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THE EUROPEAN UNION**

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from:	Working Party on Substantive Criminal Law (DROIPEN) (MAD)
on:	5 January 2012
No proposal:	16000/11 DROIPEN 125 EF 145 ECOFIN 717 CODEC 1811
Subject:	Summary of discussions

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**A. Adoption of the agenda**

The agenda as set out in CM 5899/11 was adopted.

**B. Proposal for a Directive of the European Parliament and of the Council on criminal sanctions for insider dealing and market manipulation (MAD)**

16000/11 + ADD 1 + ADD 2 + COR 1 DROIPEN 125 EF 145 ECOFIN 717 CODEC 1811

The Working Party began the examination of the proposal. After a presentation of the proposal by the Commission, delegations were invited to present their initial views on the instrument, highlighting issues of particular relevance. Subsequently, a reading of the text started, covering Articles 1-3.

The Presidency thanked delegations for their constructive contributions and committed approach to this new proposal and explained their approach to negotiations. Discussions would continue on 25 January 2012. Based on the outcome of discussions, the Presidency would propose certain among the issues raised to the reflection of delegations in view of further work on the draft.

## **1. Relations with Market Abuse Regulation (MAR) and other instruments on financial markets, scope and definitions**

The scope of application of MAD is partially dependent upon the content of the other instruments of the "package" presented by the Commission, currently under discussion in other preparatory bodies of the Council (proposals for: Directive on markets in financial instruments - "MiFID"; Regulation on markets in financial instruments and OTC - "MiFIR"; Regulation on insider dealing and market manipulation - "MAR").

Many delegations stressed the importance of ensuring coordination and consistency in the work on the different instruments, and the Presidency fully agreed with this. Coordination and reciprocal information should be provided in the forthcoming work of the different Working Parties. In particular, the Presidency has committed to inform DROIPEN of the developments in the discussions on those issues concerning the other instruments which are relevant for the definition of the content of MAD.

The substance of certain points of the Directive will be defined in the context of discussions on these other instruments. In this context several delegations supported cross-references; other delegations suggested that the Directive should in parallel contain definitions even for elements which refer to the content of the other instruments.

Most delegations welcomed the introduction of criminal sanctions for market abuse. Delegations also welcomed the extension of the scope of the 2003 Market Abuse Directive (Directive 2003/6/EC) to all financial instruments, even if some delegations expressed hesitations about its extension to organised trading facilities (OTFs).

Several delegations entered a reservation on the definition of "inside information" as discussed in the context of MAR negotiations.

## **2. Definitions of offences**

Some delegations have raised doubts concerning the present formulation of the proposed text for what concerns the definition of the offences; in particular, during the first discussion on Article 3 of MAD it has been noted that the description of insider dealing differs both from that provided for by the MAR (see Article 7) and from that provided for by the 2003 Market Abuse Directive (Directive 2003/6/EC). The need was stressed to ensure that the elements of the offences should be laid out with sufficient precision and clarity because of their criminal law nature.

## **3. Levels of penalties and types of sanctions**

The Commission proposal does not provide for approximation of the levels of penalties for the offences described in Articles 3 and 4 of the proposal. Instead, Article 9, in describing the review mechanism to be carried out after 4 years of operation of the Directive, expressly provides for the possibility that, following such a review, the Commission may propose the introduction of common levels of penalty.

While some delegations have stated their agreement with this solution, others are of the opinion that already in the framework of MAD the EU should approximate levels of penalties.

On the same topic, some delegations have suggested to include a measure of flexibility in the Directive for Member States to be able to take, in concrete cases, punitive measures of a non-criminal nature in reaction to the offences described; according to these delegations, this could be achieved by introducing in the Directive text along the lines of Recital (10) of Directive 2008/99/EC on the protection of the environment through criminal law. Other delegations disagreed with this proposal.

#### **4. Relation between criminal and administrative sanctions**

Many delegations have raised the issue concerning the relationship between the administrative penalties for insider dealing and market abuse provided for by the MAR and the criminal sanctions which should be applied in accordance with the Directive, in particular for what concerns possible tensions with the principle of *ne bis in idem*. At present, neither of the proposed instruments resolves the matter; in MAD, only Recital (18) contains a generic reference to the need to respect the principle of *ne bis in idem*, as enshrined by Article 50 of the Charter of fundamental rights, in the application of the Directive. For certain delegations a recital was not sufficient; they emphasised that a provision should specify clearly the circumstances in which administrative and in which circumstances criminal sanctions apply.

According to the Commission, this matter has not been regulated since the administrative sanctions provided for by the MAR do not attain a sufficient level of severity to be considered as equivalent to criminal sanctions for the purpose of applying the principle of *ne bis in idem*; however, this explanation was not deemed satisfactory by some delegations, which on the contrary advocate the need to regulate expressly the relationship between the two concurring system of sanctions, not leaving it to the individual Member State systems. Delegations which have raised the issue also pointed to different needs to be addressed, such as the independence of the administrative and judicial authorities which would be called to apply the different types of penalties in their legal systems.

#### **5. Insider dealing - specific offence concerning recommendation to trade.**

During the first reading of Article 3 of the draft Directive, some delegations have pointed out the inconsistency between this and Article 7 (3) of the MAR, which prohibits the person who holds inside information from recommending to another person to engage in insider dealing. They suggested, therefore, to add such a case to the list of offences provided for in the Directive. Other delegations have expressed doubts on the matter, indicating that the issue should be solved by the correct application of the rules on inciting, aiding and abetting provided by Article 5 of the draft Directive.

## **6. Opt-in by United Kingdom and Ireland.**

Both the United Kingdom and Ireland informed the Working Party about the fact that internal consultations are still ongoing with a view to deciding whether to exercise their right to opt in on the MAD. The Presidency recalled that the deadline for exercising the opt-in for these delegations expires on 10 February 2012.

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