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Committee on Civil Liberties, Justice and Home Affairs

2011/0297(COD)

13.6.2012

OPINION

of the Committee on Civil Liberties, Justice and Home 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(*): Emine Bozkurt

(*) Associated committee – Rule 50 of the Rules of Procedure

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SHORT JUSTIFICATION

Adopted in early 2003, the Market Abuse Directive (MAD) 2003/6/EC, despite introducing a comprehensive framework to tackle insider dealing and market manipulation practices, has not achieved the objective to increase investor confidence and market integrity.

According to the report by the High-Level Group on Financial Supervision in the EU, one of the main reasons lies in the Member States sanctioning regimes, considered weak and heterogeneous.

Moreover, the Commission impact assessment highlights that the sanctions currently in place to fight market abuse offences are lacking impact and are insufficiently dissuasive, which results in ineffective enforcement of the Directive. In addition, the definition of which insider dealing or market manipulation offences constitute criminal offences diverges considerably from Member State to Member State. Since market abuse can be carried out across borders, this divergence undermines the internal market and leaves a certain scope for perpetrators of market abuse for forum shopping. The impact assessment concluded that criminal sanctions for the most serious market abuse offences were essential to ensure the effective implementation of the Union policy on market abuse.

The proposal for the Directive, based on Article 83 (2) of the TFEU, aims to implement the recommendations of the High-Level Group on Financial Supervision in the EU and of the European Commission impact assessment. It is to be seen as part of a package including also the proposal for a Regulation on insider dealing and market manipulation (market abuse) COM(2011)0651 final. In this view, the maximum consistency between the two legal instruments should be ensured. This implies that definitions of administrative and criminal offences should be consistent while at the same time respecting the principle of legal certainty by describing the elements of a criminal offence as precisely as possible to allow individuals to understand precisely what actions will make him/her criminally liable (amendments on Articles 3 and 4). On the other side, the principle of *ne bis in idem* should apply in order not to punish a person twice for the same fact (Amendment on Article 6 1 c) new).

As one of the main concerns raised on the current legal framework is the weak and heterogeneous sanctioning regime, harmonising at least the minimum of the maximum sanction seems more than appropriate (Amendment to Article 6 1 a) new and 6 1 b) new) .

AMENDMENTS

The Committee on Civil Liberties, Justice and Home 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 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

(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.***In light of the aftermath of the financial crisis, it has been evident that market manipulation has a potential for widespread damage on the lives of millions of people. The absence of harmonised criminal sanctions is rightly seen by citizens as creating an environment of impunity where market manipulators can thrive, taking advantage of a borderless market while operating***

from jurisdiction that are not prosecuting them or have deficient penal frameworks in dealing with these matters. In turn, this creates reasons for an increased societal perception of corruption and the corresponding lack of trust in the rule of law and the legitimacy of institutions. In addition, the imposition of criminal sanctions for market abuse offences will have an increased deterrent effect on potential offenders.

Amendment 2

Proposal for a directive Recital 12 a (new)

Text proposed by the Commission

Amendment

(12a) In order for the sanctions for the offences referred to in Articles 3 and 4 to be effective and dissuasive, a minimum of the maximum term of imprisonment should be set in this Directive.

Amendment 3

Proposal for a directive Recital 13 a (new)

Text proposed by the Commission

Amendment

(13a) Member States should fully respect the ne bis in idem and the favor rei principles and ensure that if an administrative sanction has already been applied, no criminal sanction shall be applied in relation to the same facts, in case the administrative and the criminal sanctions are of the same nature.

Amendment 4

Proposal for a directive
Recital 14 a (new)

Text proposed by the Commission

Amendment

(14a) Member States should take the necessary measures to ensure that law enforcement and judicial authorities or other services responsible for investigating or prosecuting the offences referred to in Articles 3 and 4 are appropriately trained. Member States should take the necessary measures to ensure that effective investigative tools are available for law enforcement and judicial authorities or other services responsible for investigating or prosecuting the offences referred to in Articles 3 and 4.

Amendment 5

Proposal for a directive
Recital 16 a (new)

Text proposed by the Commission

Amendment

(16a) Every conviction imposed according to this Directive should be promptly made public and include at least information on the type and nature of the offence, of the sanction and the identity of the convicted natural or legal person, to the extent that this would not seriously jeopardise the stability of financial markets or cause disproportionate damage to the parties involved.

Amendment 6

Proposal for a directive
Recital 17

Text proposed by the Commission

(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.

Amendment

(17) **Although at the moment limited statistics are available about the cross-border dimension of insider dealing and market manipulation, considering the integration of financial markets inside the Union, it can be safely assumed that many of these offences are not limited to transactions in one Member State only. Against that background,** 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.

Amendment 7

**Proposal for a directive
Recital 17 a (new)**

Text proposed by the Commission

Amendment

(17a) In order to ensure effective prosecution of cross-border cases, Member States should take the necessary measures to establish their jurisdiction over the offences referred to in Articles 3 and 4, where the offence has been committed in whole or in part within their territory or for the benefit of a natural or legal person residing or established in the territory of a Member State.

Amendment 8

Proposal for a directive Recital 18 a (new)

Text proposed by the Commission

Amendment

(18a) In implementing this Directive Member States should ensure procedural rights of suspected or accused persons in criminal proceedings and, in particular, should take into consideration the Council Resolution of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings¹, Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings², Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings³ and any other Union legal act or recommendation in this area.

¹ OJ C 295, 4.12.2009, p. 1.

² OJ L 280, 26.10.2010, p. 1.

³ OJ L 142, 1.6.2012, p. 1.

Justification

It is important to underline the importance of fundamental rights and notably procedural rights in criminal proceedings.

Amendment 9

Proposal for a directive Recital 19

Text proposed by the Commission

(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.

Amendment

(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. ***In particular, the Commission should seek to obtain information on the cross-border nature of many of the transactions constituting an offence according to this Directive, thus respecting the subsidiarity principle.***

Amendment 10

**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 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

(a) *possessing* inside information, ***and, while being aware of the nature of that information, using,*** that information ***directly or indirectly*** to acquire or dispose of, ***to recommend the acquisition or disposal of, or to induce another person 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 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 ***and was effectively cancelled or amended;***

Justification

This amendment applies the principle of legal certainty: the description of the elements of a criminal offence must be worded as precisely as possible to the effect that an individual shall be able to predict actions that will make him/her criminally liable

Amendment 11

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) disclosing inside information to any other person ***while being aware of the nature of that information***, unless such disclosure is made in the lawful course of the exercise of duties resulting from employment or profession;

Justification

This amendment applies the principle of legal certainty: the description of the elements of a criminal offence must be worded as precisely as possible to the effect that an individual shall be able to predict actions that will make him/her criminally liable

Amendment 12

Proposal for a directive Article 3 – point b a (new)

Text proposed by the Commission

Amendment

(ba) while in possession of inside information, recommending the acquisition or disposal of, or inducing another person to acquire or dispose of, financial instruments to which the information relates, or to cancel or amend an order concerning a financial instrument to which that information relates, without disclosing the inside information to that person.

Amendment 13

Proposal for a directive Article 5 – paragraph 1

Text proposed by the Commission

1. Member States shall take the necessary

Amendment

1. Member States shall take the necessary

measures to ensure that inciting, aiding and abetting the criminal offences referred to in Articles 3 and 4 are punishable as criminal offences.

measures to ensure that inciting, aiding and abetting ***and attempting to commit*** the criminal offences referred to in Articles 3 and 4 are punishable as criminal offences.

Amendment 14

Proposal for a directive

Article 6 – paragraph 1a (new)

Text proposed by the Commission

Amendment

1a. Member States shall take the necessary measures to ensure that the criminal offences referred to in point (a) of Article 3 and points (a), (b) and (c) of Article 4 are punishable by a maximum term of imprisonment of at least five years.

Justification

If the need for this legal instrument lies on the fact that Member States sanctioning regimes are in general weak and heterogeneous, sanctions should be to a certain extent harmonised.

Amendment 15

Proposal for a directive

Article 6 – paragraph 1 b (new)

Text proposed by the Commission

Amendment

1b. Member States shall take the necessary measures to ensure that the criminal offences referred to in points (b) and (ba) of Article 3 and in point (d) of Article 4 are punishable by a maximum term of imprisonment of at least two years.

Justification

If the need for this legal instrument lies on the fact that Member States sanctioning regimes

are in general weak and heterogeneous, sanctions should be to a certain extent harmonised.

Amendment 16

Proposal for a directive

Article 8 a (new)

Text proposed by the Commission

Amendment

Article 8a

Jurisdiction

Member States shall take the necessary measures to establish their jurisdiction over the offences referred to in Articles 3 and 4, where :

(a) the offence has been committed in whole or in part within their territory; or

(b) the offence has been committed for the benefit of a natural or a legal person residing or established in the territory of a Member State.

Amendment 17

Proposal for a directive

Article 8 b (new)

Text proposed by the Commission

Amendment

Article 8b

Ne bis in idem

Members States shall ensure that if an administrative sanction has already been applied, no criminal sanction shall be applied in relation to the same facts in case the administrative and the criminal sanctions are of the same nature.

Amendment 18

Proposal for a directive

Article 8 c (new)

Article 8c

Training and investigative tools

1. Member States shall take the necessary measures to ensure that law enforcement and judicial authorities or other services responsible for investigating or prosecuting the offences referred to in Articles 3 and 4 are appropriately trained.

2. Member States shall take the necessary measures to ensure that effective investigative tools are available for law enforcement and judicial authorities or other services responsible for investigating or prosecuting the offences referred to in Articles 3 and 4.

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	LIBE 15.11.2011
Associated committee(s) - date announced in plenary	24.5.2012
Rapporteur Date appointed	Emine Bozkurt 20.3.2012
Discussed in committee	21.3.2012
Date adopted	10.7.2012
Result of final vote	+: 45 –: 0 0: 4
Members present for the final vote	Jan Philipp Albrecht, Edit Bauer, Mario Borghezio, Rita Borsellino, Emine Bozkurt, Arkadiusz Tomasz Bratkowski, Simon Busuttil, Carlos Coelho, Ioan Enciu, Frank Engel, Monika Flašíková Beňová, Hélène Flautre, Kinga Göncz, Nathalie Griesbeck, Sylvie Guillaume, Monika Hohlmeier, Salvatore Iacolino, Sophia in 't Veld, Livia Járóka, Teresa Jiménez-Becerril Barrio, Timothy Kirkhope, Baroness Sarah Ludford, Monica Luisa Macovei, Svetoslav Hristov Malinov, Véronique Mathieu, Anthea McIntyre, Claude Moraes, Antigoni Papadopoulou, Georgios Papanikolaou, Carmen Romero López, Renate Sommer, Rui Tavares, Nils Torvalds, Wim van de Camp, Axel Voss, Josef Weidenholzer, Cecilia Wikström, Tatjana Ždanoka
Substitute(s) present for the final vote	Elena Oana Antonescu, Michael Cashman, Leonidas Donskis, Dimitrios Droutsas, Lorenzo Fontana, Hubert Pirker, Raúl Romeva i Rueda, Salvador Sedó i Alabart, Bogusław Sonik, Michèle Striffler
Substitute(s) under Rule 187(2) present for the final vote	Nadja Hirsch