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**NOTE**

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from:	Presidency
to:	Delegations
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) - Presidency 2nd compromise text

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1. Delegations will find in the Annex a proposal by the Presidency for a compromise text of the Directive, drafted after the meeting of the Friends of the Presidency (DROIPEN) on 12 October 2012 and on the basis of the written comments received from delegations. Modifications with respect to the previous version of the Directive (14511/12) are highlighted by strikethrough and underlining.
2. Delegations are invited to submit their comments at the meeting of the Friends of the Presidency (DROIPEN-MAD) on 22 October 2012. The Presidency would be grateful for any comments that delegations may want to submit in writing prior to that meeting. These can be addressed to the General Secretariat of the Council ([secretariat.criminal-law@consilium.europa.eu](mailto:secretariat.criminal-law@consilium.europa.eu)).

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,<sup>1</sup>

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.

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<sup>1</sup> OJ C , , p. .

- (2) Directive 2003/6/EC<sup>2</sup> 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.

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<sup>2</sup> 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 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 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 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.
- (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 activities 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 ~~subject~~ provide that the most serious cases ~~0000~~ the offences of insider dealing and market manipulation are subject 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.
- (11a) This Directive should oblige Member States to provide in their national legislation for criminal penalties in respect of the behaviours of insider dealing and market manipulation 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].
- (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 sanctions which are effective, proportionate and dissuasive.
- (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 scope of application 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 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 does not breach the principle of *ne bis in idem*.
- (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 data.<sup>3</sup>
- (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 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). Nothing in this Directive is intended to restrict freedom of press and freedom of expression in the media as they are guaranteed in the Union and in the Member States under Article 11 of the Charter of Fundamental Rights and other relevant provisions.

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<sup>3</sup> 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) 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 and market manipulation.
2. This Directive concerns misuse of inside information and market manipulation and 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 (ba) 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.

23. 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 ~~a~~Article 3 of [Regulation MAR], 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 ~~a~~Article 4 of [Regulation MAR].

43. 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.<sup>4</sup>

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 1 of this Article;

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<sup>4</sup> 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.



(b) financial instruments referred to in paragraph 1 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) benchmarks, where any transmission of information, input, calculation or behaviour is used to affect or affects the calculation of the benchmark.

6. This Directive applies irrespective of whether the transaction, behaviour or order actually takes place on a regulated market, MTF, OTF or over-the-counter.

## *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. "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 of [Regulation MAR].
4. "Benchmark" ~~means any published index or published figure within the~~ has the same meaning as in ~~of~~ Article 5.27 of [Regulation MAR].
5. "Accepted market practice" means any activity within the meaning of Article 8a of [Regulation MAR].
6. "Person" means any natural ~~or legal~~ person.

7. "Regulated market" means a multilateral system in the Union within the meaning of Article 2(1)(5) of Regulation[MiFIR].
8. "Multilateral Trading Facility (MTF)" means a multilateral system in the Union within the meaning of Article 2(1)(6) of Regulation[MiFIR].
9. "Organised Trading Facility (OTF)" means a system or facility in the Union referred to in Article 2(1)(7) of Regulation[MiFIR].
10. "Trading venue" means a system or facility in the Union referred to in Article 2(1)(26) of Regulation[MiFIR].
11. "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.
12. "Buy-back programme" means trading in own shares in accordance with Articles 19 to 24 of Council Directive 77/91/EEC<sup>5</sup>.
13. "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;
14. "Emission allowance" means a financial instrument as defined in point (11) of Section C of Annex I of Directive [new MiFID].

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<sup>5</sup> 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*

1. Member States shall take the necessary measures to ensure that insider dealing as defined in this Article constitutes a criminal offence at least in serious cases, 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 or ought to know 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 recommends or induces another person on the basis of that information, 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.

~~6.8. Insider dealing shall be considered serious.~~ For the purposes of paragraph 1 of this Article, at least in the following cases of insider dealing shall be considered serious:

- (a) [when the value of the financial instruments acquired or disposed, at the time of the conduct, is considered high by Member States in accordance with their national law;]
- (b) when the ~~agent~~ person has obtained the inside information as a result of the exercise of his employment, profession or duties;
- (c) when the ~~agent~~ person has obtained the inside information as a result of the exercise of a public office or of an office or profession in a regulatory or supervisory body, or of a position directly connected to a public office or regulatory or supervisory body;
- (d) when the inside information has been obtained as a result of criminal activity of the ~~agent~~ person, alone or in conjunction with other persons.

~~8.9.~~ This Article applies irrespective of whether the transaction or order actually takes place on a regulated market, MTF, OTF or over-the-counter.

~~9.10. Unless there is evidence to the contrary,~~ 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) and (3) of [Regulation MAR]. A sanction can still be imposed if the Member State establishes that there was an illegitimate reason behind these transactions or orders to trade.

### Article 3a

#### *Recommendation or inducement to engage in insider dealing*

- ~~1. Member States shall take the necessary measures to ensure that recommendation or inducement to engage in insider dealing as defined in this Article constitutes a criminal offence at least in serious cases, when committed intentionally.~~
- ~~2. For the purposes of this Directive, recommending or inducing another person to engage in insider dealing arises where a person who possesses inside information according to Article 3(3), recommends or induces another person, on the basis of that information [but without disclosing it to the other person] to acquire or dispose of financial instruments to which that information relates.~~
- ~~3. Recommendation or inducement to engage in insider dealing shall be considered serious, for the purposes of this Article, at least in the cases provided for by Article 3(6)(b), (c) and (d).~~
- ~~4. This Article applies irrespective of whether the transaction or order actually takes place on a regulated market, MTF, OTF or over the counter.~~

#### *Improper disclosure of inside information*

1. Member States shall take the necessary measures to ensure that improper disclosure of inside information as defined in this Article constitutes a criminal offence at least in serious cases, when committed intentionally.
2. For the purposes of this Directive, improper 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.
3. For the purposes of paragraph 1 of this Article, improper disclosure of inside information shall be considered serious at least in the cases provided for by Article 3(8)(b), (c) and (d).

*Article 4*  
*Market manipulation*

1. Member States shall take the necessary measures to ensure that market manipulation as defined in this Article constitutes a criminal offence at least in serious cases.
2. For the purposes of this Directive, market manipulation arises ~~when a person intentionally engages in an activity or behaviour as described in Article 8 of Regulation (EU) No... of the European Parliament and the Council on insider dealing and market manipulation 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 person who entered into the transactions or issued the orders to trade establishes that his reasons for so doing are legitimate, and that 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;

3. Market manipulation shall be considered serious, for the purposes of this Article, at least in the following cases:
  - (a) when the conduct relates to a benchmark, or a significant number of financial instruments or related spot commodity contracts, or causes effects ~~, or is likely to cause effects,~~ on financial instruments or related spot commodity contracts traded on a significant number of trading venues in different Member States;
  - (b) when the conduct is performed in the exercise of the ~~agent's~~ person's employment, profession or duties, or of the exercise of a public office or of an office or profession in a regulatory or supervisory body, or of a position directly connected to a public office or regulatory or supervisory body.
4. The offences defined in accordance with this Article do not apply to accepted market practices. A sanction can still be imposed if the Member State establishes that there was an illegitimate reason behind these transactions or orders to trade.

#### *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 paragraphs 2 to 5 of Article 3, ~~3a~~ and Article 4 are 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 paragraphs 2 to 5 and 7 of Articles ~~3~~ and in Article 4 is punishable as a criminal offence.

*Article 6*

~~*Criminal sanctions*~~ *Penalties for natural persons*

Without prejudice to administrative measures and sanctions in accordance with [Regulation MAR], Member States shall take the necessary measures to ensure that the criminal offences referred to in Articles 3 to 5 are punishable by ~~criminal sanctions which are~~ 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 ~~where such offences have been committed~~ for their benefit by any person, acting either individually or as part of an organ of the legal person, and having 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*

Without prejudice to administrative measures and sanctions in accordance with [Regulation MAR] and with national law, Member States shall take the necessary measures to ensure that a legal persons held liable pursuant to Article 7 ~~are~~ is subject to punishable by effective, proportionate and dissuasive sanctions.

*Article 8a*  
*Interaction with [Regulation MAR]*

~~The application of administrative measures, penalties and fines as laid down in [Regulation MAR] shall be without prejudice to the power of Member States, in accordance with their national law, to investigate, prosecute and apply sanctions in relation to the criminal offences contemplated in this Directive.~~

*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*