



EUROPEAN PARLIAMENT

2009 - 2014

Committee on Legal Affairs

2011/0297(COD)

20.6.2012

OPINION

of the Committee on Legal Affairs

for the Committee on Economic and Monetary Affairs

on the proposal for a directive of the European Parliament and of the Council
on criminal sanctions for insider dealing and market manipulation
(COM(2011)0654 – C7-0358/2011 – 2011/0297(COD))

Rapporteur: Alexandra Thein

PA_Legam

SHORT JUSTIFICATION

The introduction of criminal sanctions against market abuse is an important innovation and a welcome addition to the toolkit to combat market abusive behaviour. The rapporteur welcomes the fact that the Commission is, for the first time in this key area, making use of the new powers introduced by the Lisbon Treaty to approximate criminal-law provisions to ensure the effective implementation of harmonisation measures (Article 83(2) TFEU).

On the one hand, the proposed amendments seek to clarify that the liability of legal persons forms part of the existing national systems: i.e. that making legal persons punishable is only envisaged where this is already recognised in the Member States.

On the other hand, the *ne bis in idem* principle should be spelt out, particularly as regards the combination of criminal and administrative sanctions, so that this key principle is given the importance it merits.

It is also necessary to extend the scope of the proposed Commission evaluation report on the implementation of the Directive to encompass criminalisation of the attempt and the liability and punishment of legal persons, as particular attention should be paid to how these measures turn out in practice.

AMENDMENTS

The Committee on Legal Affairs calls on the Committee on Economic and Monetary Affairs, as the committee responsible, to incorporate the following amendments in its report:

Amendment 1

Proposal for a directive

Recital 1

Text proposed by the Commission

(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.

Amendment

(1) An integrated and efficient financial market ***and stronger investor confidence*** 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.

Amendment 2

Proposal for a directive Recital 7

Text proposed by the Commission

(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 **and 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. Convictions for market abuse offences under criminal law often result in extensive media coverage, which helps to deter potential offenders, as it draws public attention to the commitment of competent authorities to tackling market abuse.

Amendment 3

Proposal for a directive Recital 14

Text proposed by the Commission

(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

Amendment

(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. Convictions for market abuse offences under criminal law often result in extensive media coverage, which helps to deter potential offenders, as it draws public attention to the commitment of competent authorities to tackling market abuse.

the European Parliament and the Council on insider dealing and market manipulation, Member States should also extend liability to legal persons, including, whenever possible, criminal liability of legal persons.

the European Parliament and the Council on insider dealing and market manipulation, Member States should also extend liability to legal persons, including, whenever possible, criminal liability of legal persons, *where this is compatible with the national legislation applicable.*

Amendment 4

Proposal for a directive

Recital 18

Text proposed by the Commission

(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 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 for the same offence (Article 50).

Amendment

(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 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 for the same offence (Article 50). ***In this respect, Member States should ensure that the same offence is not punished by both criminal and administrative sanctions.***

Amendment 5

Proposal for a directive

Article 1 – paragraph 1

Text proposed by the Commission

1. This Directive establishes minimum rules for criminal sanctions for the most serious market abuse offences, namely insider dealing and market manipulation.

Amendment

1. This Directive establishes minimum rules for criminal sanctions for the most serious market abuse offences, namely insider dealing and market manipulation. ***This Directive shall only apply to***

transactions, orders or behaviours which would fall within Regulation (EU) No. ... of the European Parliament and the Council on insider dealing and market manipulation and which would be prohibited under that Regulation.

Justification

For consistency purposes, the criminal offences in MAD should be the same items of conduct prohibited in MAR, and therefore, the scope of both legal instruments should be aligned.

Amendment 6

**Proposal for a directive
Article 3 – introductory part**

Text proposed by the Commission

Member States shall take the necessary measures to ensure that the following conduct constitutes a criminal offence, when committed intentionally:

Amendment

Member States shall take the necessary measures to ensure that the following conduct constitutes a criminal offence, when committed intentionally **by a natural person**:

Justification

It should be clear that a natural person does not commit the offence of insider dealing in Article 3 (punishable as a criminal offence) unless he also knows that the information in question is indeed inside information. Insider dealing provisions in MAD should only be applicable to natural persons, since the scope of corporate liability should be left to national law.

Amendment 7

**Proposal for a directive
Article 3 – point a**

Text proposed by the Commission

(a) when in possession of inside information, using that information to acquire or dispose of financial instruments to which that information relates for one's own account or for the account of a third party. This also includes using inside

Amendment

(a) when **the person concerned is** in possession of inside information **and knows that the information is inside information**, using that information to acquire or dispose of financial instruments to which that information relates for one's

information to cancel or amend an order concerning a financial instrument to which that information relates where that order was placed before entering into possession of that inside information; or

own account or for the account of a third party. This also includes using inside information to cancel or amend an order concerning a financial instrument to which that information relates where that order was placed before entering into possession of that inside information; or

Amendment 8

Proposal for a directive

Article 3 – point b

Text proposed by the Commission

(b) disclosing inside information to any other person, unless such disclosure is made in the lawful course of the exercise of duties resulting from employment or profession.

Amendment

(b) ***when the person concerned is in possession of inside information and knows that the information is inside information***, disclosing inside information to any other person, unless such disclosure is made in the lawful course of the exercise of duties resulting from employment or profession.

Amendment 9

Proposal for a directive

Article 3 – point b a (new)

Text proposed by the Commission

Amendment

(ba) when the person concerned is in possession of inside information and knows that the information is inside information, recommending or inducing another person, on the basis of inside information, to acquire or dispose of financial instruments to which that information relates.

Justification

This is introduced to cover cases where a person who has inside information encourages someone else to deal without disclosing the information. With this provision, the person in question may not be inciting insider dealing, since the person incited is not engaged in insider dealing (since he never possesses the inside information). Similar wording is used in Article

7(3) of MAR (Commission proposal).

Amendment 10

Proposal for a directive

Article 3 – paragraph 1 a (new)

Text proposed by the Commission

Amendment

Points (a) and (ba) of paragraph 1 shall not apply unless the inside information had a material influence on the decision of the person concerned to acquire or dispose of the financial instruments or to recommend or induce another person to do so.

Justification

Entering into a transaction while possessing inside information should not alone constitute a wrongdoing. This defence makes clear that it is legitimate for a person to deal in financial instruments, to recommend or induce another person, when the inside information does not have a material influence on the decision to deal.

Amendment 11

Proposal for a directive

Article 8

Text proposed by the Commission

Amendment

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.

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. ***In accordance with the applicable national law, these sanctions can also include criminal proceedings against legal persons.***

Amendment 12

Proposal for a directive Article 8 a (new)

Text proposed by the Commission

Amendment

Article 8a

Combination of criminal and administrative sanctions

Member States shall ensure, in the context of the measures they take under this Directive, that conduct which constitutes a criminal offence and is subject to administrative measures or sanctions, is only punishable as a criminal offence. Member States shall further ensure that this conduct can be subject to administrative sanctions if the criminal sanction is not imposed.

Amendment 13

Proposal for a directive Article 9 – paragraph 1

Text proposed by the Commission

Amendment

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, in particular ***with regard to*** the appropriateness of introducing common minimum rules on types and levels of criminal sanctions.

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. ***It shall consider***, in particular, the appropriateness of introducing common minimum rules on types and levels of criminal sanctions ***and whether criminalising the attempt, and making legal persons liable and punishable, have been valuable measures.***

PROCEDURE

Title	Criminal sanctions for insider dealing and market manipulation		
References	COM(2011)0654 – C7-0358/2011 – 2011/0297(COD)		
Committee responsible Date announced in plenary	ECON 15.11.2011		
Opinion by Date announced in plenary	JURI 15.11.2011		
Rapporteur Date appointed	Alexandra Thein 21.11.2011		
Discussed in committee	26.3.2012	26.4.2012	30.5.2012
Date adopted	19.6.2012		
Result of final vote	+: -: 0:	13 8 0	
Members present for the final vote	Raffaele Baldassarre, Luigi Berlinguer, Sebastian Valentin Bodu, Christian Engström, Marielle Gallo, Giuseppe Gargani, Lidia Joanna Geringer de Oedenberg, Klaus-Heiner Lehne, Antonio Masip Hidalgo, Alajos Mészáros, Evelyn Regner, Francesco Enrico Speroni, Rebecca Taylor, Alexandra Thein, Cecilia Wikström, Tadeusz Zwiefka		
Substitute(s) present for the final vote	Piotr Borys, Cristian Silviu Buşoi, Eva Lichtenberger, Dagmar Roth-Behrendt, Axel Voss		
Substitute(s) under Rule 187(2) present for the final vote	Patrice Tirolien		