POSITION PAPER

28 July 2009

BUSINESSEUROPE RESPONSE TO THE COMMISSION CONSULTATION ON THE REVIEW OF THE MARKET ABUSE DIRECTIVE

INSIDE INFORMATION

2.2.1: Definition of inside information: the general definition (article 1(1) of directive 2003/6/EC and article 1 of directive 2003/124/EC) and the particular definition for commodity derivatives

BUSINESSEUROPE shares the Commission views and sees no need to further specify the general definition of insider information (in view of prohibition on insider dealing).

2.2.2.1 General obligation of disclosure of inside information

BUSINESSEUROPE believes that changes to the definition of inside information for disclosure purposes of issuers are necessary. Issuers have many difficulties in complying with article 6 of the directive. The directive adopts a single definition of "inside information" which applies both to the prohibition of insider dealing and to the duty of publication by the issuer. The most relevant consequence is the risk of uncertainty of information disseminated to the market, with the possibility to determine both market manipulation and insider trading. In fact, whenever an issuer discloses inside information at an early stage in order to comply with MAD, it bears the risk of creating false market expectations and even manipulation in cases where the inside information does not develop into a real event.

In order to tackle the aforesaid negative consequence of a single definition of inside information, there are three solutions that are not necessarily mutually exclusive:

- The first one is to disentangle the definition of material information to be disclosed from the definition of inside information relevant for insider dealing;
- The second one is to review the circumstances when disclosure may properly be delayed;
- A third possible solution lies in regulation of the delayed disclosure.

As to the ESME Report of July 2007, the more straightforward solution would be to distinguish between inside information in terms of disclosure needs of issuers and inside information in terms of the obligation to refrain from abusive dealing. This would constitute a return to a position similar to that existing prior to the directive. A distinction between the "inside information" relevant for market abuses and the "inside information" to be disclosed to the public could be reached through an amendment to the directive reflecting the previous 2001/34/EC directive.

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Another solution could be to make a distinction between the two definitions of “inside information” by focusing on when the information becomes of a sufficiently “precise nature”. This could be done in the level 2 directive 2003/124/EC through a distinction between what is precise for an insider and what is precise for the whole market. Article 2 of the level 2 directive already seems to recognise a distinction between the two definitions of inside information to the extent that it states, “Member States shall ensure that issuers are deemed to have complied with the first subparagraph of article 6(1) of directive 2003/6/EC where, upon the coming into existence of a set of circumstances or the occurrence of an event, albeit not yet formalised, the issuers have promptly informed the public thereof”. This rule has in fact been used by some Member States to limit the duty of disclosure only to events that have reached a high level of precision.

Given the importance of the topic, the meaning of the quoted level 2 rule might be usefully clarified stating that “issuers comply with the first subparagraph of article 6(1) of directive 2003/6/EC when they inform the public of the coming into existence of a set of circumstances or the occurrence of an event, albeit not yet formalised”.

Regarding the circumstances when disclosure may properly be delayed, one solution could be to amend the level 1 directive by repealing the problematic and unduly narrow test for delaying dissemination: “provided that such omission would not be likely to mislead the public” (article 6(2)).

Alternatively, since amending the level 1 directive may prove to be impossible, the level 2 directive 2003/124/EC could explain the meaning of the words “mislead the public”. For instance, it could be made clear that a delay is likely to mislead the public only when the relevant information could run counter to a market consensus, i.e., only when the investment community (through market prices, analysts coverage or others) clearly shows expectations that are contradicted by the information directly regarding the issuer. In addition, there should be a clarification that in case of legitimate reasons there is a presumption that the public is not misled.

Timing of disclosure (article 6 paragraph 1)

Paragraph 1 of article 6 calls for disclosure ‘as soon as possible’. It is important to note that the provision should not necessarily call for immediate or prompt disclosure, but allows the issuer some latitude to analyse the development and in timing its disclosure and the content hereof. There can be no doubt that disclosure should be made without unnecessary delay, but the wording chosen makes it clear that the provision strives to balance the interest of the issuer with the need of the market for reliable information. Accordingly, inside information should be disclosed to the market when it has become a reality, not a mere possibility.

2.2.3: Prohibition of insider dealing (articles 2, 3 and 4 of directive 2003/6/EC)

As mentioned in the Commission working document, Member States have not taken a single view on how the concept of "using inside information" should be transposed in the implementation at national level. Some Member States find it is a breach of the inside dealing prohibition when a person being in possession of inside information trades (or attempts to trade). Other Member States find that use of inside information takes place only when a person trades (or attempts to trade) on the basis of inside information. BUSINESSEUROPE supports the proposed Commission approach aiming at clarifying this divergence.

2.2.4.1 and 3 A) 1: Insider lists (article 6 (3) of directive 2003/6/EC and article 5 of directive 2004/72/EC).

BUSINESSEUROPE believes that drawing up insider lists is very burdensome. Maintaining a register which at every given point of time shows which persons have access to insider information involves considerable difficulties. Partly, because it is difficult to determine what constitutes insider information, partly because it is nearly impossible to ensure that all individuals receiving such information are identified.

Consequently, BUSINESSSEUROPE would be pleased if the obligation could be abolished. Such a measure would be a significant better regulation measure contributing to the overall objective of reducing administrative burdens in the EU. The use and value of insider lists for authorities and others is not proportionate to the organisational and administrative burden of companies drawing them up and maintaining them.

Having said that, the requirement that lists of insiders shall state the reason why a person is on the list is particularly unnecessary. Usually, it is obvious, for example, if a person from the communication department of a company is put on the insider list, the reason is that he or she shall prepare press releases and other communications. If the general requirement to draw up and maintain insider lists is not to be abolished, other simplifications should be considered leading to less detailed requirements.

2.2.4.2 and 3 A) 2: Transaction reporting by managers and closely associated persons and subsequent disclosure (article 6(4) of directive 2003/6/EC and article 6 of directive 2004/72/EC)

BUSINESSEUROPE welcomes the amendments that are mentioned in the Commission working document. Especially the one regarding a higher threshold for transactions that have to be reported. Besides, there should be a limit under which transactions do not have to be reported (the number of shares and/or value); a limit that should not be subject to national variations in the Member States. We also support the proposal to restrict the scope of the obligation to report managers' transactions.

MARKET MANIPULATION

2.3.3 Exemption for buy-back programmes and stabilisation activities (article 8 of directive 2003/6/EC and Commission regulation 2273/2003)

The “safe harbour” rules of Regulation 2273/2003 state the conditions for exempting buy-back programmes and stabilisation activities under the MAD rules. These safe harbour rules have not been used to any great extent. One important reason for this is the condition in the regulation of a highest price at which shares can be purchased. This requirement is a hindrance and therefore BUSINESSEUROPE is of the opinion that the regulation needs to be simplified and made clearer.

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