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To the Members of the
Committee on Economic and Monetary Affairs and the Legal Affairs Committee of the European Parliament

Your ref.	Our ref.	Official in charge	Tel **501 65**	Fax **501 65**	Date
-	WP-GSt/Wi/Vo/Ni	Susanne Wixforth Judith Vorbach	DW 2122	DW 2532	29.11.2011

1.) Proposal for a Regulation of the European Parliament and the Council on insider dealing and market manipulation (market abuse)

2.) Proposal for a Directive of the European Parliament and the Council on criminal sanctions for insider dealing and market manipulation - “MAD”

Dear Member of Parliament,

The Austrian Federal Chamber of Labour (BAK) is the legal representation of interest for about 3.2 million employees and consumers in Austria. It represents its members in all social, educational, economical and consumer policy matters both at national and Brussels EU level.
The BAK in general welcomes the intention of the European Commission to introduce tougher regulations to combat market abuse and Insider dealing.

1.) The Regulation

Opting for the Regulation as the legal instrument appears to be more suitable to create confidence in the integrity of the trading venues on the one hand and to achieve the uniform application of the provisions at Member State level on the other.
Unfortunately, the European Commission could not bring itself to abandon the belief that a large number of differently regulated trading venues would result in an alleged added value for society in form of more competition. The fact that the development of more or less regulated trading venues (regulated markets, multilateral trading facilities, systematic internalisers and a non-regulated sector) has done far more damage to the integrity and the trust in the financial centres than the non-harmonised application of the current Market Abuse Directive, is unfortunately still not being recognised as a problem.
As long as there is regulatory arbitrage between regulated markets and other trading venues - and this will be the case even with the new draft on the “Markets in Financial Instruments

Directive" - combating market abuse and insider dealing will remain a "Hare and Tortoise game", whereby the supervisory bodies would continue to play the role of the hare.

Having said that, we welcome the very broad definition of market manipulation and insider dealing as well as the inclusion of the ban on attempted market manipulation. However, it is regrettable that the obligation to disclose insider information should only apply to a limited extent, i.e. only when it is sufficiently precise. This results in scopes of discretion, which have to be interpreted by the issuer and which will probably turn out to be to the detriment of the interest of society as a whole in disclosure.
We expressly welcome that the term market manipulation also includes the spreading of wrong or misleading information. In doing so, the European Commission also seems to include the case of gross negligence (see Consideration 23 resp. Article 8 (1) (c), "knew, or ought to have known"). However, it is questionable whether this is sufficient given the fact that providing evidence is very difficult. Due to the fact that the assessment is carried out from an ex tunc (resp. ex ante) position, hence from the point of view of the issuer resp. the trader at that time, the BAK urges - taking the huge public interest in the integrity of the financial markets into account - to introduce liability for slight negligence resp. to consider a reversal of the burden of proof.
Apart from that, the restriction of promptness in respect of publishing insider information relating to emission certificates also gives cause for concern.

Finally it is noted from the point of view of the BAK that - as it is by now common practice with regard to the legislative acts in the financial market sector - a large number of delegated legislative acts have been envisaged for the benefit of the European Commission resp. the determination of technical operational standards by ESMA, which will be put into force by the European Commission. From the perspective of the BAK, this represents a democratic problem, in particular where the legal framework is only very cursory, but the operational discretion broad. In our opinion, this applies in particular to Article 11, which specifies which effective arrangements and procedures the alternative trading venues shall adopt to prevent and detect market abuse. The authorisation pursuant to Article 14 (5) (increasing the threshold value limits of managers' transactions) is not acceptable from a democracy policy point of view, as in particular the handling of managers' transactions has proven to be especially problematic and open to abuse.
In conclusion, one could say from the perspective of the BAK that the Regulation contains positive approaches to improve the integrity of market places. However, in particular the following should be considered:

- Introducing liability for slight negligence as well as a reversal of the burden of proof in case of certain disclosure offences
- Restricting delegated legal acts
- Providing clearer regulation of issuers' scope of discretion
- Avoiding, if possible, exceptions to the benefit of certain financial instruments resp. for certain market places (MTF, OTF)

We therefore ask you, dear Member of Parliament, to submit resp. support the following Amendment Applications:

Article 6 - Insider Information

European Commission	Amendment Application
1. For the purposes of this Regulation, inside information shall comprise the following types of information:	…
(a) inside information shall mean information of a precise nature which has not been made public, relating directly or indirectly, to one or more issuers or financial instruments, and which, if it were made public, would be likely to have a significant effect on the prices of those financial instruments or on the price of related derivative financial instruments;	a) **(delete)** information, which has not been made public, relating directly or indirectly…
(b) in relation to derivatives on commodities, information of a precise nature, which has not been made public relating, directly or indirectly, to one or more such derivatives or to the related spot commodity contract, and which, if it were made public, would be likely to have a significant effect on the prices of such derivatives or related spot commodity contracts; notably information, which is required to be disclosed in accordance with legal or regulatory provisions at the Union or der national level, market rules, contracts or customs, on the relevant commodity derivatives or spot markets;	b) in relation to derivatives on commodities, information **(delete)**, which has not been made public relating, directly or indirectly, to one or more such derivatives …
(c) in relation to emission allowances or auctioned products based thereon, information of a precise nature, which has not been made public…	c) in relation to emission allowances or auctioned products based thereon, information **(delete)**, which has not been made public …
(d) for persons charged with the execution of orders concerning financial instruments, it also means information conveyed by a client and related to the client's pending orders in financial instruments, which is of a precise nature, which relates directly or indirectly to one or more issuers of financial instruments or to one or more financial instruments, and …	d) for persons charged with the execution of orders concerning financial instruments, it also means information conveyed by a client and related to the client's pending orders in financial instruments, which ***(delete)*** relates directly or indirectly to one or more issuers of financial instruments or to one or more financial instruments, and …

Reason: It should not be at the discretion of the issuer, whether the reporting obligation applies or not. The distinction between "precise" and "non-precise" information allows a broad scope for interpretation, which is not in the intention of the Act.	

Article 7(5) - Insider dealing and improper disclosure of inside information

European Commission	Amendment Application
… (c) his having access to access to the information through the exercise of duties resulting from an employment or profession; (d) being involved in criminal activities. Paragraphs 1, 2, 3 and 4 also apply to any inside information obtained by a person under circumstances other than those referred to in points (a) to (d) and which the person knows or ought to know, is inside information. …	… and which the person knows or ought to know, is inside information, ***whereby slight negligence is sufficient. The burden of proof with regard to applying due diligence lies with the person, who has disseminated the information.*** …
Reason: for the purpose of clarification, the degree of negligence, which constitutes the facts of a case, should be clearly defined. The threshold should be kept as low as possible as the recent events concerning France's credit rating have shown how little care is applied when using such data. Finally, the reversal of the burden of proof should be introduced as this concerns a legal obligation, the compliance of which the liable party should prove.	

Article 8 (1) - Market manipulation

European Commission	Amendment Application
… c) Disseminating information through the media, including the Internet or by any other means, which has the consequences referred to in sub-paragraph (a), where the person, who made the dissemination knew, or ought to have known, that the information was false or misleading. When information is disseminated for the purpose of journalism, …	… … where the person, who made the dissemination knew, or ought to have known, ***whereby slight negligence is sufficient***, that the information was false or misleading***. The burden of proof with regard to applying due diligence lies with the person, who has disseminated the information.*** When information is disseminated for the purpose of journalism …

Reason: for the purpose of clarification, the degree of negligence, which constitutes the facts of a case, should be clearly defined. The threshold should be kept as low as possible as the recent events concerning France's credit rating have shown how little care is applied when using such data. Finally, the reversal of the burden of proof should be introduced as this concerns a legal obligation, the compliance of which the liable party should prove.	

Article 11 - Prevention and detection of market abuse

European Commission	Amendment Application
1. Any person who operates the business of a trading venue shall adopt and maintain effective arrangements and procedures in accordance with [Articles 31 and 56] of Directive [new MiFID] aimed at preventing and detecting market abuse. …	… ***The arrangements and procedures have to be approved by the relevant supervisory body.***
2. Any person professionally arranging or executing transactions in financial instruments …	…
Reason: to prevent regulatory arbitrage it is necessary that equivalent monitoring systems are introduced at the various trading venues and platforms at least at Member State level.	

Article 12 - Public disclosure of inside information

European Commission	Amendment Application
… 3. Paragraphs 1 and 2 shall not apply to information which is only inside information within the meaning of point (e) of paragraph 1 of Article 6. …	… ***delete***
Reason: as this concerns information relevant to "informed investors", an exception from being included in insider lists does not seem to be justified.	

Article 12 - Public disclosure of inside information

European Commission	Amendment Application
… 4. Without prejudice to paragraph 5, an issuer of a financial instruments or an emission allowance market participant, not exempted pursuant to the second subparagraph of Article 12, may under his own responsibility delay the public disclosure of inside information, as referred	***…*** ***delete***

to in paragraph 1, such as not to prejudice his legitimate interests provided that both of the following conditions are met: - the omission would not be likely to mislead the public; - the issuer of a financial instrument or emission allowance market participant is able to ensure the confidentiality of that information. Where an issuer of a financial instrument or an emission allowance market participant has delayed the disclosure of inside information under this paragraph it shall inform the competent authority that disclosure of the information was delayed immediately after the information is disclosed to the public.	
Reason: as the emission allowances are rated as financial instruments and the emission of free allowances is strictly limited from the third trading period, being treated differently from other financial instruments - for example a softening of the principle of the immediacy of the disclosure - is not justified.	

Article 12 - Public disclosure of inside information

European Commission	Amendment Application
… 8. This Article shall not apply to issuers who have not requested or approved admission of their financial instruments to trading on a regulated market in a Member State, or in the case of an instrument only traded on a MTF or an OTF, have not requested or approved trading of their financial instruments on a MTF or an OTF in a Member State. …	**…** ***delete***
Reason: it is incomprehensible why the regulations for insider dealing and market abuse should not apply to non-approved financial instruments or financial instruments, which are only traded on a MTF or an OTF. Such an exception has a counterproductive effect and almost invites to engage in regulatory arbitrage. Due to the cross-linkage of the trading venues, the effects of market manipulation are not limited to MTF and OTF; on the contrary, the worry is that the regulated markets "infect each other".	

Article 13 - Insider lists

European Commission	Amendment Application

… 3. This Article shall not apply to issuers who have not requested or approved admission of their financial instruments to trading on a regulated market in a Member State or, in the case of an instrument only traded on a MTF or an OTF, have not requested or approved trading of their financial instruments on a MTF or an OTF in a Member State. …	**…** ***delete***
Reason: it is incomprehensible why the regulations for insider dealing and market abuse should not apply to non-approved financial instruments or financial instruments, which are only traded on a MTF or an OTF. Such an exception has a counterproductive effect and almost invites to engage in regulatory arbitrage. Due to the cross-linkage of the trading venues, the effects of market manipulation are not limited to MTF and OTF; on the contrary, the worry is that the regulated markets "infect each other".	

Article 14 - Managers' transactions

European Commission	Amendment Application
… 5. The Commission may adopt, by means of delegated acts in accordance with Article 31 measures, modifying the threshold in paragraph 3 taking into account the developments in financial markets.	***…*** ***delete***
Reason: from a democracy policy point of view it is important that such threshold values are modified by Parliament and not by administrative act. For that reason - and because of the public interest in the strict control of managers' transactions - the threshold value should only be regulated by virtue of law.	

2.) The Directive

The BAK welcomes the objective pursued by the Directive to ensure that all Member States of the European Union introduce uniform criminal offences relating to insider dealing and market manipulation, which entail an appropriate minimum penalty. This is the only way to put an end to the currently existing regulatory arbitrage and the competition of the systems associated with it.

The hope is that the United Kingdom and Ireland will participate in approving and implementing the Directive. The BAK would ask you, dear Member of Parliament, to ensure that a participation of these two countries is achieved, whilst retaining the high standards, which are provided for in the proposal of the European Commission.

Concerning the subjective side of the criminal offence such as "Insider dealing" (Article 3) and "Market manipulation" (Article 4), the BAK is of the opinion that not only the deliberate acceptance of success (intent), but also gross negligence, hence the failure to observe

reasonable diligence, should be rated as an offence. This seems in particular justified as participants in financial markets are highly specialised and it can therefore be expected that they apply a higher level of diligence.
We therefore ask you, dear Member of Parliament, to consider the following Amendment Applications:

Article 3 - Insider dealing

European Commission	Amendment Application
Member States shall take the necessary measures to ensure that the following conduct constitutes a criminal offence, when committed intentionally: a) when in possession of inside information, using that information to acquire or dispose of financial instruments, to …	Member States shall take the necessary measures to ensure that the following conduct constitutes a criminal offence, when committed intentionally ***or through gross negligence***: …
Reason: as highly specialised financial institutes are acting on the relevant market they can be expected to apply a higher level of diligence to their actions. Hence, they should not only envisage criminal liability when they deliberately accept success of their action but also when they fail to apply necessary diligence.	

Article 4 - Market manipulation

European Commission	Amendment Application
Member States shall take the necessary measures to ensure that the following conduct constitutes a criminal offence, when committed intentionally: a) giving false or misleading signals as to the supply of, demand for or price of a financial instrument….	Member States shall take the necessary measures to ensure that the following conduct constitutes a criminal offence, when committed intentionally ***or through gross negligence***: …
Reason: as highly specialised financial institutes are acting on the relevant market they can be expected to apply a higher level of diligence to their actions. Hence, they should not only envisage criminal liability when they deliberately accept success of their action but also when they fail to apply necessary diligence.	

In the interest of the European financial markets it is an overriding need to introduce uniform and strict regulations against market manipulation and insider dealing as soon as possible on **all** trading venues and to avoid, as far as possible, exceptions in order not to increase the complexity of existing regulations even more, which would make it impossible for the supervisory bodies to apply them.
We would therefore ask you, dear Member of Parliament, to table the Amendment Applications proposed by us in the course of the legislative procedure.

Yours faithfully,

Herbert Tumpel
President

Günther Chaloupek
on behalf of the Director