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NOTE

from:	Presidency
to:	Council
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Subject:	Proposal for a Directive of the European Parliament and of the Council on insider dealing and market manipulation (market abuse) [First reading] - General approach

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, such as the Regulation on insider dealing and market manipulation - "MAR".
2. At the informal meeting of the Justice and Home Affairs Ministers, held in Copenhagen on 26-27 January 2012, questions have been put to the attention of Ministers concerning the provisions in MAD dealing with the approximation of penalties for the offences provided for in the instrument.

3. At its meeting on 26-27 April 2012 the JHA Council adopted a partial general approach covering Articles 5-12 of the draft Directive. The agreement was subject further work on the remaining Articles of the Directive, to be postponed while negotiations on the MAR were continuing.
4. Examination of the proposal has resumed under the Cyprus Presidency. Following examination of the text by the technical Working Party, the JHA Council on 25-26 October has been called to give guidance in relation to the issue of protection of the principle of *ne bis in idem* in the Directive, considering the possible interactions between the administrative sanctions set out in MAR and the criminal sanctions deriving from MAD.
5. The Presidency also recalls that the responsible Committee (ECON) of the European Parliament has voted a draft report on the Directive on 9 October 2012.
6. The draft Directive was submitted to Coreper II on 30 November 2012. After examination of the text, the Presidency concluded that it enjoyed sufficient support by delegations and should be submitted to this Council for the endorsement of the general approach.
7. Delegations will find in the Annex to this note the draft text of the Directive. Certain changes have been introduced, with respect to the version of the document submitted to Coreper, in order to take account of comments by Member States. These changes are highlighted by bold and underlined.
8. The Presidency believes that the draft represents a balanced compromise which can accommodate the concerns expressed by delegations in the course of discussions at the technical level. Some delegations maintain reservations with respect to the text; the Presidency would like to invite these delegations, in the spirit of compromise, to lend their support to this general approach, in order to advance the procedure and start negotiations with the European Parliament.

- 9. In view of the above, Council is invited to endorse the proposed general approach on MAD, as set out in the Annex to this note, with a view to commencing negotiations with the co-legislator.**
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2011/0297 (COD)

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 Committee,¹

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.

¹ OJ C , , p. .

- (2) Directive 2003/6/EC² 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 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.

² OJ L 16, 12.4.2003, p.16.

- (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 at least 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 persons, of the liability of 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. In addition, the imposition of criminal sanctions for market abuse offences will have an increased deterrent effect on potential offenders.
- (8) The introduction of criminal sanctions for at least serious market abuse offences by all Member States is therefore essential to ensure the effective implementation of Union policy on fighting market abuse.
- (9) In order for the scope of this Directive to be aligned with that of Regulation [MAR], 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 or activities related to public agricultural policy and activities concerning emission allowances in pursuit of the Union's climate policy, should be exempt from this Directive.

- (10) Member States should be under the obligation to provide that at least serious cases of insider dealing, market manipulation and unlawful disclosure of inside information constitute criminal offences when committed with intent.
- (10a) For the purpose of this Directive, insider dealing and unlawful disclosure of inside information should be deemed serious in cases such as those where the impact on the integrity of the market, the actual or potential profit derived or loss avoided, the level of damage caused to the market, or the overall value of the financial instruments traded is high.
- (10b) For the purpose of this Directive, market manipulation should be deemed serious in cases such as those where the impact on the integrity of the market; the actual or potential profit derived or loss avoided, the level of damage caused to the market, the level of alteration of the value of the financial instrument or spot commodity contract or the amount of funds originally used is high or whether the manipulation is performed by a person employed or working in the financial sector or in a supervisory or regulatory authority.
- (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.

- (11a) This Directive should oblige Member States to provide in their national legislation for criminal penalties in respect of the behaviours of insider dealing, market manipulation and unlawful disclosure of inside information to which this Directive applies. This Directive should not create obligations regarding the application of such penalties or any other available system of law enforcement, to individual cases.
- (12) This Directive should also require Member States to ensure that inciting as well as aiding and abetting the criminal offences are also punishable.
- (13) This Directive should be applied taking into account the legal framework established by the Regulation [MAR] 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 [MAR], Member States should, also extend liability for the offences provided for in this Directive to legal persons where such offences have been committed for their benefit, through the imposition of criminal or non-criminal sanctions **or measures** which are effective, proportionate and dissuasive, **such as for example those set out in MAR.**
- (15) As this Directive provides for minimum rules, Member States are free to adopt or maintain more stringent criminal law rules for market abuse.
- (15a) The obligations under Articles 6 and 8 do not exempt Member States from the obligation to provide in national law for administrative sanctions and measures for the breaches set out in Regulation [MAR] unless Member States have decided, in accordance with the provisions of Regulation [MAR], to lay down only criminal sanctions for such breaches in their national law.

- (15b) The scope of this Directive is defined in such a way as to complement and ensure the effective implementation of the provisions set out in Regulation [MAR]. In the application of the law transposing this Directive, Member States should ensure that imposition of criminal sanctions on the basis of offences foreseen by this Directive and of administrative sanctions in accordance with the Regulation [MAR] does not lead to the breach of the principle of *ne bis in idem*.
- (17) Since the objective of this Directive, namely to ensure the availability of criminal sanctions for at least 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 right to protection of personal data (Article 8), the freedom of expression (Article 11), 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 in criminal proceedings for the same offence (Article 50).

- (18a) Nothing in this Directive is intended to restrict freedom of press and freedom of expression in the media in so far as they are guaranteed in the Union and in the Member States, **in particular** under Article 11 of the Charter of Fundamental Rights and other relevant provisions. This should be emphasized in particular as regards disclosure of inside information in accordance with Article 3a.
- (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) 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 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.
- (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 insider dealing, unlawful disclosure of inside information and market manipulation.
2. This Directive applies in relation to the following financial instruments:
 - (a) financial instruments admitted to trading on a regulated market or for which a request for admission to trading on a regulated market has been made;
 - (b) financial instruments traded, admitted to trading or for which a request for admission to trading on a MTF has been made;
 - (c) financial instruments traded on an OTF
 - (d) financial instruments not covered by subparagraph (a) or (b) or (c) whose price or value depends on or has an effect on the price or value of a financial instrument referred to in those sub-paragraphs and which may include, but are not limited to, credit default swaps or contracts for difference.
3. 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, exchange rate, public debt management or public agricultural 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.

4. 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.³
5. Article 4 shall also apply to:
 - (a) spot commodity contracts, which are not wholesale energy products, where the transaction, order or behaviour has an effect on the price or value of a financial instrument referred to in paragraph 2 of this Article;
 - (b) financial instruments referred to in paragraph 2 of this Article, where the transaction, order, bid or behaviour has an effect on the price or value of a spot commodity contract where the price or value depends on the price or value of those financial instruments;
 - (c) behaviour in relation to benchmarks.
6. This Directive applies irrespective of whether the transaction, behaviour or order actually takes place on a trading venue, systematic internaliser, or is over the counter trading.

³ 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.

Article 2
Definitions

For the purposes of this Directive:

1. "Financial instrument" means any instrument within the meaning of Article 4(2)(14) of Directive [MiFID new]
2. "Spot commodity contract" means any instrument within the meaning of Article 5.10 of Regulation [MAR] .
3. "Inside information" means information within the meaning of Article 6(1), (2), (2a) and (3) of Regulation [MAR].
4. "Benchmark" has the same the meaning as in Article 5.27 of Regulation [MAR].
5. "Accepted market practice" means any activity which has been established by a competent authority in accordance with Article 8a of Regulation [MAR].
6. "Regulated market" means a multilateral system in the Union within the meaning of Article 2(1)(5) of Regulation[MiFIR].
7. "Multilateral Trading Facility (MTF)" means a multilateral system in the Union within the meaning of Article 2(1)(6) of Regulation[MiFIR].
8. "Organised Trading Facility (OTF)" means a system or facility in the Union referred to in Article 2(1)(7) of Regulation[MiFIR].

9. "Trading venue" means a system or facility in the Union referred to in Article 2(1)(25) of Regulation [MiFIR].
10. "Legal person" means any entity having legal personality under the applicable law, except for States or public bodies in the exercise of State authority and for public international organisations.
11. "buy-back programme" means trading in own shares in accordance with Articles 19 to 24 of Council Directive 77/91/EEC.⁴
12. "stabilisation" means any purchase or offer to purchase relevant financial instruments, or any transaction in associated instruments equivalent thereto, by investment firms or credit institutions, which is undertaken in the context of a significant distribution of such relevant securities exclusively for supporting the market price of these relevant securities for a predetermined period of time, due to a selling pressure in such securities;
13. "emission allowance" means a financial instrument as defined in point (11) of Section C of Annex I of Directive [new MiFID].
15. "systematic internaliser" means an investment firm trading on own account within the meaning of article 2(1)(3) of Regulation [MiFIR] ;

⁴ Second Council Directive 77/91/EEC of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent. [OJ L 26, 31.1.1977, p. 1].

Article 3

Insider dealing, recommending or inducing another person to engage in insider dealing

1. Member States shall take the necessary measures to ensure that insider dealing, recommending or inducing another person to engage in insider dealing as defined in this Article constitute criminal offences at least in serious cases and when committed intentionally.
2. For the purposes of this Directive, insider dealing arises where a person possesses inside information and uses that information by acquiring or disposing of, for his own account or for the account of a third party, either directly or indirectly, financial instruments to which that information relates.
3. This Article applies to any person who possesses inside information as a result of any of the following situations:
 - (a) being a member of the administrative, management or supervisory bodies of the issuer,
 - (b) having a holding in the capital of the issuer,
 - (c) having access to the information through the exercise of duties resulting from his employment, profession or duties;
 - (d) being involved in criminal activities;
 - (e) obtaining inside information under circumstances other than those in points (a) to (d) and which the person knows is inside information.

4. The use of inside information by cancelling or amending an order concerning a financial instrument to which the information relates where the order was placed before the person concerned possessed the inside information, shall also be considered as insider dealing.
5. In relation to auctions of emission allowances or other auctioned products based thereon that are held pursuant to Regulation (No) 1031/2010, the use of inside information referred to in paragraph 4 shall also comprise modifying or withdrawing a bid by a person for its own account or for the account of a third party.
6. For the purposes of this Directive, recommending or inducing another person to engage in insider dealing arises where a person who possesses inside information in accordance with paragraph 3 of this Article, recommends or induces on the basis of that information, another person who does not possess this information in accordance with paragraph 3 of this Article to acquire or dispose of financial instruments to which that information relates.
7. The use of recommendations or inducements referred to in paragraph 6 amounts to insider dealing when the person using the recommendation or inducement knows it is based on inside information.
8. In relation to the offences defined in this Article, a person in possession of inside information shall not be deemed to have used that information or consequently to have engaged in insider dealing if his behaviour qualifies as legitimate behaviour under Article 7a(1),(2),(3), (3a) and (3b) of Regulation [MAR].

Article 3a

Unlawful disclosure of inside information

1. Member States shall take the necessary measures to ensure that unlawful disclosure of inside information as defined in this Article constitute criminal offences at least in serious cases and when committed intentionally.
2. For the purposes of this Directive, unlawful disclosure of inside information arises when a person who possesses inside information as a result of any of the conditions set out in Article 3 (3) discloses that information to others, except where the disclosure is made in the normal course of the exercise of his employment, profession or duties or where the disclosure qualifies as a market sounding made in compliance with Article 7c (1) to (5) of Regulation [MAR].
3. This Article shall be applied in accordance with the need to protect the freedom of the press and the freedom of expression.

Article 4
Market manipulation

1. Member States shall take the necessary measures to ensure that market manipulation as defined in this Article constitutes criminal offences at least in serious cases and when committed intentionally.
2. For the purposes of this Directive, market manipulation arises in the following cases:
 - (a) entering into a transaction, placing an order to trade or any other behaviour which:
 - gives false or misleading signals as to the supply of, demand for, or price of, a financial instrument or a related spot commodity contract; or
 - secures the price of one or several financial instruments or a related spot commodity contract at an abnormal or artificial level;unless the reasons for so doing of the person who entered into the transactions or issued the orders to trade are legitimate, and these transactions or orders to trade are in conformity with accepted market practices on the trading venue concerned; or
 - (b) entering into a transaction, placing an order to trade or any other behaviour which affects 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; or
 - (c) dissemination of information which gives false or misleading signals as to the supply of, demand for, or price of financial instruments or related spot commodity contracts, or secures the price of one or several financial instruments or a related spot commodity contract at an abnormal or artificial level, where those persons derive, for themselves or another person, an advantage or profit from the dissemination of the information in question or

- (d) transmitting false or misleading information, providing false or misleading inputs, or any action which manipulates the calculation of a benchmark

Article 5

Inciting, aiding and abetting, and attempt

1. Member States shall take the necessary measures to ensure that inciting, aiding and abetting the offences referred to in Articles 3, 3a and 4 with the exception of the conduct referred to in paragraphs 6 and 7 of Article 3, is punishable as a criminal offence.
2. Member States shall take the necessary measures to ensure that the attempt to commit any of the offences referred to in Articles 3 and 4, with the exception of the conduct referred to in paragraph 6 of Article 3, is punishable as a criminal offence.

Article 6

Criminal penalties for natural persons

Member States shall take the necessary measures to ensure that the criminal offences referred to in Articles 3 to 5 are punishable by effective, proportionate and dissuasive criminal penalties as regards natural persons.

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 committed for their benefit by any person, acting either individually or as part of an organ of the legal person, and having a leading position within 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 on legal persons

Member States shall take the necessary measures to ensure that a legal person held liable pursuant to Article 7 is punishable by effective, proportionate and dissuasive criminal or non-criminal 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, including 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.

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 [MAR].

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.

Article 11
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 12
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
