Enforcement powers and sanctions

We agree with the extension of transaction reporting to include financial instruments only admitted to trading on MTFs and OTC derivatives which can influence the prices of instruments traded on RMs or MTFs. We believe it is imperative that regulators have a complete picture of trading activity and to ensure that they are able to efficiently monitor trading activity and share information.

In the Consultation Paper, the Commission notes that: “evidence by CESR shows that there are significant differences and lack of convergence across the EU in terms of the sanctions available for market abuse as well as the application of those sanctions. At present sanctions are simply too weak in some Member States and lead to the rise of weak enforcement and even regulatory arbitrage.”



It is important that all Member States have a strong enforcement regime. However, we do not agree that the imposition of additional requirements will necessarily of itself result in a strong enforcement regime where this does not currently exist. ESMA will have important role to play in ensuring high standards and consistency between Member States.

We agree with the proposal to make public information relating to enforcement actions. With respect to the proposal to implement a minimum administrative fine, we would be concerned if this resulted in a worse outcome than the current arrangements. In particular, we can see the benefit in allowing Member States a certain degree of flexibility to ensure that any sanctions are sufficiently punitive to act as a deterrent but also allow them to take into account other factors, for example, the FSA's efforts to incentivise cooperation or early settlement.

Market surveillance

We strongly agree that the operators of RMs and MTFs should have in place the necessary technical systems, tools and procedures and the appropriate human resources aimed at effectively preventing and detecting market abuse and notify the relevant Competent Authority.

As noted above, articles 26 and 43 of MiFID place identical obligations on MTFs and RMs in this regard. **We are supportive of any proposal to update the language in MAD to include MTFs and to clarify that RMs and MTFs already are subject to the same obligations (including under MiFID) when conducting the same activities.**

We believe that ESMA could usefully perform a role in offering guidance and ensuring consistency between organised markets with respect to market surveillance.

We would be happy to discuss our response further or provide such additional information as the Commission may require.

Yours sincerely

Anna Westbury
Head of Compliance and Regulatory Affairs
BATS Europe

BATS ... Making Markets Better



Annex

Note: We have generally limited our comments to the financial instruments for which we offer a secondary market trading facility, as well as shares only admitted to trading on an MTF (which we refer to as “primary market MTF shares”).

A. EXTENSION OF THE SCOPE OF THE DIRECTIVE

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

We have no comment on the specific proposal but will be interested in the views of those better placed to respond. However, as a broader point, **we strongly agree with the position set out by the FSA and HM Treasury in their joint response to the Commission’s Call for Evidence on the Market Abuse Directive (April 2009) that there should be a “dual definition” of inside information** that distinguishes between information that is disclosable by issuers and that whose abuse by market participants should be covered by the prohibition”.¹⁴

We agree that there may be information that is capable of being abused before it is sufficiently precise to fall under the disclosure obligation. **We fully support the extension of the MAD definition to ensure that regulators are able to take action against such abuse of information.** We would be concerned if the current regime, including the UK’s super equivalent provisions, was weakened, to the detriment of investors and the overall integrity of the market.

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

We agree that regulators should be able to take action where there is intent to manipulate the market but no actual market impact.

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

Yes. We agree that the prohibition of market manipulation should include derivatives where the underlying is a financial instrument admitted to trading on an RM or an MTF.

¹⁴ See:

http://circa.europa.eu/Public/irc/markt/markt_consultations/library?l=/financial_services/securities_directive/public_authorities/majestys_responcepdf/ EN_1.0 &a=d.



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

BATS Europe, like a number of other MTFs, operates a secondary market trading facility for shares that have their primary listing (i.e. have been admitted to trading) on an RM (or a comparable market in a third country). **Such instruments, which are admitted to trading on an RM but are also subsequently traded on multiple MTFs are already within the scope of MAD.** It is also important to note that, when conducting the same activity (that is, secondary market trading), investment firms operating an MTF and Market Operators (i.e. exchanges) already have substantially the same obligations, if not identical in some areas, including with respect to fair and orderly trading¹⁵, pre- and post-trade transparency¹⁶, and the identification of disorderly trading, rule breaches and potential market abuse¹⁷.

Market Operators are those persons who can operate an RM, including a primary market function for the listing of shares which are subject to a broad range of European directives (including the Prospectus Directive and the Transparency Directive). However, both Market Operators and investment firms can offer a primary market for shares that are not admitted to trading on an RM. Such shares are only admitted to trading on an MTF, i.e. their primary listing is on an MTF. They are not therefore covered by the provisions in a number of European directives. **We support the Commission's proposal to extend the scope of MAD to include shares which only have a primary listing on an MTF and are not also listed ("admitted to trading") on an RM.**

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

We strongly believe that the obligation to disclose inside information should apply to all issuers, regardless of whether they have been admitted to trading on an RM or only to a primary market MTF. The general principle of disclosure of such information is imperative to the operation of a clean, fair and efficient market. Whilst we agree that it should be explored whether there are certain provisions that could be disapplied to SMEs, we believe that allowing SMEs to effectively withhold the disclosure of such information would pose unacceptable risks to investors and damage market confidence.

6. *Is there a need for an adapted regime for SMEs admitted to trading on regulated markets and/or MTFs? To what extent should the adapted regime apply to SMEs or to "companies with reduced market capitalisation" as defined in Prospectus Directive? To what extent can the criteria to be*

¹⁵ Article 14 (Trading process and finalisation of transactions in an MTF); Article 42 (Access to regulated markets)

¹⁶ Article 29 (Pre-trade transparency requirements for MTFs) and article 30 (Post-trade transparency requirements for MTFs); Article 44 (Pre-trade transparency requirements for regulated markets) and article 45 (Post-trade transparency requirements for regulated markets).

¹⁷ Article 26 (Monitoring of compliance with the rules of the MTF and with other legal obligations); Article 43 (Monitoring of compliance with the rules of the regulated market and with other legal obligations)



fulfilled by SMEs as proposed for such an adapted regime be further specified through delegated acts?

With respect to any exemption from the more administrative burdens in MAD, we believe that such an exemption should only apply to issuers where they are admitted to trading only on a primary market MTF and are not, therefore, subject to the full spectrum of the European directives applicable to admission to an RM.

B. ENFORCEMENT POWERS AND SANCTIONS

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

We agree with the extension of transaction reporting to include financial instruments only admitted to trading on MTFs and OTC derivatives which can influence the prices of instruments traded on RMs or MTFs. We believe it is imperative that regulators have a complete picture of trading activity and to ensure that they are able to efficiently monitor trading activity and share information.

We agree that attempts at market manipulation should be included within the scope of MAD, such that Competent Authorities are able to take action where there is intent to manipulate the market but no actual impact on the market.

We believe that the proposed amendments to the current STR regime to include orders could provide useful information in this regard. However, we believe it is important that sufficient guidance is given by regulators or ESMA to ensure that firms have greater certainty on what should be reported and that regulators are not inundated with Suspicious Order Reports which provide little information.

As the operator of an MTF, we have in place mechanisms to identify potential market abuse, including market manipulation. Whilst it is important that organised markets monitor for potential market manipulation and report such instances to the relevant Competent Authority, we would note that monitoring by organised markets for such behaviour is more complex where there is no actual impact in the market. Some attempts at market manipulation will be identifiable. However, we would expect that reports of suspicious activity by brokers will provide a particularly useful source of information.

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



In the Consultation Paper, the Commission notes that: “evidence by CESR shows that there are significant differences and lack of convergence across the EU in terms of the sanctions available for market abuse as well as the application of those sanctions. At present sanctions are simply too weak in some Member States and lead to the rise of weak enforcement and even regulatory arbitrage.”

It is important that all Member States have a strong enforcement regime. However, we do not agree that the imposition of additional requirements will necessarily of itself result in a strong enforcement regime where this does not currently exist. ESMA will have important role to play in ensuring high standards and consistency between Member States.

We agree with the proposal to make public information relating to enforcement actions. With respect to the proposal to implement a minimum administrative fine, we would be concerned if this resulted in a worse outcome than the current arrangements. In particular, we can see the benefit in allowing Member States a certain degree of flexibility to ensure that any sanctions are sufficiently punitive to act as a deterrent but also allow them to take into account other factors, for example, the FSA’s efforts to incentivise cooperation or early settlement.

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

It is important that regulators have the means and mechanisms to share information on a timely basis. Therefore, we are supportive of any measures to improve information sharing arrangements between regulators. Whilst we would be concerned if any proposal fettered the ability of a Competent Authority to carry out its own functions, we believe that ESMA will have an important role in ensuring the smooth operation of information sharing arrangements between Member States.

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

We believe that it would be worthwhile building on arrangements already in place, including the IOSCO Multilateral Memorandum of Understanding (“MMOU”).



C. SINGLE RULE BOOK

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

We agree that, in certain limited circumstances, the public interest of ensuring financial stability and the protection of investors may be such that there should be an exemption from the general principle regarding the disclosure of price sensitive information. We believe that this should only be used in extreme circumstances and that the Competent Authority should have ultimate say on whether relevant information can be effectively withheld in the interests of maintaining the public interest.

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

We have no comment.

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

We have no comment.

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

We have no comment.

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

We strongly agree that the operators of RMs and MTFs should have in place the necessary technical systems, tools and procedures and the appropriate human resources aimed at effectively preventing and detecting market abuse and notify the relevant Competent Authority.

As noted above, articles 26 and 43 of MiFID place identical obligations on MTFs and RMs in this regard. **We are supportive of any proposal to update the language in MAD to include MTFs and to clarify that RMs and MTFs already are subject to the same obligations (including under MiFID) when conducting the same activities.**

We believe that ESMA could usefully perform a role in offering guidance and ensuring consistency between organised markets with respect to market surveillance.