BUSINESSEUROPE

THE DIRECTOR GENERAL

Ambassador Rory Montgomery
Permanent Representation of Ireland to the European Union
Rue Froissart 50
1040 Brussels

16 April 2013

Dear Ambassador,

As you know, BUSINESSEUROPE is supportive of the current revision of European market abuse rules, which are essential in order to ensure market integrity and investor confidence.

Although there has been good progress in the current trilogue discussions, BUSINESSEUROPE has a number of concerns which need to be addressed in order to make the proposed legal framework more effective and less burdensome on companies.

As you will see in the attached position paper, these concerns are linked to the extension of the definition of inside information and to the rules governing disclosure of inside information and disclosure of manager's transactions.

BUSINESSEUROPE is pleased with the inclusion of accepted market practices in both the Council and Parliament's texts and supports the Council General approach which preserves legal certainty regarding the definition of inside information.

I thank you in advance for taking our views into consideration on this important issue. Should you have any questions or comments, please do not hesitate to contact us.

Yours sincerely,

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ANNEX: BUSINESSEUROPE comments on the Market Abuse Regulation trilogue discussions

1. ACCEPTED MARKET PRACTICES (Article 4a of EP ECON report)

BUSINESSEUROPE **fully supports** the ECON committee and Council approach to maintain accepted market practices, however, has a slight preference for Council proposal.

BUSINESSEUROPE believes that the Council proposal is more precise and avoids legal uncertainty. In the Council proposal, the accepted market practice established before the entry into force of the new regulation will continue to apply until the competent authority made a *decision* following the European Securities Market Authority (ESMA) decision. On the contrary, in the ECON proposal, the accepted market practice will continue to apply until it has been *submitted* to ESMA which means that this practice will be illegal for the period of time up to the decision of the competent authority.

2. SAFE HARBOURS

BUSINESSEUROPE fully **supports** the ECON Report which reintroduces recitals 29 and 30 of the present directive 2003/6/EC maintaining safe harbours.

However, BUSINESSEUROPE is not against moving these provisions to article 7a.

3. EXTENTION OF THE DEFINITION OF INSIDE INFORMATION - Article 6(1)(e)

The proposal introduces a new definition of inside information which departs from two important criteria of that notion as known until now. There is neither a requirement that the information is of a precise nature, nor that it is likely to have a significant effect on the share price (price sensitivity).

The wording, as it stands in the Commission proposal and in the ECON report, is too broad and it means that almost any information can constitute inside information. It would introduce a grey area leading to legal uncertainty as to what has to be considered as inside information. The definition should instead be more precise also bearing in mind the legal implications of market abuse practices which might lead to criminal sanctions.

This lack of certainty and the extension of the violation as criminal sanction would have too far-reaching consequences: financial intermediaries would limit their activities and reduce liquidity on European stocks; corporate governance dialogue, often encouraged by European institutions, would be reduced; and the possibility for companies to act in general and operate on their shares would be hindered.

Key suggestion:

BUSINESSEUROPE supports the Council General approach **deleting Article 6(1)(e).**

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4. RULES ON DISCLOSURE OF INSIDE INFORMATION - Article 12

If it is common knowledge that all the inside information shall not be abused, not all the inside information shall be disclosed to the public, for two reasons:

i. because it could be too early (and the information too uncertain). In its ruling in the Daimler case, the Court of Justice of the EU stated how early a piece of information should be considered inside information and how early it should potentially be disclosed;

ii. in order to protect the company interest. It is clear that if certain transactions, as a merger or an acquisition, were communicated too early they would never happen. Moreover, a too early disclosure could also damage the shareholders, as this information could be very uncertain and possibly misleading, which might lead to investors losing confidence and trust in the financial market.

Article 12.3 gives the company the possibility to "delay" the disclosure provided that some conditions are met, amongst which, that it is not "misleading for the public". However, as "inside information" is - by definition - a price sensitive information that the investor would use in its investment decision, it is obvious that any delay of this information is misleading for the public. Therefore, companies face the dilemma either to communicate all the information to the public with negative impact on their business or to delay the information opening the door to millions of claims from investors who could feel damaged by that delay (as in the Daimler case).

Businesses worries are increased by the fact that the instrument used for reforming the market abuse rules, an EU Regulation, will leave little room for market authorities to perform their important role of interpreting and adapting the rules to the national context. Moreover, National courts will apply these rules directly.

Key suggestions:

- BUSINESSEUROPE urges the European Parliament and the Council to be open to **the report of the European Securities Market Expert Group,** appointed by the European Commission (at Annex) which tries to provide different alternatives to solve these problems.

- Furthermore, the **ECON report** introduces an ex-ante control by the competent authority of the “intention” to delay information and, in practice, prevents issuers from delaying the publication of inside information. In fact, the intention to delay must be justified according to criteria set out in paragraph 5: i) the information is of systemic importance; ii) it is in the public interest to delay its publication; iii) the confidentiality of that information can be ensured. However, the first criterion mainly applies to banking activities and occurs infrequently. This seems to be a technical mistake which should be deleted.

- BUSINESSEUROPE generally supports Council position on article 12.3 and 12.4, possibly modified to take into account ESME proposals.

5. RULES ON DISCLOSURE OF MANAGERS TRANSACTIONS - Article 14

a) Extending the time limit for disclosing information (Article 14, paragraph 1)

The **Commission** and the **ECON committee** have proposed a **2-day time limit for disclosing information** to the public by "*Persons discharging managerial responsibilities within an issuer*", and "*persons closely associated with them*".

On the other hand, the Council General Approach proposes a **3-day time limit** after the day in which the transaction occurred for the disclosure to the issuers and the competent authority; and the same time limit for the issuers to ensure that this information is made public.

These deadlines cannot be met in practice because, in most cases, bank statements listing a transaction are only received two days after the transaction occurs.

Key suggestion:

BUSINESSEUROPE supports the Council General approach as regards Article 14 paragraph 1 but with a time limit of – *at least* – **4 days**. Moreover, BUSINESSEUROPE points out that the time limit for the issuers to ensure that information is made public cannot coincide with the starting point of the manager's obligation to disclose his transactions, because if the manager communicates to the issuer at the very last stage, the issuer will not have the possibility to fulfill its own obligation to communicate.

b) Threshold for managers' transactions (Article 14, paragraph 3 of the Commission proposal and the ECON report and Article 14, paragraph 6 of Council's General approach)

The application of Article 14 to:

i) all managers' transactions, and of persons closely associated with them, whatever the amount per year (as proposed by the ECON Committee), or

ii) transactions exceeding 5.000 EUR, with a possibility for the competent authority to increase this threshold up to 20.000 EUR (as proposed by the Council)

would be burdensome, complex and would flood the market with unnecessary information, making it more difficult to find the few relevant disclosures.

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Key suggestion:

BUSINESSEUROPE supports the Commission initial proposal of a threshold of 20.000 EUR, however, believes that a possible compromise could be a **threshold of 10.000 EUR** but the information should be made public every time the threshold (aggregate amount) is reached again.

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