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**NOTE**

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from:	Presidency
to:	Delegations
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Subject:	Proposal for a Directive of the European Parliament and of the Council on criminal sanctions for insider dealing and market manipulation - Outstanding issues

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**I. Introduction.**

1. On 26-27 April 2012 the JHA Council examined and endorsed a partial general approach on the draft Directive on criminal sanctions for insider dealing and market manipulation (MAD) on the basis of document 9019/12. That partial general approach covered Articles 5-12 of the Directive as well as the corresponding recitals. The Council also acknowledged that at a later stage of negotiations it might be necessary to revert to Articles 5-12 once Articles 1-4 have been agreed on.
2. Following this agreement, it has been decided that further negotiations on MAD should await the developments in the discussions - held in the Working Party on Financial Services - on the proposal for a Regulation on insider dealing and market manipulation (MAR), since many of the issues still open in MAD are dependent on the outcome of those discussions.

3. The Presidency notes that, since then, considerable progress has been made in the negotiations on MAR.<sup>1</sup> This allows DROIPEN to resume the examination of the outstanding issues in MAD, at least on those questions, which do not depend on the final agreement of a particular wording for the provisions of MAR.
4. The resuming of negotiations will build on the results of the work done on MAD under the Danish Presidency. Discussions should therefore take stock of the results of the questionnaire sent to delegations in February 2012<sup>2</sup> ("the questionnaire"), as well as of the partial general approach mentioned above.
5. Therefore, with the present note the Presidency would like to highlight the outstanding issues in MAD which it deems appropriate at this stage to submit to the attention of delegations in view of discussions at the next meeting of the DROIPEN Working Party on 9-10 July 2012.

## **II. Specific issues.**

### **A. Description of the offences.**

6. In responding to the questionnaire several delegations have highlighted the need for consistency between the description of the (administrative) offences in MAR and the (criminal) offences in MAD.
7. The Presidency is of the opinion that, even though an agreement seems to have been reached on MAR for what concerns the broad outline of the provisions (Articles 7 and 8 in particular) which define the administrative offences of insider dealing and market manipulation, it is still premature to engage in a discussion on how the corresponding provisions in MAD on criminal offences (Articles 3 and 4) should be worded.

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<sup>1</sup> The latest version of MAR can be found in document 11183/12.

<sup>2</sup> Document 6693/12; the replies submitted by delegations are set out in doc. 7623/12 + REV 1 ADD 1.

8. However, the Presidency subscribes to the observation, whereby from the responses to the questionnaire it appears evident that the majority of delegations do not consider that the distinction between the administrative offences described in MAR and the criminal offences described in Articles 3 and 4 of MAD should be based solely on the element of intent, as proposed by the Commission.
9. Indeed, while delegations consider intent to be an important element in the description of the criminal offences, the majority of delegations have suggested adding other criteria for distinction in the scope of application of the two instruments, in order to ensure that only the most serious facts of insider dealing and market manipulation will be made the object of provisions of criminal law.
10. While it is for a future meeting to discuss specific wording, it is certainly useful to begin already at this stage a reflection on which additional elements could be used in defining the minimum threshold of seriousness of the offence which Member States are required to implement in their national laws as criminal offences under MAD.
11. Building on the list of possible criteria already set out in document 7622/12, by way of example the following additional elements could be identified :
  - the amount of profit derived (or loss avoided) from the insider dealing or market manipulation, or the level of damage caused;
  - the overall value of the financial instruments traded in the case of insider dealing;
  - the alteration (or level of alteration) of the value of the financial instrument or commodity in the case of market abuse;
  - the personal quality of the offender, e.g. by distinguishing the position of primary vs. secondary insiders in the case of Article 3, or by requiring a particular professional quality of the offender under Article 4 MAD;
  - the funds originally used to commit market manipulation or insider dealing;
  - the nature of the financial instrument or commodity which is the object of the offence;

- the open or limited nature of the market on which the financial instrument or commodity is traded.
12. The Presidency would like to recall that, even though these elements may appear to reduce the scope of criminal relevance of market abuse, the provisions of MAD (neither those of MAR) would not limit the discretion of Member States to go beyond these indications, widening the scope of criminally relevant behaviour.
13. In the light of the above, delegations are invited to consider the above criteria and express their opinion in view of subsequent possible proposals for modifications to the text.

## **B. Ne bis in idem**

14. In replying to the questionnaire, the majority of delegations indicated that, while the simultaneous operation of criminal and administrative pursuits for the same act, based respectively on the national laws implementing MAD and MAR, may abstractly give rise to potential hazards to the respect of the *ne bis in idem* principle, it should be for the Member States to ensure that, both in the process of implementation and in the practical application, the principle is respected.
15. On the basis of this opinion, the Danish Presidency proposed to insert in MAD a recital drafted along these lines:

*"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 (EU) No...of the European Parliament and the Council on insider dealing and market manipulation. In the implementation and 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, as provided for by Article 50 of the Charter of Fundamental Rights of the European Union."*

16. The Presidency would like to hear the views of delegations on this suggestion or possible alternatives thereto.
17. In this context it should be highlighted that informal contacts with the European Parliament (LIBE Committee) have shown that the issue of *ne bis in idem* is an important issue in the upcoming negotiations with the co-legislator.

#### **F. Privilege against self-incrimination**

18. Numerous delegations stated the importance of ensuring the protection of the privilege against self-incrimination. This issue concerns, in particular, the exercise of investigative powers by the national authorities competent to ascertain the administrative offences covered by MAR, when these concern directly the person (or persons) suspected of the infraction. If these persons, in accordance with provisions of national law, are required to actively collaborate for the purposes of the administrative enquiry or to provide elements which could be prejudicial to their position, and the failure to comply with this requirement is subject to a sanction, the privilege against self-incrimination may be in jeopardy if the elements so gathered may subsequently be used against this person (or persons) in criminal proceedings concerning the same or related acts which amount to criminal offences.
19. The majority of delegations observed that this issue should rather be addressed in MAR, rather than in MAD. However, the latest draft text of MAR does not contain any indication in this respect. In the light of this, the Presidency would like to turn once again to delegations, asking whether they do not deem appropriate to consider the issue in the framework of MAD.
20. This potential hazard could be avoided, for example, by means of a provision in MAD stating that investigation and prosecution for the acts contemplated by MAD cannot be based on elements gathered by authorities competent to ascertain the administrative offences set out in MAR if these have been collected from the suspected or accused person without due regard to the privilege against self-incrimination.
21. Delegations are invited to state their views on this matter.

## **G. Approximation of penalties.**

22. The Presidency recalls to the attention of delegations the fact that the Commission proposal does not provide for an approximation of the levels or types of penalties for the offences covered by the Directive.
23. However, on basis of informal contacts with the European Parliament, the approximation of penalties will, with all probability, form part of a specific proposal for amendment of MAD. In the light of this, the Presidency would like to return to this issue and encourage further reflection among delegations, on the understanding that this issue has been discussed as part of the partial general approach approved by the JHA Council on 26-27 April 2012.
24. The issue concerning the approximation of penalties has been discussed at the informal meeting of the JHA Ministers in Copenhagen in January 2012, and in DROIPEN. While it appears that a majority of Member States is satisfied with the current wording of the Directive, several delegations have indicated that they consider it insufficient and that MAD should go further by including the approximation of the levels and/or types of sanctions. This opinion has been also stated by several delegations at the JHA Council of 26-27 April 2012.
25. One element which might be taken into consideration is that the approximation of the levels of sanctions for the criminal offences provided for in MAD would be beneficial to the effective operation of instruments of judicial cooperation. Indeed, the types of crimes contemplated by the Directive, by their nature, often have cross-border implications. Given the reference which is often made by EU instruments on judicial cooperation to the level of sanctions (e.g. Article 2 of the EAW Framework Decision), the fact that offences under MAD may fall below the appropriate threshold may severely hamper cross-border investigations.
26. Delegations are invited to express their views on this matter.

### III. Conclusions

27. The Presidency invites delegations to discuss the issues set out above. Delegations are welcome to submit written input at their earliest convenience to the functional mailbox: [secretariat.criminal-law@consilium.europa.eu](mailto:secretariat.criminal-law@consilium.europa.eu)
28. In the light of the debate, the Presidency intends to draft text proposals for one of the future meetings.
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