COUNCIL OF THE EUROPEAN UNION

Brussels, 17 October 2012

14598/12

Interinstitutional File: 2011/0297 (COD)

DROIPEN 135
EF 219
ECOFIN 824
CODEC 2301

NOTE

from:	Presidency
to:	Council
No. Cion proposal:	16000/11 DROIPEN 125 EF 145 ECOFIN 717
No. prev. doc.:	14511/12 DROIPEN 133 EF 217 ECOFIN 818 CODEC 2287
Subject:	Proposal for a Directive of the European Parliament and of the Council on criminal sanctions for insider dealing and market manipulation (MAD) - State of play and orientation debate

I. INTRODUCTION AND STATE OF PLAY

1. On 21 October 2011 the Commission presented a proposal for a Directive of the European Parliament and of the Council on criminal sanctions for insider dealing and market manipulation (hereinafter "MAD") as part of a broader "package" of measures, including proposals currently under discussion in other preparatory bodies of the Council (Directive on markets in financial instruments - "MiFID"; Regulation on markets in financial instruments and OTC - "MiFIR"; Regulation on insider dealing and market manipulation - "MAR").

2. The proposal for MAD has been examined in the Working Party for substantive criminal law (DROIPEN). On 25-26 April 2012 the Justice and Home Affairs Council reached partial general approach on Articles 5 to 12. Delegations kept open the possibility to revert to those provisions in the light of further developments in the negotiations concerning the remaining parts of the Directive.

3. The Cyprus Presidency resumed discussions on MAD at the meeting of DROIPEN on 9 July 2012. Subsequently, the Council Legal Service issued an opinion [1] on the appropriateness of the legal basis of the proposal and on the compatibility of the proposal with the *ne bis in idem* principle.

4. Furthermore, on 27 July 2012 the Commission submitted an amended proposal,[2] integrating in the scope of MAD questions concerning the manipulation of benchmarks for interbanking lending rates; a similar proposal was submitted concerning MAR.

5. On the basis of these documents, and building on the comments received from delegations, the Presidency has presented an amended draft text of the Directive. This draft was discussed at the meeting of the Friends of the Presidency on 12 October 2012. Further meetings are planned for 22 October and 9 November 2012.

6. Given the outcome of discussions of the meeting of 12 October 2012 the Presidency would like to ask the Council for orientation in view of future work on the proposal, in particular for what concerns the question relating to the application of the principle of *ne bis in idem*.

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1 See doc. 12979/12 LIMITE JUR 438 EF 184 ECOFIN 730 DROIPEN 113 CODEC 1991.
2 See doc. 13037/12 DROIPEN 115 EF 188 ECOFIN 736 CODEC 2004.

II. APPLICATION OF THE PRINCIPLE OF *NE BIS IN IDEM*.

7. The legal basis of MAD is Article 83 (2) TFEU, according to which provisions of substantial criminal law may be the object of approximation through Directives when this "*proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonization measures*". In this respect, MAD compliments MAR by ensuring proper implementation of the rules set out therein. For this purpose, it imposes on Member States the obligation to provide in their national law that certain forms of insider dealing and market manipulation are punishable as criminal offences, through sanctions which are dissuasive, proportionate and effective.

8. This implies that the description of the offences (administrative offences in MAR, criminal offences in MAD) is partially overlapping, with the concrete possibility that certain conduct may fall both within the scope of application of the administrative penalties provided for by MAR and within that of the criminal sanctions which the laws of the Member States will provide once MAD has been implemented. It should be recalled that this situation, i.e. that the same conduct may be punished both by criminal and by administrative sanctions, is common practice in several Member States while it is not known in some Member States.

9. It must be further recalled that, under certain conditions, penalties which are labelled as administrative could be considered to be in substance of a criminal, or punitive, nature. Among others, the case law of the European Court of Human Rights has since many years elaborated on the principles applicable (the so-called "*Engel* criteria", after the leading case on the subject of 1976) in its case-law. The CJEU has integrated these criteria in its own jurisprudence.

10. Considering the above, it could be argued that the current structure of the MAR and MAD proposals may give rise to tensions with the principle of *ne bis in idem*, enshrined in Article 50 of the Charter of Fundamental Rights of the European Union. In accordance with this principle, if a person has already been subject to criminal proceedings for a particular offence, and if he has been acquitted or convicted by a final decision of a competent authority of a Member State, that person cannot be subject to new criminal proceedings for the same act within the Union.

11. During discussions in the Working Party, it has been indicated that the risk of breaching the *ne bis in idem* principle could present itself if the competent authorities of one (or more) Member States applied to the same conduct of a person both the criminal sanctions provided for under their national law for that criminal offence and administrative sanctions provided by MAR, when these are of such severity to be substantially considered punitive under the "*Engel* criteria". It should be noted, in this context, that the *ne bis in idem* principle applies across the borders of the EU.

12. Some delegations have indicated that this risk should already be taken into consideration at the level of the EU legislation and, consequently, be addressed by specific provisions of MAD (and MAR) regulating the relationship between the different instruments and sanctioning regimes. In the opinion of these Member States, since EU law imposes both an obligation to provide for administrative sanctions (in MAR) and an obligation to provide in national law for criminal sanctions for certain types of conduct (in MAD), it should be the same acts of EU law to provide Member States with the rules to avoid conflicts between these sanctions.

13. A number of other delegations disagree with this point of view. In their opinion the question of respecting the principle of *ne bis in idem* does not arise at the level of the EU legislation, but rather must be addressed by the competent authorities of each Member State in the application of the legislative instruments to a concrete case. Accordingly, the mere fact that MAR and MAD provide for (potentially) interfering sanctions - as is the case in the national law of several Member States - does not have any significance in relation to the principle of *ne bis in idem*. Instead, it is for the authorities of each Member State, acting in accordance with the rules of their legal system, to avoid in a concrete case that the simultaneous application of different types of sanctions would violate the right of the person not to be tried twice for the same offence. Each Member State would therefore be called to regulate the relationship between criminal and administrative sanctions for insider dealing and market manipulation in accordance with the specific rules that their legal system already employs to protect the *ne bis in idem* principle.

III. CONCLUSIONS

14. In the light of this discussion, and in order to advance in the examination of the proposal, the Presidency asks the Council for guidance. The Ministers are invited to express their views on this matter and, in particular, on the following questions:

- *Do Ministers consider that the protection of the principle of* ne bis in idem *is relevant in relation to the MAR and MAD proposals?*

- *In case of a positive answer to the previous question, do Ministers consider that the task of protecting the principle of* ne bis in idem *should be left to each Member State, when implementing this legislation and in its application?*