Association for Financial
Markets in Europe

The voice of banking
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International Swaps and
Derivatives Association, Inc.

European Commission Consultation on the Revision of MAD

A response by:

Association for Financial Markets in Europe

The British Bankers' Association

International Swaps and Derivatives Association

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INTRODUCTION

The Association for Financial Markets in Europe (AFME), the British Bankers Association (the BBA), and the International Swaps and Derivatives Association (ISDA) welcome the opportunity to respond to the European Commission's consultation on a revision of the Market Abuse Directive. We thank you for extending our time deadline for responding to this consultation paper.

The members of our associations are strongly supportive of a robust and effective market abuse regime in the EU and globally. They are convinced that the integrity of the financial markets must be resolutely defended for the good of all stakeholders and that investors must be assured of fairness in the marketplace and in the practices of financial institutions. They accept that, as practitioners in the financial markets, theirs is the first line of defence against unfair and manipulative behaviour.

Below you will find our answers to the specific queries indicated in the consultation paper. We may summarise our positions as follows:

1. There are technical and practical issues which need to be considered before applying a blanket extension of the general insider trading rules to *all* products e.g. commodities and other derivatives.
2. While the extension of the market abuse regime to suspicious orders, OTC financial instruments, and to attempted market manipulation are desirable, there are important safeguards which must be assured to prevent unfairness and arbitrary enforcement actions.
3. Issuers' independence and responsibility must be maintained and not reduced by adapting the regime as applied to SMEs or by impinging issuers' ability to decide whether to delay public disclosure.
4. While we favour a pan-European proportionate approach to regulation for many reasons, we believe that questions of a Single Rule Book per se and regarding the governance role of ESMA in the future should be resolved separately.
5. Regulator transparency by the periodic disclosure of aggregated and suspicious activity reporting (orders/transactions) reports and their handling would be appropriate and useful.

We are grateful for your consideration of our responses to the queries posed in the consultation paper. We would be pleased to discuss our response and related issues with you or your staff, if that would be helpful to you.

Very truly yours,

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The Association for Financial Markets in Europe, promotes fair, orderly, and efficient European wholesale capital markets and provides leadership in advancing the interests of all market participants. AFME was formed on November 1st 2009 following the merger of LIBA (the London Investment Banking Association) and the European operation of SIFMA (the Securities Industry and Financial Markets Association). AFME represents a broad array of European and global participants in the wholesale financial markets, and its 197 members comprise all pan-EU and global banks as well as key regional banks, brokers, law firms, investors and other financial market participants. AFME provides members with an effective and influential voice through which to communicate the industry standpoint on issues affecting the international, European, and UK capital markets. AFME is the European regional member of the Global Financial Markets Association (GFMA). For more information, visit the AFME website, www.AFME.eu.

The British Bankers' Association is the leading association for UK banking and financial services sector, speaking for 220 banking members from 60 countries on a full range of UK and international banking issues. All the major banking institutions in the UK are members of the Association as are the large international EU banks, the US banks operating in the UK, as well as financial entities from around the world. The integrated nature of banking means that our members engage in activities ranging widely across the financial spectrum encompassing services and products as diverse as primary and secondary securities trading, insurance, investment bank and wealth management as well as conventional forms of banking.

The International Swaps and Derivatives Association, or ISDA, was chartered in 1985 and has over 820 member institutions from 56 countries on six continents. Our members include most of the world's major institutions that deal in privately negotiated derivatives, as well as many of the businesses, governmental entities and other end users that rely on over-the-counter derivatives to manage efficiently the financial market risks inherent in their core economic activities. Since its inception, ISDA has pioneered efforts to identify sources of risk in the derivatives and risk management business and reduce those risks through: documentation that is the recognized standard throughout the global market; legal opinions that facilitate enforceability of agreements; the development of sound risk management practices; and advancing the understanding and treatment of derivatives and risk management from public policy and regulatory capital perspectives.

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?

AFME, ISDA and BBA fully support the aim of having a definition of inside information which is relevant and effective for the purpose of preventing misconduct in commodity derivative markets.

However, it is our view that that the general definition of inside information in the Market Abuse Directive may not be appropriate for commodity derivatives.

In particular, many of our members are concerned about the absence of a general framework for the disclosure of inside information in relation to commodity derivatives. This contrasts with the position in securities markets because of the unique role of the issuer of securities in keeping the market informed on a continuous basis of price sensitive information.

We believe European Commission work on future legislation addressing new obligations of public disclosure for energy markets (as recommended by CESR and ERGEG) will make the existing definition of insider information for commodity derivatives in the Market Abuse Directive more effective for those markets (that is, the proposals being developed by DG Energy will be focused on disclosures in physical electricity and gas markets).

Therefore, we suggest that the current MAD provisions addressing inside information for commodity derivatives business should be retained, pending the outcome of the proposals being developed by DG Energy on disclosures in physical electricity and gas markets. Some member firms (including many of the financial institutions most active in commodity derivatives business) believe that similar work needs to be undertaken in other physical commodity markets in order to define relevant disclosure obligations and thus inside information (though the global nature of these markets makes such work difficult). These firms believe that it is this kind of initiative – rather than a change in the definition of inside information for commodity derivatives – which will enable MAD's insider dealing provision to function effectively in commodity markets.

However, we recommend that the European Commission should consider clarifying that information is only inside information for the purposes of the particular definition where the information in question is price sensitive (in the sense defined in paragraph 1 of article 1(1) MAD), and where it meets the requirements of the particular definition, i.e. that the purpose of the particular definition is to narrow the more general definition used in relation to securities and securities related derivatives. Market participants only expect to be restricted as regards their use of material (in this context, price sensitive) information. It is also clear that accepted market practices might require the disclosure of information that is not price sensitive. Therefore, we would suggest that the European Commission make clear that the particular definition also only applies where the information, if it were made public, would be likely to have a significant effect on the prices of the derivatives in question (in addition to the requirement that it is information which market users would expect to receive in accordance with accepted market practices).

We would add that the general definition of inside information – though effective for securities markets – is not, in our opinion, appropriate for commodity derivatives, having been drafted with securities markets in mind.

(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?

Yes - our members would support in principle the proposal to prohibit attempts to manipulate the market defined as:

> "the entering into transactions or the issuing of orders to trade which knowingly: (a) attempt to secure, by a person or by persons acting in collaboration, the price of one or several financial instruments at an ~~abnormal or~~ artificial level, unless the person who entered into the transactions or issued the orders to trade establishes that his reasons for doing so are legitimate and that these transactions or orders to trade conform to accepted market practices on the regulated market or multilateral facility concerned; or (b) attempt to employ fictitious devices or any other form of deception or contrivance."

We have not referred to "abnormal" price levels in our proposed definition of the conduct because that term is vague and possibly susceptible to varying interpretations. In any case we agree that ESMA should endeavour to determine which conduct or practices by means of electronic trading may constitute market manipulation or an attempt to manipulate the market. However, we believe that their findings should be subject to public consultation before making a final determination for purposes of general application across the EU.

Since the Market Abuse Directive is an effects-based regime, it is essential that any formal test to identify attempted market abuse must be based around one's original intentions. We are concerned that the definition as proposed in the consultation document should require the party (or parties) accused of market abuse to provide evidence demonstrating the legitimacy of their actions, effectively, reversing the burden of proof. We consider it important that the onus to demonstrate why a specific action is manipulative or does not conform with market conventions continues to lie with supervisors. This is important to ensure fairness where no proof that the conduct has been successful in establishing an artificial price will be available. We note that our members already have measures in place to prevent attempted market abuse within their firms. Indeed, it is possible the FSA could launch an enforcement case against attempted market abuse (providing there was intention) under the FSA Principles

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

ISDA, AFME and the BBA are supportive of the European Commission's proposal to ensure that manipulative actions committed through derivatives will be prohibited.

We consider that it would be appropriate to clarify the scope of elements of the market manipulation regime, perhaps through changes to the level 1 legislation. It is notable that paragraphs (a) and (b) of article 1(2) MAD define market without specifying whether this is restricted to transactions or orders to trade in financial instruments that are admitted to trading on a regulated market.

In particular, the directive could make clear whether these prohibitions apply to transactions or orders to trade in:

- OTC derivatives whose value depends on a financial instrument admitted to trading on a regulated market (e.g. OTC options on a listed security);

- the underlying subject matter of derivative that is admitted to trading on a regulated market (e.g. the physical commodity underlying an exchange traded derivative).

We believe that it should be clear that MAD addresses the manipulation carried out by someone who, for example, manipulates the price of listed securities by trading in contracts for differences or carries out an abusive squeeze on an exchange traded commodity derivative contract by trading in the underlying commodity.

Nevertheless, even if article 1(2)(a) were extended in this way, we suggest that it should still apply to transactions or orders to trade which have the effects specified in the directive on a financial instrument admitted to trading on a regulated market. That is, the regime would only proscribe conduct which gives or is likely to give false or misleading signals as to financial instruments admitted to trading on a regulated market or which distorts the price of such financial instruments. The rationale for the market abuse regime is based on the need to protect the integrity of the market for instruments traded on regulated markets. Accordingly, it may not be appropriate to extend the regime to cover transactions or orders to trade which do not have and are unlikely to have any effect on those markets.

As noted in our answer to the European Commission's Question 1, we propose that detailed consideration of expansion of insider dealing provisions in the area of commodity derivatives may be premature and should be analyzed in conjunction with the forthcoming proposals of DG Energy on disclosures in physical electricity and gas markets and other initiatives being undertaken concerning transparency in the physical commodity markets (e.g. IOSCO's work in the oil market and the Joint Oil Data Initiative (JODI).

Finally, we query whether it would be appropriate to extend the scope of the definition of market manipulation to cover dissemination of information that gives false or misleading signals as to financial instruments not admitted to trading on a regulated market solely on the basis that their value depends on financial instruments that are so admitted. We suggest that, as the rationale of the regime is to protect the integrity of regulated markets, it should focus on conduct which has (or is likely to have) an effect on the instruments that are admitted to trading on those markets. If the conduct does not have that effect, then it would be inconsistent with the framework for the regime to proscribe that conduct.

(4) To what extent should MAD apply to financial instruments admitted to trading on MTFs?

ISDA, AFME and the BBA are in principle very supportive of the application of the Market Abuse Directive to MTFs, including larger MTFs for conduct of commodity derivatives business.

We agree that it is important that market integrity legislation should cover a much larger scope of instruments, including OTC derivatives transacted at MTFs.

We make the following remarks, which are designed to highlight certain considerations which we believe the European Commission should take into account, in order to ensure

an appropriate coverage of MTFs and instruments transacted therein in the revised MAD:

- A general extension of MAD to all MTFs *could* constitute a disproportionate regulatory response creating barriers to efficient and effective operation of markets. Due consideration should be given to the effects on market liquidity on extension of MAD to *all* MTFs. A fully developed market abuse regime, designed with Regulated Markets in mind, *may* be disproportionate for certain MTFs because of important compliance costs and could hamper further market development.

- Further to this point, we presume that the European Commission would seek to undertake analysis of the many types of MTF before proposing a revised MAD. There is a very wide range of MTFs, including some that look very much like regulated markets, and some which are more similar to broker execution facilities, bulletin boards or OTC trading.

- Naturally, we believe that proposed revisions (like any legislative proposals) should be justified in a cost-benefit analysis and following impact assessment.

- We are somewhat cautious about the suggestion by the European Commission that it may seek to extend prohibitions of market manipulation to any financial instrument not admitted to trading on a regulated market or an MTF in a Member State, but which can have an impact on the value of a financial instrument admitted to trading on a regulated market or on an MTF. We believe that some thought is needed to ensure that such a step does not have unintended consequences for some markets (barriers to entry; illiquidity).

- If MAD is to be extended to MTFs, we encourage DG Internal Market to continue to coordinate with DG Energy to ensure a consistent regulatory approach.

We observe that MTFs that compete with regulated markets to trade European equities are already fully within the scope of the directive, since the instruments traded are generally admitted to trading on regulated markets and as such covered by the directive irrespective of whether the trades take place on the regulated market, on an MTF or OTC.

The European Commission may also wish to consider whether requirements governing initial prospectus disclosure and ongoing disclosure of financial information (if such exist) for instruments traded on MTFs make application of a MAD regime to such instruments more complex. The issuer of these instruments may not have requested the admission of the instruments in question to the MTF (or any other trading facility), and – under current EU legislation (e.g. the Prospectus Directive) - the duty of disclosure in article 6(1) MAD would not apply (by virtue of article 9) and there might be no corresponding duty of disclosure on the issuer under any other system of law. In these circumstances, there might be significant difficulties in applying the insider dealing framework in a practical way, given the likelihood that market participants will hold differential information.

(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?

Our strong view is that the obligation to disclose inside information should apply to issuers who have instruments which are only admitted to trading on an MTF, provided that the issuer is in a position to control the distribution of inside information and that the information concerns the issuer or an enterprise or activity it controls. The obligation to disclose inside information is central to ensuring investor protection, and without that obligation we could see a false market emerge in a particular security.

Generally speaking, there should be a distinction between information which is legally required to be publicly disclosed in a controlled way and information which may not be generally available to the public but which is not subject to legally controlled distribution regulations. Material, price sensitive information about an issuer of listed securities is subject to the Transparency Directive and must be disclosed to the market. Information regarding interest rate trends, currency trends, or production of commodities is not so regulated. Therefore, there could be no insider dealing prohibitions since no party has an obligation to disclose the information or to ensure that it is disclosed to the public as a whole at the same time. For example, the issuer of an interest rate futures contract would have no duty to disclose inside information because it would not have information which it controls which it may be obliged to publish. It would have no obligation to disclose e.g. proprietary research.

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

We strongly oppose any differentiation as between SMEs and larger issuers concerning their respective disclosure and dealing obligations under MAD. We fear the European Commission's proposals could:

- could create a false market in SME stocks with participants trading at prices which do not represent the true (perceived) value of the company because price sensitive information has not been released;

- would not be practical for SMEs to retain inside information for long periods without leaks and or rumours circulating which could potentially lead to abusive behaviour; or

- could cause a market confidence issue, which could reduce liquidity provision in SME stocks (because of the increased potential for false markets, as mentioned above).

In our view the costs and burdens of SMEs in this regard would be correspondingly less onerous due to their smaller scale. Further, the costs arising from a SME floating on a regulated market will be justified by the benefits accrued by the firm following the issue.

We also consider that it would be highly undesirable to lessen protections for investors in SMEs, for they will expect to have the same protections from abusive behaviour as they enjoy when investing in larger entities. We believe that the introduction of a differentiated regime would result in less investor interest in the sector due to a perception of higher risk and a corresponding diminution of trust. Investors will consider that SMEs should be able to more easily control information flow and employee trading than a larger firm.

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 have no objection to creating a regime for reporting suspicious orders and suspicious OTC transactions.

In instances where an unexecuted order to trade gives rise to a suspicion of market abuse, and where the suspicion is based on reasonable grounds, the relevant Competent Authority should be notified of the unexecuted order. We also consider that Competent Authorities should be notified of suspicious OTC transactions, just as they are already reportable in the UK. Financial institutions operating within Europe are principally concerned that the business they engage in, or potentially engage in, is both legal and within the scope of the rules. Our members want markets with integrity within which to operate, and are Competent Authorities' - greatest partners in the prevention and detection of market abuse.

Financial institutions can sometimes face a difficult task in deciding whether a transaction should qualify as 'suspicious'. On one hand, Competent Authorities have indicated that they want to receive only those suspicious transaction reports of a high quality. Indeed, we believe CESR has stated in the past that its members are "interested in quality not quantity of reporting, and will pursue vigorously cases where firms are notifying transactions without seriously considering whether they meet the test of reasonable suspicion". This policy should extend to the reporting of suspicious orders and suspicious OTC transactions. Firms must have reasonable grounds to believe that an order is an attempt at intentional market abuse as a basis for submitting a suspicious order / report. However, this is especially difficult when a firm receives an order that constitutes only a single aspect of a customer's overall trading strategy. The final decision whether to accept or decline any order for handling must remain with the regulated firm. Our members would welcome guidance on this issue.

With respect to the general query regarding means to enhance powers of regulators to investigate market, we are of the view that market participants would support an undertaking by CESR / ESMA to report on the usage of suspicious transactions/orders reports by competent authorities, on the basis that such disclosure would generate support for an expanded regime of suspicious transaction reporting. It would be helpful to know the number of reports received by subject matter (suspicious activity

suspected), and the number of investigations instigated as a result of the reports, and a breakdown by member state. Such a report would inform regulators as to regulatory inadequacies and would alert regulated entities to perceived problems in other Member States.

(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?

We strongly agree with the following proposals made in the consultation:

"In particular Member States should ensure that:

- appropriate administrative measures should mean decisions which have at least the effect of putting an end to a breach of the provisions of the national measures implementing MAD and/or of eliminating its effect. Such administrative measures should include at least: injunctions to put an end to an infringement, temporary prohibition of an activity, correction of false or misleading disclosed information and the possibility of issuing public notices on the website of competent authorities;

- appropriate administrative sanctions should mean decisions which have the effect of acting as a deterrent against the breach of the provisions of the national measures implementing MAD, in particular administrative fines and periodic penalty payments; or

- a minimum amount for administrative fines is established so as to guarantee deterrence. Where the infringement to a provision of MAD produces a direct or indirect quantifiable advantage, the amount of the fine should be at least twice that advantage, whether gain or loss avoided.

Member States could (should) provide that the competent authority disclose to the public, at least on its website, every measure or sanction that will be imposed for infringement of the provisions adopted in the implementation of MAD, unless such disclosure would seriously jeopardise the financial markets or cause disproportionate damage to the parties involved."

We would also propose that each Member State publish a report on its enforcement activities on an annual basis which would include categories of investigation, fines/penalties set, criminal prosecutions, and suspicious orders/transactions reports filed by category and actions taken.

In addition we would propose that CESR/ESMA should publish an annual comparison of such measures as among the Member States as part of its Level 3 effort to promote cooperation and consistency. This would assist Member States in understanding their relative position in enforcement as well as aid investors in the EU in assessing the integrity of the markets in each Member State.

(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?

We share the view that there should be active and timely cooperation between and among competent authorities of the Member States. Where a Member State is unable or unwilling to provide assistance as requested by another Member state, there should be a timely indication provided with a rationale. However, there may be reasons for refusing or delaying cooperation in addition to the situations where the public policy or security of a Member State could be affected or where the parties have already been dealt with by the Member State. For example, there may be disagreement concerning the priority of the matter or as to the sufficiency of the basis for the requested action.

In most cases ESMA should be able to assist the process of accommodation, but there may be occasions where only a court could decide a technical point of law upon which action is predicated. The decision to take action in such cases should reside with the Member State who will bear the expense of taking action.

We understand that the powers of ESMA are currently being discussed in a parallel forum and we suggest that the issues raised by this question can only be resolved in those discussions e.g. binding mediation between authorities.

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

We offer no comment due to the ongoing consideration in another forum.

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?

Yes, in situations where an issuer requires emergency assistance from a government or a public body to remain viable, we agree that the Competent Authority should have the power to determine that the obligation to disclose inside information should not apply to information about the emergency assistance, providing that the Competent Authority is satisfied that not disclosing the information would be in the public interest and that confidentiality of that information can be ensured.

However, there are some practicalities that should be considered. In some Member States there may be more than one regulatory authority involved in any case. Further,

there may be tensions between different competent authorities when the rule is applied to dual-listed securities. Any decision by a competent authority whether to delay or not delay the disclosure of information should also effectively bar any liability against the company or its directors arising from the execution of that decision to delay or not delay the disclosure of emergency assistance.

As a general rule, we do not consider that the discretion of issuers in relation to delayed disclosure (and when this is permissible) should be reduced. MAD allows issuers, under their own responsibility, to delay the public disclosure of inside information provided that: they have a legitimate interest in doing so, and; the delay would not be likely to mislead the public; and the information can be kept confidential. Issuers are generally equipped to make decisions regarding disclosure on this basis, and feel they are in the best position to make such decisions.

Further, it is likely that the issuer in question would have engaged in informal discussions with their Competent Authority prior to making any such decisions regarding a delay in disclosure. Indeed, the view of the Competent Authority will likely prove very influential on the eventual decision taken by the issuer. We believe this approach works. If Competent Authorities are asked to play a more prominent role in the decision to delay disclosure in normal circumstances, they may find it very difficult to take a view on behalf of the company, the shareholders and the wider market. Thus, our view is that in 'normal' circumstances, responsibility should reside with the company.

The consultation paper implicitly suggests that, going forward, issuers would be automatically obliged to inform their supervisor when they delay the disclosure of a particular piece of inside information. This approach would have an unduly inhibitory aspect to it, in that issuers would have to be very sure the delay in disclosure would be viewed positively by the regulator. In our view, this is unnecessary and would operate to impair the ability of the issuer to exercise its independent judgement. Of course, an issuer is finally responsible for its decision in any case and may indeed choose to consult with the regulator in certain cases.

(12) Should there be greater coordination between regulators on accepted market practices?

We consider that there should be greater coordination and harmonisation among regulators concerning accepted market practices in any Member State which the regulatory authority accepts as legitimate and in accord with binding technical standards. Harmonisation would make proportionate regulation clearer and more effective. A first step might be to publish acceptable practices in each Member State on a single website for use and comparison. Differences could then be addressed by the relevant regulatory authorities with ESMA. While differences persists, the rules of the market in which trading is effected should govern.

(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 do agree that the threshold for disclosure of transactions of senior managers of an issuer should be lifted to Euro 50,000, but that this threshold should operate over rolling 30 day periods beginning on any trading day.

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

The single rulebook issue should be considered in conjunction with much wider initiatives on regulatory harmonisation (e.g. discussions in the EU and US) rather than trying to address the issue in the narrow context of the EU Market Abuse Directive.

(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 agree that the obligations of market operators could be clarified to better prevent and detect market abuse, where such clarification focused on avoiding duplication and to promoting consistency. For example, we believe circuit breakers should be set consistently. We would be supportive of consultation in this area.

We hope that you will find these comments useful, and remain at your disposal should you wish to discuss this response. In such instances, please contact either: Christopher Ford (020 7216 8895; christopher.ford@bba.org.uk) of the British Bankers Association; William Ferrari (020 7743 9320; william.ferrari@afme.eu) of the Association for Financial Markets in Europe; or Roger Cogan (0032 2 4018760; rcogan@idsa.org).