



EUROPEAN COMMISSION

Brussels, 20.10.2011
COM(2011) 654 final

2011/0297 (COD)

Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

on criminal sanctions for insider dealing and market manipulation

{SEC(2011) 1217}

{SEC(2011) 1218}

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

Adopted in early 2003, the Market Abuse Directive (MAD) 2003/6/EC introduced a comprehensive framework to tackle insider dealing and market manipulation practices, jointly referred to as "market abuse". The Directive aims to increase investor confidence and market integrity by prohibiting those who possess inside information from trading in related financial instruments, and by prohibiting the manipulation of markets through practices such as spreading false information or rumours and conducting trades which secure prices at abnormal levels.

In order to ensure the enforcement of Directive 2003/6/EC, Member States are required to ensure, in conformity with national law, that the appropriate administrative measures can be taken or administrative sanctions be imposed against the persons responsible where the provisions adopted in implementation of the Directive have not been complied with. This requirement is without prejudice to the right of Member States to impose criminal sanctions.

The report by the High-Level Group on Financial Supervision in the EU¹ recommended that a "sound prudential and conduct of business framework for the financial sector must rest on strong supervisory and sanctioning regimes". To this end, the Group considers that supervisory authorities must be equipped with sufficient powers to act and should be able to rely on "equal, strong and deterrent sanctions regimes against all financial crimes, sanctions which should be enforced effectively".

Effective enforcement requires that, in accordance with article 14 of Directive 2003/6/EC, sanctions are available to the competent authorities that are "effective, proportionate and dissuasive. In addition, effective enforcement also relates to the resources of competent authorities, their powers and their willingness to detect and investigate abuses. However, the High-Level Group considers that "none of these is currently in place" and Member States sanctioning regimes are regarded as in general weak and heterogeneous.

To this end, the Commission has published a Communication² with regard to sanction regimes in the financial sector. The Communication argues that criminal sanctions, in particular imprisonment, are generally considered to send a strong message of disapproval that could increase the dissuasiveness of sanctions, provided that they are appropriately applied by the criminal justice system. However, criminal sanctions may not be appropriate for all types of violations and in all cases. The Communication concludes that the Commission will assess whether and in which areas the introduction of criminal sanctions, and the establishment of minimum rules on the definition of criminal offences and sanctions may prove to be essential in order to ensure the effective implementation of EU financial services legislation.

¹ *Report of the High-Level Group on Financial Supervision in the EU*, Brussels, 25.2.2009, p. 23.

² European Commission, Communication on *Reinforcing sanctioning regimes in the financial sector*, COM (2010) 716, 8 December 2010.

The proposal follows the approach set out in the Communication of 20 September 2011 "Towards an EU criminal policy – Ensuring the effective implementation of EU policies through criminal law"³. This includes an assessment, based on clear factual evidence, an assessment of the national enforcement regimes in place and the added value of common EU minimum criminal law standards, taking into account the principles of necessity, proportionality and subsidiarity.

In line with the Stockholm Programme and the conclusions of the JHA Council of 22 April 2010 on economic crisis prevention and support for economic activity⁴, the European Commission has assessed the application of the national rules implementing the MAD and has identified a number of problems which have negative impacts in terms of market integrity and investor protection. One of the problems identified in the impact assessment is the fact that the sanctions currently in place to fight market abuse offences are lacking impact and are insufficiently dissuasive, which results in ineffective enforcement of the Directive. In addition, the definition of which insider dealing or market manipulation offences constitute criminal offences diverges considerably from Member State to Member State. For example, five Member States do not provide for criminal sanctions for disclosure of inside information by primary insiders and eight Member States do not do so for secondary insiders. In addition, one Member State does not currently impose criminal sanctions for insider dealing by a primary insider and four do not do so for market manipulation. Since market abuse can be carried out across borders, this divergence undermines the internal market and leaves a certain scope for perpetrators of market abuse to carry such abuse in jurisdictions which do not provide for criminal sanctions for a particular offence.

Minimum rules on criminal offences and on criminal sanctions for market abuse, which would be transposed into national criminal law and applied by the criminal justice systems of the Member States, can contribute to ensuring the effectiveness of this Union policy by demonstrating social disapproval of a qualitatively different nature compared to administrative sanctions or compensation mechanisms under civil law. Criminal convictions for market abuse offences, which often result in widespread media coverage, help to improve deterrence as they demonstrate to potential offenders that the authorities take serious enforcement action which can result in imprisonment or other criminal sanctions and a criminal record. Common minimum rules on the definition of criminal offences for the most serious market abuse offences facilitate the cooperation of law enforcement authorities in the Union, especially considering that the offences are in many cases committed across borders.

Although the rules of preventing and fighting market abuse offences are in place at EU level since 2003, experience shows that the desired effect, i.e. contributing

³ COM (2011) 573 final.

⁴ In its "Stockholm Programme – an open and secure Europe serving and protecting citizens" of 2.12.2009, the European Council emphasised the need to regulate financial markets and prevent abuse and invited the Member States and the Commission to improve the detection of market abuse and the misappropriation of funds. The JHA Council conclusions on economic crisis prevention and support for economic activity, stressed that consideration could be given to whether it is possible or, as the case may be, appropriate to harmonise criminal laws regarding the handling of serious stock market price manipulations and other misconduct relating to securities markets. See Docc. 8920/10 of 22.4.2010 and 7881/10 of 29.3.2010

effectively to the protection of the financial markets, has not been achieved by the current system. While proposals to strengthen and ensure the coherence of administrative sanctions are included in the proposal for a Regulation (EU) No...of the European Parliament and the Council on insider dealing and market manipulation that also intends to remedy other major problems in the existing system, this proposal lays down a requirement for Member States to provide for minimum rules on the definition of the most serious market abuse offences and on minimum levels of criminal sanctions attached to them.

2. RESULTS OF CONSULTATIONS WITH THE INTERESTED PARTIES AND IMPACT ASSESSMENTS

The initiative is the result of consultations with all major stakeholders, including public authorities (governments and securities regulators), issuers, intermediaries and investors.

It takes into consideration the report published by the Committee of European Securities Regulators (CESR) on administrative measures and sanctions as well as criminal sanctions available in Member States under the market abuse directive (MAD)⁵. It also takes into account the results of the consultation launched by the Commission in its Communication on reinforcing sanctioning regimes in the financial sector.

On 12 November 2008 the European Commission held a public conference on the review of the market abuse regime⁶. On 20 April 2009, the European Commission launched a call for evidence on the review of the Market Abuse Directive. The Commission services received 85 contributions. The non-confidential contributions can be consulted in the Commission website⁷.

On 28 June 2010 the Commission launched a public consultation on the revision of the Directive which closed on 23 July 2010⁸. The Commission services received 96 contributions. The non-confidential contributions can be consulted in the Commission website⁹. A summary is found in Annex 2 to the impact assessment report¹⁰. On 2 July 2010, the Commission held a further public conference on the review of the Directive¹¹.

In line with its "Better Regulation" policy, the Commission conducted an impact assessment of policy alternatives. Policy options related to criminal sanctions were considered as part of this preparatory work. The impact assessment concluded on this point that requiring Member States to introduce criminal sanctions for the most serious market abuse offences was essential to ensure the effective implementation of the Union policy on market abuse. In combination with the preferred policy options

⁵ CESR/08-099, February 2008.

⁶ See http://ec.europa.eu/internal_market/securities/abuse/12112008_conference_en.htm.

⁷ See http://ec.europa.eu/internal_market/consultations/2009/market_abuse_en.htm

⁸ See http://ec.europa.eu/internal_market/consultations/docs/2010/mad/consultation_paper.pdf

⁹ See http://ec.europa.eu/internal_market/consultations/2010/mad_en.htm

¹⁰ The impact assessment report can be found on

http://ec.europa.eu/internal_market/securities/abuse/index_en.htm

¹¹ See Annex 3 of the impact assessment report for a summary of the discussions.

addressed in the proposal for a Regulation (EU) No...of the European Parliament and the Council on insider dealing and market manipulation, this will have a positive impact on investors' confidence and will further contribute to the financial stability of financial markets.

3. LEGAL ELEMENTS OF THE PROPOSAL

3.1. Legal basis

The proposal is based on Article 83.2 of the TFEU.

3.2. Subsidiarity and proportionality

According to the principle of subsidiarity (Article 5.3 of the TEU), action at EU level should be taken only when the aims envisaged cannot be achieved sufficiently by Member States alone and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the EU.

Market abuse can occur across borders and harms the integrity of financial markets which are increasingly integrated in the Union. The divergent approaches to the imposition of criminal sanctions for market abuse offences by Member States leave a certain scope for perpetrators who can often make use of the most lenient sanction systems. This undermines both the deterrent effect of each national sanction regime and the effectiveness of enforcement of the Union's legislative framework on market abuse. EU-wide minimum rules on the forms of market abuse that are considered to be a criminal conduct contribute to addressing this problem.

Against this background EU action appears appropriate in terms of the principle of subsidiarity.

The principle of proportionality requires that any intervention is targeted and does not go beyond what is necessary to achieve the objectives. This principle has guided the process from the identification and evaluation of alternative policy options to the drafting of this proposal.

3.3. Detailed explanation of the proposal

3.3.1. Criminal offences

Article 3 in conjunction with Article 2 of the proposal defines the market abuse offences which should be regarded as criminal offences by Member States and therefore be subject to criminal sanctions.

Two forms of market abuse conduct, namely insider dealing and market manipulation, should be regarded as criminal offences if committed intentionally. The attempt to commit insider dealing and market manipulation should also be punishable as a criminal offence.

The offence relating to inside information should apply to persons who possess inside information of which they know that it is inside information. The offence relating to market manipulation is applicable to anybody.

3.3.2. *Inciting, aiding and abetting and attempt*

Article 4 ensures that inciting as well as aiding and abetting the defined criminal offences are also punishable in Member States. The attempt to commit one of the offences defined in Articles 3 and 4 is also covered by the Directive with the exception of improper disclosure of inside information and dissemination of information which gives false or misleading signals, as it does not seem appropriate to define attempts to commit these offences as criminal offences.

3.3.3. *Criminal sanctions*

Article 5 requires Member States to take the necessary measures to ensure that the criminal offences identified in Articles 3 and 4 are subject to criminal sanctions. These sanctions should be effective, proportionate and dissuasive.

3.3.4. *Liability of legal persons*

Article 6 requires Member States to ensure that legal persons can be held liable for the criminal offences defined in Articles 3 and 4.

4. BUDGETARY IMPLICATIONS

The proposal has no implications for the Union budget.

Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

on criminal sanctions for insider dealing and market manipulation

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 83 (2) thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national Parliaments,

Having regard to the opinion of the European Economic and Social Committee¹²,

,

Acting in accordance with the ordinary legislative procedure,

Whereas:

- (1) An integrated and efficient financial market requires market integrity. The smooth functioning of securities markets and public confidence in markets are prerequisites for economic growth and wealth. Market abuse harms the integrity of financial markets and public confidence in securities and derivatives.
- (2) Directive 2003/6/EC¹³ of the European Parliament and the Council on insider dealing and market manipulation (market abuse) required Member States to ensure that competent authorities have the powers to detect and investigate market abuse. Without prejudice to the right of Member States to impose criminal sanctions, Directive 2003/6/EC also required Member States to ensure that the appropriate administrative measures can be taken or administrative sanctions be imposed against the persons responsible for violations of the national rules implementing that Directive.
- (3) The report by the High-Level Group on Financial Supervision in the EU recommended that a sound prudential and conduct of business framework for the financial sector must rest on strong supervisory and sanctioning regimes. To this end, the Group considered that supervisory authorities must be equipped with sufficient powers to act and there should also be equal, strong and deterrent sanctions regimes against all financial crimes, sanctions which should be enforced

¹² OJ C , , p. .

¹³ OJ L 16, 12.4.2003, p.16.

effectively. The Group concluded that Member States sanctioning regimes are in general weak and heterogeneous.

- (4) A well-functioning legislative framework on market abuse requires effective enforcement. An evaluation of the national regimes for administrative sanctions under Directive 2003/6/EC showed that not all national competent authorities had a full set of powers at their disposal to ensure that they could respond to market abuses with the appropriate sanction. In particular, not all Member States had pecuniary administrative sanctions available for insider dealing and market manipulation, and the level of these sanctions varied widely among Member States.
- (5) The adoption of administrative sanctions by the Member States has proven insufficient to ensure compliance with the rules on preventing and fighting market abuse.
- (6) It is essential that compliance be strengthened by the availability of criminal sanctions which demonstrate a social disapproval of a qualitatively different nature compared to administrative penalties. Establishing criminal offences for the most serious forms of market abuse sets clear boundaries in law that such behaviours are regarded as unacceptable and sends a message to the public and potential offenders that these are taken very seriously by competent authorities.
- (7) Not all Member States have provided for criminal sanctions for some forms of serious breaches of national legislation implementing Directive 2003/6/EC. These different approaches undermine the uniformity of conditions of operation in the internal market and may provide an incentive for persons to carry out market abuse in Member States which do not provide for criminal sanctions for these offences. In addition, until now there has been no Union-wide understanding on which conduct is considered to be such a serious breach. Therefore, minimum rules concerning the definition of criminal offences committed by natural and legal persons and of sanctions should be set. Common minimum rules would make it also possible to use more effective methods of investigation and effective cooperation within and between Member States. Convictions for market abuse offences under criminal law often result in extensive media coverage, which helps to deter potential offenders, as it draws public attention to the commitment of competent authorities to tackling market abuse.
- (8) The introduction of criminal sanctions for the most serious market abuse offences by all Member States is therefore essential to ensure the effective implementation of Union policy on fighting market abuse, in line with the requirements described in the Communication "Towards an EU criminal policy – Ensuring the effective implementation of EU policies through criminal law"¹⁴.
- (9) In order for the scope of this Directive to be aligned with that of Regulation (EU) No...of the European Parliament and the Council on insider dealing and market manipulation, trading in own shares for stabilisation and buy-back programmes, as well as transactions, orders or behaviours carried out for the purposes of monetary and public debt management activities and activities concerning emission allowances in pursuit of the Union's climate policy, should be exempt from this Directive.

¹⁴ COM (2011) 573 final.

- (10) Member States should be under the obligation to subject the offences of insider dealing and market manipulation to criminal sanctions according to this Directive only when they are committed with intent.
- (11) Due to the adverse effects attempted insider dealing and attempted market manipulation have on the integrity of the financial markets and on investor confidence in these markets, these forms of behaviour should also be punishable as a criminal offence.
- (12) This Directive should also require Member States to ensure that inciting as well as aiding and abetting the criminal offences are also punishable. In this context, causing another person, on the basis of inside information, to acquire or dispose of financial instruments to which that information relates should be considered inciting to insider dealing.
- (13) This Directive should be applied taking into account the legal framework established by the Regulation (EU) No...of the European Parliament and the Council on insider dealing and market manipulation and its implementing measures.
- (14) In order to ensure effective implementation of the European policy for ensuring the integrity of the financial markets set out in Regulation (EU) No...of the European Parliament and the Council on insider dealing and market manipulation, Member States should also extend liability to legal persons, including, whenever possible, criminal liability of legal persons.
- (15) As this Directive provides for minimum rules, Member States are free to adopt or maintain more stringent criminal law rules for market abuse.
- (16) Any processing of personal data undertaken in the implementation of this Directive should be in compliance with Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data¹⁵.
- (17) Since the objective of this Directive, namely to ensure the availability of criminal sanctions for the most serious market abuse offences across the Union, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale and effects of this Directive, be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary to achieve that objective.
- (18) This Directive respects the fundamental rights and observes the principles recognised in the Charter of Fundamental Rights of the European Union as enshrined in the Treaty. Specifically, it should be applied with due respect for the freedom to conduct a business (Article 16), the right to an effective remedy and to a fair trial (Article 47), the presumption of innocence and right of defence (Article 48), the principles of legality and proportionality of criminal offences and penalties (Article 49), and the right not to be tried or punished twice for the same offence (Article 50).

¹⁵ OJ L 281, 23.11.1995, p. 31.

- (19) The Commission should assess the implementation of this Directive in the Member States, also with a view to assessing a possible future need for introducing minimum harmonisation of the types and levels of criminal sanctions.
- (20) [In accordance with Articles 1, 2, 3 and 4 of Protocol (No 21) on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, annexed to the Treaty, the United Kingdom has notified its wish to participate in the adoption and application of this Directive] OR [Without prejudice to Article 4 of Protocol (No 21) on the position of the United Kingdom in respect of the area of freedom, security, and justice, annexed to the Treaty, the United Kingdom will not participate in the adoption of this Directive and is therefore not bound by or be subject to its application.
- (21) [In accordance with Articles 1, 2, 3 and 4 of Protocol (No 21) on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, annexed to the Treaty, Ireland has notified its wish to take part in the adoption and application of this Directive] OR [Without prejudice to Article 4 of Protocol (No 21) on the position of Ireland in respect of the area of freedom, security, and justice annexed to the Treaty, Ireland will not take part in the adoption of this Directive and is therefore not bound by it or be subject to its application.
- (22) In accordance with Articles 1 and 2 of Protocol (No 22) on the position of Denmark annexed to the Treaty, Denmark is not taking part in the adoption of this Directive and is therefore not bound by it or subject to its application.

HAVE ADOPTED THIS DIRECTIVE:

Article 1
Subject matter and scope

1. This Directive establishes minimum rules for criminal sanctions for the most serious market abuse offences, namely insider dealing and market manipulation.
2. This Directive does not apply to trading in own shares in buy-back programmes or for the stabilisation of a financial instrument, where such trading is carried out in accordance with article 3 of Regulation (EU) No...of the European Parliament and the Council on insider dealing and market manipulation, or to transactions, orders or behaviours carried out for the purposes of monetary and public debt management activities and activities concerning emission allowances in pursuit of the Union's climate policy, in accordance with article 4 of Regulation (EU) No...of the European Parliament and the Council on insider dealing and market manipulation.
3. This Directive shall also apply to behaviour or transactions, including bids, relating to the auctioning of emission allowances or other auctioned products based thereon pursuant to

Commission Regulation No 1031/2010. Any provisions in this Directive referring to orders to trade shall apply to bids submitted in the context of an auction.¹⁶

Article 2 *Definitions*

For the purposes of this Directive:

1. "Financial instrument" means any instrument within the meaning of Article 2(1)(8) of Regulation (EU) No...of the European Parliament and the Council on markets in financial instruments.
2. "Inside information" means information within the meaning of Article 6 of Regulation (EU) No...of the European Parliament and the Council on insider dealing and market manipulation.

Article 3 *Insider dealing*

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 which that information relates for one's own account or for the account of a third party. This also includes using inside information to cancel or amend an order concerning a financial instrument to which that information relates where that order was placed before entering into possession of that inside information; or
- (b) disclosing inside information to any other person, unless such disclosure is made in the lawful course of the exercise of duties resulting from employment or profession.

Article 4 *Market manipulation*

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 or a related spot commodity contract;
- (b) securing the price of one or several financial instruments or a related spot commodity contract at an abnormal or artificial level;

¹⁶ Commission Regulation (EU) No 1031/2010 of 12 November 2010. on the timing, administration and other aspects of auctioning of greenhouse gas emission allowances pursuant to Directive 2003/87/EC of the European Parliament and the Council establishing a scheme for greenhouse gas emission allowances trading within the Community, OJ L 302, 18.11.2010, p. 1.

- (c) entering into a transaction, placing an order to trade, or any other activity in financial markets affecting the price of one or several financial instruments or a related spot commodity contract, which employs a fictitious device or any other form of deception or contrivance;
- (d) dissemination of information which gives false or misleading signals as to financial instruments or related spot commodity contracts, where those persons derive, for themselves or another person, an advantage or profit from the dissemination of the information in question.

Article 5

Inciting, aiding and abetting, and attempt

1. Member States shall take the necessary measures to ensure that inciting, aiding and abetting the criminal offences referred to in Articles 3 and 4 are punishable as criminal offences.
2. Member States shall take the necessary measures to ensure that the attempt to commit any of the offences referred to in Articles 3(a) and 4(a), (b) and (c) is punishable as a criminal offence.

Article 6

Criminal sanctions

Member States shall take the necessary measures to ensure that criminal offences referred to in Articles 3 to 5 are punishable by criminal sanctions which are effective, proportionate and dissuasive.

Article 7

Liability of legal persons

1. Member States shall take the necessary measures to ensure that legal persons can be held liable for offences referred to in Articles 3 to 5 where such offences have been committed for their benefit by any person who has a leading position within the legal person, acting either individually or as part of an organ of the legal person, based on:
 - (a) a power of representation of the legal person;
 - (b) an authority to take decisions on behalf of the legal person; or
 - (c) an authority to exercise control within the legal person.
2. Member States shall also take the necessary measures to ensure that legal persons can be held liable where the lack of supervision or control, by a person referred to in paragraph 1, has made possible the commission of an offence referred to in Articles 3 to 5 for the benefit of the legal person by a person under its authority.

3. Liability of legal persons under paragraphs 1 and 2 shall not exclude criminal proceedings against natural persons who are involved as perpetrators, inciters or accessories in the offences referred to in Articles 3 to 5.

Article 8
Sanctions for legal persons

Member States shall take the necessary measures to ensure that legal persons held liable pursuant to Article 7 are punishable by effective, proportionate and dissuasive sanctions.

Article 9
Report

By [4 years after entry into force of this Directive], the Commission shall report to the European Parliament and the Council on the application of this Directive and, if necessary, on the need to review it, in particular with regard to the appropriateness of introducing common minimum rules on types and levels of criminal sanctions.

The Commission shall submit its report accompanied, if appropriate, by a legislative proposal.

Article 10
Transposition

1. Member States shall adopt and publish, by [24 months after entry into force of this Directive] at the latest, the laws, regulations and administrative provisions necessary to comply with this Directive. They shall forthwith communicate to the Commission the text of those provisions and a correlation table between those provisions and this Directive.

They shall apply those provisions from [24 months after entry into force of this Directive] and subject to and on the date of the entry into force of Regulation (EU) No...of the European Parliament and the Council on insider dealing and market manipulation.

When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive and a table indicating the correlation between those provisions and this Directive.

Article 12
Entry into force

This Directive shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

Article 13
Addressees

This Directive is addressed to the Member States in accordance with the Treaties.

Done at Brussels,

For the European Parliament
The President

For the Council
The President