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FESE POSITION ON THE MARKET ABUSE REVIEW

The Federation of European Securities Exchanges (FESE) represents 46 exchanges in equities, bonds, derivatives and commodities through 21 full members from 30 countries, as well as 4 Observer Members from European emerging markets. FESE is a keen defender of the Internal Market and many of its members have become multi-jurisdictional exchanges, providing market access across multiple investor communities. FESE represents public Regulated Markets (RMs), which provide both institutional and retail investors with transparent and neutral price-formation. In line with the interests of the broader market, securities admitted to trading on our markets have to comply with stringent initial and ongoing disclosure requirements and accounting and auditing standards imposed by EU laws.

At the end of 2011, FESE members had up to 9,088 companies listed on their markets, of which 9% are foreign companies contributing towards the European integration and providing broad and liquid access to Europe's capital markets. Many of our members also organised specialised secondary market MTFs that allow small and medium sized companies across Europe to access the capital markets; 1,292 companies are listed in these specialised markets/segments in equity, increasing choice for investors and issuers. Through their RM and MTF operations, FESE members are keen to support the European Commission's objective of creating a single market in capital markets. At the same time, as will be explained further below, the objective of integrating secondary trading at the European level does clash with another EU objective; that of maintaining the access to capital markets for vibrant local companies that are vital to economic growth and employment.

Executive Summary

FESE's positions on the Review of the Market Abuse Directive (MAD & MAR) are a result of the wealth of experience and detailed knowledge of the markets and of the activities and services provided and operated by FESE members. In particular:

- FESE members and the financial instruments traded on their markets are covered by MAD provisions. FESE members' are committed to a sound regulatory framework.
- FESE members' business has been influenced by MAD and supports continued robust market integrity.
- The financial crisis has shown the strength of RM infrastructures and the importance of the safeguards provided on FESE members' platforms. The gaps identified as a result of the crisis should be addressed as part of the review of MAD to ensure ongoing provision of orderly markets.
- The original MAD was produced before the introduction of the Markets in Financial Instruments Directive (MiFID) and with the continued evolution of European markets; it is timely to review the legislation within the current context of market structure.

FESE members are committed to ensuring the highest possible level of investor confidence and market integrity. RMs have long assumed a central role in the oversight and supervision of markets, investing for decades in the systems, human resources and expertise required to detect and prevent market abuse of all kinds. However, after the implementation of MiFID, market infrastructure was subject to greater competition and fragmentation in the provision of trading services. The unintended consequences of MiFID resulted in the appearance of gaps in exchange surveillance data and additional challenges in the ability of individual venue operators to effectively safeguard market integrity with any certainty. Furthermore, new venues established by MiFID should be able to deliver the same levels of protection and devote the same level of market surveillance as RMs and provide suitable support infrastructure to ensure market integrity, even if the venue is relatively small. Given that market abuse could happen irrespective of the size of market, the absence of equal surveillance and enforcement obligations in support of market abuse creates a loophole for potential abuses to occur.

FESE members welcome the Commission's proposals and fully endorse the objectives supporting the revision of MAD, in particular, we support:

- **The extension of the scope of the market abuse framework to any financial instrument admitted to trading on a Multilateral Trading Facility (MTF) (or Organised Trading Facility (OTF)), including any related financial instrument traded Over-the-counter (OTC)**. We believe that this is vital in order to create a level playing field and to provide investors with the same level of protection across all trading venues.
- **The extension of the definition of market manipulation to include 'attempted market manipulation'.** FESE supports the proposal to include the new offence of 'attempted market manipulation'. However, we also believe that the definition could be further clarified to ensure that it captures any scenario where orders are placed on an order-book with the intention of influencing the price, irrespective of whether or not they have that intended net effect.
- **Regulation to be adapted to the needs of issuers, whose instruments are admitted to trading on SME growth markets**. We cautiously support the proposal for SMEs to provide inside information in a modified and simplified market-specific manner, as well as the exemption from maintaining and updating insider lists. However, we do highlight the need to always ensure the highest level of investor protection.
- **Regulation to ensure that algorithmic trading and High Frequency Trading (HFT) are sufficiently regulated to prevent these activities being used for market manipulation**. We agree with the Commission's assessment that certain trading strategies, as defined in MAR[1], may be abusive and should be prosecuted. However, these strategies are not specifically related to algorithmic trading or HFT. In order to strengthen the regulation we would suggest that the proposed list provided in the draft Regulation not be exhaustive but suggestive, and that it state that it incorporates all trading activity, not just algorithmic and HFT. This will guarantee that there are no loopholes created.
- **Encourage policy makers to consider the issue of effective cross-venue surveillance of shares traded on several European venues**. Currently the most liquid shares are traded on several trading venues outside of the primary market. This poses key questions as to the effectiveness of detection and subsequent investigation of market abuse in a given financial instrument when the abuse may be spread over several venues.

As indicated by the above summary, FESE agrees with many of the improvements proposed by the Commission. At the same time, on a number of other issues, FESE has significant concerns with the proposals. **We strongly believe that the provisions of MAD should be aligned with other legislation with which it might overlap (e.g. EMIR/RCSD/MiFID) and avoid any uncertainties or arbitrage among market participants and trading venues.**

Therefore, FESE proposes the following changes to the proposals, which, if adopted, would provide welcome additional clarification and strengthen the draft legislation:

- **We would caution against any provision for MTFs (and OTFs) to have 'proportionate' structural provisions for market surveillance**. The size of the venue does not limit or impact the potential for market abuse to occur. We need to ensure that MTFS (and OTFs) do not become subject to less stringent obligations for surveillance, therefore there should be no ambiguity left

[1]COM(2011) 651 final: Article 8

to Level 2 or 3. We need to ensure that multilateral trading happening on a RM, MTF or OTF is subject to the same provisions to avoid any unlevel playing field and ensure a robust environment. This is in line with the spirit of the MiFID Review of ‘same business, same rules’.

- **The definition of ‘inside information’ for commodity derivatives needs to be amended in order to ensure that it does not inadvertently cover legitimate risk management activity**. There is a need to understand the key characteristics of commodity markets and not to over-simplify the application of these principles to these markets. We believe that the regulation should include a set of exemptions to this definition based on an entity trading on the basis of the knowledge of its own intentions, i.e. its hedging strategy.
- **The regulation must reflect the operation of a RMs’ position management regime in Commodity Markets**. These regimes are already efficiently operated by the RM in order to prevent settlement squeezes and potential market manipulation.
- **We are concerned by the removal of the existing exemption from the original MAD legislation of certain specific ‘Accepted Market Practices’ (AMP).** In several Member States, this exemption is vital to the existence of liquidity contracts, which allow issuers – especially smaller, less liquid issuers – to remain visible and liquid in the market. We believe that the removal of the exemption would ultimately impact the attractiveness of issuers, in particular SMEs, to investors.
- **We are concerned with the proposed powers of fines and public censure over RMs in the context of the prevention and detection of market abuse.** In particular, we are concerned that provisions in both MAR and MiFID confuse the obligation for trading venues to have effective monitoring systems in place, with the obligation that they must guarantee that no market abuse will take place. The proposed fines in MAR would have a significant and we believe unwarranted impact on RMs. More generally, FESE Members have a close and continuous relationship with regulators in maintaining scrutiny over our systems and controls for running the market and we would be concerned by any change which could undermine the ability of the RM and regulators to work together effectively.
- **Finally, we believe that the threshold for notifications by persons discharging managerial responsibilities (PDMRs) should not be increased to €20,000.** Maintaining the current threshold would ensure that investors can take the information of individuals dealing in their own financial instruments into account in their investment decisions.

<u>**DETAILED REMARKS BY ISSUE**</u>

1. Scope of the Market Abuse Regulation to be extended to new markets and OTC financial instruments

FESE agrees with the Commission's proposal to extend the scope of the market abuse framework to any financial instrument admitted to trading on an MTF (or OTF), including any related financial instrument that is traded OTC but may have an effect on the covered underlying market. **FESE believes that this extension is vital to ensure that investors are provided with the same level of protection across all trading venues in Europe.**

However, we are very concerned about the inclusion of the proposed Recital 21 of MAR, which states that "MTFs and OTFs should be required to adopt <u>proportionate</u> structural provisions aimed at preventing and detecting market manipulation practices" (emphasis added). As the main text of the proposal applies to all trading venues, we believe that this Recital may be misleading with the inclusion of the term 'proportionate'. Therefore, we would suggest that this recital be removed. We believe that this is vital in order to create a level playing field and to provide investors with the same level of protection across all trading venues. Similarly, there would be no possibility of an unlevel playing field between venues which may create opportunities for market manipulation. This would ensure that the Commission's goal of efficient monitoring of potential market abuse would apply to all trading venues.

FESE RECOMMENDATION

- **We propose:**
  - **The extension of the scope is maintained to ensure a level playing field and the same level of investor protection across all trading venues.**
  - **In order to ensure that there is no ambiguity about the creation of a level playing field, we would propose the removal of Recital 21 of MAR, which makes reference to 'proportionate structural provisions'.**

2. Commodity Derivatives

The Commission states that the proposed Regulation will improve protection against market abuse through commodity derivatives by improved market transparency. FESE supports this general approach. In principle, the prohibition of insider dealing and market manipulation would improve market transparency.

However, in its current form, the Regulation does not take into account some of the key characteristics of commodity markets. FESE is concerned that the Regulation over-simplifies the application of these principles to these markets. **The proposed MAR must be refined so that it takes into account the key characteristics of commodity markets**. If not, we are concerned that the revised regime will not deliver any benefit and will, instead, undermine the current functioning of these markets.

FESE has highlighted below certain instances where the proposal will affect the efficient working of commodity derivatives markets followed by an assessment of the proposed measures in MAR.

(1) The role and functioning of Commodity Derivatives Markets

(a) Price discovery and hedging

One of the key utilities provided by RMs dealing in commodities is price discovery. **Each day, a RM will publish official prices that are used as the reference price for the settlement of transactions for that commodity, on both the RMs and in the physical industry**. In order for a typical industrial user of a commodity, such as a miner, producer or refiner, to plan the supply of the commodity, he will typically take the following steps:

- First, he will enter into a 'forward contract' which states that he agrees to supply the commodity to a third party on a future date. The price for this transaction will be set at the reference price for that date as published by the RM at the time of delivery. This reference price is not known at the time the forward contract is agreed but it is known that the relevant RM will be trading futures contracts for that settlement date.
- Typically, at the same time as entering into the physical supply transaction, the supplier will then also enter into a futures contract on the relevant RM that states they agree to the sale of the same quantity of the commodity.
- Finally, at the time of delivery of the original 'forward contract' the supplier will enter into another futures contract on the RM for the purchase of the same quantity of the commodity at the prevailing price, thereby cancelling out its obligation to deliver on the RM.

The purpose of this final financial transaction in this case is to hedge against the risk of a drop in the price of the commodity, therefore, securing the margin in the original physical transaction.

For industrial users that are also market participants, the physical and financial (RM) arms of a transaction are intrinsically linked. The hedging of physical transactions on a RM is essential to its forward planning. As such, an industrial user of RMs will develop complex hedging strategies to ensure that its business is best protected. **Without the ability to execute hedging strategies on a RM, industry would be more likely to pass adverse price changes to its supply chain, which will ultimately be met by consumers.**

(b) Brokerage model and dual capacity

The characteristics of RMs that provide a forum for the trading of commodity derivatives have evolved over time to reflect the needs of the users of each particular market and the industries these users stem from. For certain markets (in particular the London Metal Exchange which operates open outcry and telephone trading markets), this has led to a brokerage model where brokers operate with dual capacity. This means that a broker may both (i) accept orders from a client and (ii) trade on his own account. Both of these are examined below:

(i) <u>Orders from a client</u>: In accepting an order from a client, a broker will be privy to price sensitive client order information which would be considered inside information as defined in Article 6 of the proposed MAR (in particular Art 6(1)(d)).

(ii) <u>Trading on own account</u>: Article 9 of the proposed MAR prohibits insiders from using inside information by trading for its own account or for the account of a third party, either directly or indirectly. FESE agrees that there are certain practices that should be caught by this type of provision, for example, the practice commonly referred to as 'front running'[2]. However, the dual capacity brokerage model has certain complexities that are not acknowledged in the Regulation.

Own-account trading has two aspects. First, the broker may enter into a transaction as the result of quoting prices to clients, who then choose whether or not to trade. Second, the broker may retain those positions on his books or offset all or part of them by trading with other brokers or clients. It is in the nature of futures contracts that time is a factor in any offsetting trades. After entering into a transaction, the broker has until the settlement date to decide whether or not to offset the trade in whole or in part. In buying and selling metal over time, the trades that can be said to offset each other may change over that period. As such, a broker will need to have its own hedging strategy in order to properly manage the risk it is exposed to. Intrinsic to that hedging strategy will be the information received from client orders.

(2) FESE Recommendations on Commodity Derivatives Provisions

(a) Definition of inside information

FESE is concerned that the MAR proposal as drafted does not take into account that industrial users use RMs in order to hedge against the risk of a change in price. The proposed definition of inside information set out in Article 6 is so broad that it could be interpreted to capture commercially sensitive information relating to the business plans of such industrial users.

The proposed Regulation aligns the definition of inside information in relation to commodity derivatives (Article 6(1)(b)), more closely with the general definition of inside information, extending it to price sensitive information which is relevant to the related spot commodity contract as well as to the derivative itself. The Commission's view is that spot markets and related derivative markets are highly interconnected and that accordingly market abuse may take place across these markets. In addition, it also defines as inside information, information conveyed by a client to a broker charged with execution of their orders and all information not generally available to the public (article 6(1)(d)), but which a reasonable investor could determine as being relevant in deciding the terms of a transaction (article 6.1e).

We are concerned that the proposed definition is less precise than the current definition under the existing MAD. Article 6(1)(b) defines inside information but then leaves open an incredibly broad interpretation of this information through the additional clause '***notably*** *information which is required to be disclosed in accordance with legal or regulatory provisions, market rules, contracts or customs*' (emphasis added). This injects a high degree of uncertainty as to precisely what would constitute inside information in relation to commodities, i.e. what other category of information which would not be a market required disclosure is sought to be caught by article 6(1)(b) and which is not caught by the other subsections in paragraph 1 of the same article.

To ensure against the capturing of legitimate transactions which are undertaken in order to hedge physical market exposures, the text could be amended to either remove "notably" from Article 6(1)(b) or insert an exemption based on "knowledge of one's own intentions". **FESE considers that the main form of potential market abuse on commodity derivatives is price manipulation but not insider dealing**. In particular, supply squeezes are a major form of abuse, one for which commodity exchanges

[2] **DEFINITION OF 'FRONT RUNNING'**
The unethical practice of a broker trading an equity based on information from the analyst department before his or her clients have been given the information. http://www.investopedia.com/terms/f/frontrunning.asp#ixzz1kgEugJQL

have in place robust position reporting obligations for market participants, to ensure that this practice does not manifest itself (this is further explained below).

(b) <u>Market rules and practices</u>

FESE considers that, as drafted, Article 9 of MAR does not take into account the dual capacity of brokers and that a defence of 'legitimate reasons' is necessary in relation to the Article 9 prohibition to protect brokers where they are operating in accordance with market rules and practices. Without this defence, MAR will not reflect the operational reality of the markets it seeks to serve. The need for this defence is recognised in Directive 2003/6/EC[3]. FESE also believes that an exemption is required from Article 12 obligation to publish so that a broker is not compelled to publish its own commercially sensitive information.

(c) <u>Position management</u>

(i) Article 12 broker disclosure of sensitive client position information

RMs operate position management regimes in order to prevent abusive practices such as settlement squeezes and market manipulation. The way in which a RM enforces its position management regime on a broker's client is typically for the client to give the broker instructions to trade on its behalf. By virtue of this, the broker will be privy to client sensitive position information. Existing market rules already prevent brokers from trading for their own account on the basis of this information. Measures such as information barriers are required to ensure that a broker is not privy to this information where it has been disclosed to its organisation's compliance department. The proposed MAR will reinforce these existing market rules, which FESE supports. However, **FESE believes that an exemption is required from the Article 12 obligation to publish so that brokers are not compelled to publish sensitive client position information.**

(ii) Article 8 and market manipulation

FESE would also like to clarify the wording of Paragraph 3(a) of Article 8 of MAR. This paragraph states that market manipulation includes: **"conduct by a person, or persons acting in collaboration, to secure a dominant position over the supply of or demand for a financial instrument or related spot commodity contracts <u>which has the effect</u> of fixing, directly or indirectly, purchase or sale prices or creating other unfair trading conditions"** (emphasis added).

FESE suggests that wording is added to MAR to clarify the term 'with the effect'. The purpose of a position management regime is to prevent unfair trading conditions arising by virtue of a dominant position. Specifically, such tools as the Lending Guidance[4] (a position management regime specific to the London Metal Exchange) provides that where there is a dominant position, the holder of that dominant position is obliged to lend to other users of the market subject to a restricted premium. **The effect of this specific position management tool is to prevent unfair market conditions from taking effect.** FESE considers that the Regulation would benefit from expressly acknowledging these particular market rules.

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[3] Article 18 of Directive 2003/6/EC states: "Use of inside information can consist in the acquisition or disposal of financial instruments by a person who knows, or ought to have known, that the information possessed is inside information. In this respect, the competent authorities should consider what a normal and reasonable person would know or should have known in the circumstances. Moreover, the mere fact that market-makers, bodies authorised to act as counterparties, or persons authorised to execute orders on behalf of third parties with inside information confine themselves, in the first two cases, to pursuing their legitimate business of buying or selling financial instruments or, in the last case, to carrying out an order dutifully, should not in itself be deemed to constitute use of such inside information."

[4] http://www.lme.com/regulation_rules_notices.asp

FESE RECOMMENDATION

- **We propose :**
  - **A clarification of Article 6(1)(b) to either eliminate "notably" from Article 6(1)(b) or insert an exemption based on "knowledge of one's own intentions";**
  - **A defence of "legitimate reasons" to the prohibition on insider dealing to be recognised in article 9 for certain practices adhering to market rules and accepted practices;**
  - **A readjustment of Article 12 to reflect the operation of these markets position management regimes; and,**
  - **A clarification on Article 8 in relation to market manipulation.**

3. Liquidity contracts – Proposed deletion of exemption for Accepted Market Practices (AMP)

A liquidity contract is a contract between an issuer and a financial institution in which the institution agrees to trade in the issuers' stock by either using shares provided to it by the issuer, or trading in the issuers' stock with funds provided by the issuer in order to create and maintain trading liquidity. Under an exemption from the current MAD legislation, the contracts are usually subject to clear frameworks limiting their scope to the exact objectives of the liquidity contract. Today, they are widely used in France, Italy, the Netherlands, Portugal and Spain and. These contracts are a long established practice which has not to date raised supervisory concerns in countries where their use is wide-spread.

In the original MAD there is an explicit definition of AMP which, in conjunction with the April 2004 implementing Directive, has been used to exempt specific market practices from the scope of the market abuse legislation. Under the proposed MAR Article 3, exemptions for existing market practices will in future only be framed in the context of share buy-back and stabilization programs (December 2003 Implementing Directive is now included in MAR Article 3) and not the separate broader provisions for AMP, which no longer feature in MAR. FESE considers that the Commission has provided insufficient explanation for this deletion, both in the proposal and accompanying Impact Assessment

Liquidity contracts allow smaller and less liquid issuers to remain visible in the market by keeping their shares in continuous trading. This ensures dynamic price formation for their shares which creates certainty that the shares will remain liquid. **This is particularly important for SME issuers.** The practice enables investors, including retail investors, to buy and sell shares within reasonable conditions of liquidity and represents a key factor in the development of secondary market liquidity and in the access to the markets by retail orders.

The deletion of the exemption for AMP would remove the option for issuers to maintain or enter into new contracts of this kind. In their absence, the liquidity of SME stocks would be significantly affected, and their exposure to risk would rise considerably. **FESE believes that if the exemption is deleted, then the continuing existence of liquidity provider schemes in several Member States will be threatened and with it the liquidity of many European SME and mid-cap companies.**

Moreover, **the existing liquidity provision contracts are already subject to proper regulatory oversight and mandatory public disclosure and they do not negatively impact the supply and demand nor distort the price-formation process. Ultimately, FESE believes that this would undermine the attractiveness of issuers, particularly of SMEs, to investors**. **We therefore believe that it is essential to maintain the existing exemption.**

FESE RECOMMENDATION

- **We propose :**
  - **To include a continued exemption for liquidity contracts, offered under Accepted Market Practices, as included in the Original MAD, and to be inserted under Article 3 of the proposed MAR**

4. Market Manipulation

(i) Algorithmic trading and HFT

FESE agrees with the Commission's intention to tackle market manipulation. As markets have become more technology based and the landscape has become more fragmented, various trading activities have come to the attention of regulators. FESE recognises the inherent increase in algorithmic trading and HFT technology activities in European markets. In order to ensure we preserve the integrity of the market, **these activities must fully be covered by the scope of market manipulation practices whilst at the same time these algorithmic and HFT activities are not intrinsically manipulative in their own right.**

FESE agrees with the Commission that market participants could send orders to the market without the intention to trade but instead to disrupt the market**. However, we do not think that this practice is specific to algorithmic traders only**. By definition, any trader that, by whatever means, seeks to disrupt the market in this manner must be brought under the provisions of market manipulation. **For this reason, we believe that it should be stated that practices contained in Article 8(3)(c) can be applied to all trading strategies, not just algorithmic trading and HFT, and therefore are not specific to recent technological methods of trading.** This would ensure that all traders are subject to these provisions.

Moreover, we believe that this list should <u>not</u> be exhaustive, but should be an example of those manipulative strategies that could be employed by certain market participants. In this way it will ensure that there are no loopholes for further developments in manipulative behaviour and that all attempts at market manipulation, regardless of their exact nature, will be covered.

(ii) Attempted Market Manipulation

FESE welcomes the proposal to extend the definition of market manipulation to include 'attempted market manipulation'. However, we are concerned that the proposed definition in Art 8(2)(a) may fail to capture scenarios where an order has been deliberately placed to influence the price but it does not have the intended effect on the price. We would classify this as 'attempted market manipulation'. Recital 19 of the proposed Regulation appears to imply that this scenario is already considered as actual market manipulation under that definition, but we would question this as it would be extremely hard to prove if it did not actually have the desired effect on the price.

FESE agrees that there is a need to sanction 'attempts of manipulation'. This offence would necessarily be intent-based rather than effect-based, i.e. it would differ from the basis of the offence of market manipulation itself. It is important that the burden of proof for demonstrating intent lies with the regulator as the alleged perpetrator cannot reasonably be expected to prove a negative. This could be made clearer in the text.

FESE RECOMMENDATION

- **We propose:**
  - **Article 8(3)(b) should be adjusted, as currently the text is too focused on manipulation related to closing prices only. It should be made clear that other types of prices are also relevant in this regard.**
  - **Article 8(3)(c) should state that behaviour shall be considered as market manipulation when the 'sending of orders to a trading venue by *any means, including* algorithmic and high frequency trading' – this will ensure that all methods of inputting orders into the market are covered by these provisions**
  - **It should be stated that the list provided in Article 8(3)(c) is not an exhaustive list of manipulative strategies but an example of known strategies and that other strategies may also be identified as sharing the same principles of market manipulation**
  - **Regarding Article 8(3)(c):**
    - **Ensure that traders are obliged to make additional information transparent toward the trading venue and the regulator in order to facilitate the ability of a market operator to trigger an initial suspicion and conduct an investigation.**
    - **Information required includes:**
      - **a) who stands behind an order,**
      - **b) what is the means of execution (manual or electronic), and**
      - **c) if the execution is electronic, i.e. the 'marking' of a strategy**
  - **The definition of 'attempted market manipulation' should be clarified to ensure it captures scenarios where orders are placed with the intention of influencing the price but they do not have the intended effect.**

5. Disclosure Requirements

FESE is concerned with the proposal included under Article 14 for Manager's Transactions.

In particular, **we do not support the proposal to increase the threshold for 'Persons Discharging Managerial Responsibilities' (PDMR) notifications to the market to €20,000**. We firmly believe that the market should be aware in as much as possible when such individuals deal in their own financial instruments. This will ensure that all investors can take this information into account in their investment decisions.

Furthermore, **we are concerned about the unintended extraterritorial reach of this proposal**. We do not think that it is viable that a director of a non-EU issuer listed on another market, e.g. a US exchange, and who has no knowledge that his shares are traded on a European platform must disclose his dealings in Europe. Any issuer from a non-EU market would be subject to regulation in their own market.

In order to avoid this consequence, we would advocate that a similar exemption provided in Article 12(8) also be provided in Article 14. This would state that issuers who have not approved their instruments to be traded on a RM, MTF (or OTF) in a Member State would be not be subject to the provisions for the disclosure requirements for managers transactions in Article 14.

FESE Recommendation:

- **We propose:**
  - **The PDMR threshold be maintained and not to be increased to €20,000**
  - **Clarification of Article 14 of MAR to bring it in line with Article 12(8), in order to avoid any unintended extraterritorial reach, i.e. MAR wrongly being applied to the director of a non-EU issuer with shares listed in that country and also traded on platforms in the EU where trading on such EU platforms has not been requested or approved by the issuer**

6. Market Abuse regime for SMEs

FESE agrees with the goals of the Commission to increase the attractiveness of securities markets for capital raising for SME issuers. In order to achieve this goal, FESE recognises that there is an important trade-off between alleviating certain bureaucratic burdens on the issuers, while at the same time ensuring the highest levels of investor protection.

The Commission proposal for certain exemptions for SME issuers is based on the grounds that the scope and size of their business is more restricted and that the events giving rise to the need to disclose inside information are more limited than those of larger issuers. The concerns expressed by the Commission centre on the administrative burden as well as significant uncertainties surrounding the exact content of the insider lists, e.g. should these lists contain information specific to each deal, or should their content be more general. The ambiguity concerning the content of the lists is coupled with an inconsistency in the format and information required by each by different Member State.

While FESE recognises the (above) issues that SMEs face and the impact of lack of clarity may have on their resources and priorities, we still believe that market integrity is essential for economic growth and recovery. Any proposed measure that may have a direct or indirect impact on investor confidence must be very carefully examined. Furthermore, FESE would question whether the overall obligation to establish and maintain insider lists is such a significant burden for SMEs. If this proposal continues, we would welcome a further Review of its perceived success or failings by the Commission.

In principle, FESE supports goals of the Commission to encourage SME access to capital markets and therefore we cautiously support the proposal to exclude SME issuers from certain potentially burdensome requirements. Moreover, we welcome the provisions and will closely follow ESMA's work on the drafting implementing technical standards covering the disclosure of inside information by SMEs.

FESE RECOMMENDATION

- **We propose:**
  - **Cautiously accept the proposal, but propose that the Commission reviews the impact of these reductions of obligations, both on SME administrative costs and the resulting impact on market integrity.**
  - **A clarification of Article 14 of MAR to bring it in line with Article 12 (8), in order to avoid any unintended extraterritorial reach, i.e. MAR wrongly being applied to a director of non-EU SME issuer with shares listed in that country and also traded on platforms in the EU where trading on such EU platforms has not been requested or approved by the issuer.**

7. Cross-venue surveillance and cooperation

We agree with the Commission that market abuse can take place across venues and across physical/jurisdictional borders and we welcome any proposals that are specifically aimed at tackling this issue. **FESE believes that surveillance is a core and indispensible function of a market operator and we believe our ability to carry out efficient surveillance is an asset of our business**. We believe that every step must be taken to ensure that that there are robust measures in place for effective cross-market or cross venue surveillance. It is especially necessary for those liquid shares which can, in some instances, be traded on up to 30 trading venues at any given time.

We believe that any work on the issue of cross-border surveillance should clearly examine several key issues, namely: (1) who is responsible for supervising trading in any given instrument, regardless of the execution place or type; (2) who is responsible for the assessment and identification for potential abuse; (3) who is responsible for the detailed investigation into the potential abuse suspicions; and (4) who has the legal responsibility for enforcement of any activity found to be abusive. **In particular, we believe that the method of effective detection of market abuse must be urgently addressed**.

FESE welcomes the Commission's work on this issue. Fragmentation has resulted in no single venue having immediate complete oversight of all activity in any given financial instrument. Therefore it is possible that potential abuses may be occurring which may not necessarily be evident to any single venue when it looks solely at the activity conducted on its platform. FESE is currently working pro-actively with its members on the issue of cross venue surveillance in an attempt to better understand the nature of any potential issues and their impact. In particular, members are considering whether in an increasingly fragmented trading environment there is a need to enhance cross venue surveillance in order to ensure the interests of the issuer of products are protected, the integrity of the market is preserved and ensure investor protection is maintained.

FESE Recommendation

- **We propose:**
  - **A development of the issue of cross-border and cross venue market surveillance in order to ensure that the following questions are properly addressed:**
    - **(1) who is responsible for supervising trading in any given instrument regardless of the execution venue or type;**
    - **(2) who is responsible for the assessment and identification of potential abuse;**
    - **(3) do the venues with these responsibilities have the necessary information available to them to perform these responsibilities effectively;**
    - **(4) who is responsible for carrying out the derailed investigation into the potential abuse;**
    - **(5) who has the enforcement responsibility.**
  - **Furthermore, it must be considered how it would be possible to ensure effective detection of potential abuse that may be taking place across venues, and what powers are needed for an to provide for an efficient investigation.**

8. Prevention and detection of market abuse – Trading Venue responsibilities

FESE considers that some clarifications are needed on how the proposed new sanctions regime, i.e. impact on operators of trading venues, RMs in particular, and Central Counterparties. In particular, the key provisions that concern us are:

- **MiFID Article 75** establishing powers of public censure and potential fines of up to 10% of the annual turnover of the RM's corporate group in instances (*inter alia*) where it has failed to put in place arrangements, systems, rules and procedures in respect of the provisions in MiFID Article 50 and Article 51.
- **MAR Article 25** establishing the same powers of public censure over and potential fines for the operator of a trading venue failing to adopt and maintain effective arrangements and procedures aimed at preventing and detecting market manipulation (in line with MAR Article 11 and MiFID Article 56).

We would welcome some clarifications on the imposition of an obligation of means as opposed to an obligation of ends. While there should be an obligation of means on trading venues (for example, the obligation of having effective monitoring systems in place), we believe that it is unrealistic to subject trading venues to an obligation of ends (i.e. the guarantee that no market abuse will take place on their venue). As currently drafted this distinction is not clear to us, particularly in respect of:

- **MiFID Article 51(3)** and the reference to RMs having in place effective systems, procedures and arrangements to ensure that algorithmic trading systems cannot create or contribute to disorderly trading conditions. In our view, while RMs can be required to maintain the systems, they cannot be placed in a position of guaranteeing that there will be no disorderly trading.
- **MAR Article 11(1)** should be clarified that the obligation is on the RM to maintain the systems aimed at preventing / detecting market abuse, as opposed to an obligation to prevent and detect market abuse *per se*.

FESE is concerned that the magnitude of the potential fine is extremely high and amounts to standard remedies imposed on guilty parties in antitrust cases. Moreover, the logic underpinning this proposal seems paradoxical in that it applies the same fine to market operators - who have responsibilities for regulating the use of their facilities by market participants - as to those responsible for the market abuse.

FESE does not believe that the proposals recognise the unique position of RMs as front-line regulators of the member firms which use their facilities. RMs and CCPs are partners in regulation with the Competent Authorities and fulfil a number of duties which are not imposed on operators of other types of trading venues. Therefore the proposed sanctions over them are not justified by any demonstrable failure in existing regulatory practices.

FESE believes that the constructive relationship between RMs/CCPs and regulators would be jeopardized by the proposed sanction regime. In turn, **this runs the risk of undermining the ability of the statutory regulator and the RM to work together effectively – making use of their respective knowledge, powers and regulatory reach.**

In the interests of the regulatory system as a whole, FESE therefore recommends that RMs and CCPs be taken out of the scope of the sanctioning powers set out in Articles 73-78 or, at the very least, that the fining (MiFID Article 75(2)(a)) and public censure (MiFID Article 75(2)(e)) powers not be applied to them.

FESE Recommendations:

- **We propose:**
  - **Clarification of the obligations to be imposed on trading venues: while there should be an obligation of means, it would be unrealistic to subject trading venues to an obligation of ends, i.e. guaranteeing that no market abuse or disorderly trading will take place.**
  - **To maintain the respective responsibilities of RMs and the competent authorities and accordingly recommend that RMs and CCPs be taken out of the scope of the sanctioning powers set out in Articles 73- 78 or, at the very least, that the fining (MiFID Article 75(2)(a)) and public censure (MiFID Article 75(2)(e)) powers not applied to them.**