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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 (MAD) - Presidency Compromise Text

Following discussions at the meeting of the Working Party on Substantive Criminal Law on 9 July 2012, and on the basis of comments submitted by delegations at that meeting as well as subsequently in writing, discussions on the text of the Proposal for a Directive of the European Parliament and of the Council on criminal sanctions for insider dealing and market manipulation (MAD) can restart.

Delegations will find in the Annex a proposal by the Presidency for a compromise text of the Directive. Modifications with respect to the previous version of the Directive are highlighted in track changes.

The text also takes into consideration the modifications to the Directive proposed by the Commission in its amended proposal, submitted on 27 July 2012 (see doc. 13037/12).

Please note that in the current text the following recitals and Articles are based on the Partial General Approach reached under the Danish Presidency at the JHA Council on 27 April 2012;

- Recitals: 1-8, 11, 11a, 12, 14, 15, 17, 19
- Articles: 5-12.

Delegations are invited to submit their comments and proposals for amendment at the meeting of the Friends of the Presidency on 12 October 2012. The Presidency would be grateful for any comments which 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).

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 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 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 (EU) No...of the European Parliament and the Council on insider dealing and market manipulation, 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 the offences of insider dealing and market manipulation 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 (EU) No...of the European Parliament and the Council on insider dealing and market manipulation 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 (EU) No...of the European Parliament and the Council on insider dealing and market manipulation, 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 (EU) No...of the European Parliament and the Council on insider dealing and market manipulation. 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.³
- (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.
- (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.

³ OJ L 281, 23.11.1995, p. 31.

- (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 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 and public debt management 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.
3. 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.⁴

⁴ 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 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 (EU) No...of the European Parliament and the Council on insider dealing and market manipulation.
3. "Inside information" means information within the meaning of Article 6 of Regulation (EU) No...of the European Parliament and the Council on insider dealing and market manipulation.
4. **"Benchmark" means any published index or published figure within the meaning of Article 5.27 of Regulation (EU) No...of the European Parliament and the Council on insider dealing and market manipulation.**
5. **"Accepted market practice" means any activity within the meaning of Article 8a of Regulation (EU) No...of the European Parliament and the Council on insider dealing and market manipulation.**
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]**

Article 3⁵
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.

⁵ The text of Articles 3, 3a and 4 is entirely new with respect to previous drafts and is therefore not highlighted, for ease of reading.

6. Insider dealing shall be considered serious, for the purposes of this Article, at least in the following cases:
 - (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 has obtained the inside information as a result of the exercise of his employment, profession or duties;
 - (c) when the agent 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, alone or in conjunction with other persons.
7. This Article applies irrespective of whether the transaction or order actually takes place on a regulated market, MTF, OTF or over-the-counter.
8. 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 7a1., 2. and 3. of Regulation (EU) No...of the European Parliament and the Council on insider dealing and market manipulation.

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.

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.
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 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.

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 **Articles 3, 3a and 4** are punishable as criminal offences.
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** is punishable as a criminal offence.

Article 6

Criminal sanctions

Member States shall take the necessary measures to ensure that criminal offences referred to in Articles 3 to 5 are punishable by criminal sanctions which are effective, proportionate and dissuasive.

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 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

Member States shall take the necessary measures to ensure that legal persons held liable pursuant to Article 7 are 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 (EU) No...of the European Parliament and the Council on insider dealing and market manipulation.

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
