

ROADMAP

Title of the initiative: **Revision of Market Abuse Directive**
Type of initiative (CWP/Catalogue/Comitology): CWP (strategic)
Lead DG/contact person/details: DG MARKT/G3
Expected date of adoption of the initiative (month/year): December 2010
Date of modification:
Version No: 1

Initial IA screening & planning of further work

A. Context and problem definition

(i) What is the political context of the initiative? (ii) How does this initiative relate to past and possible future initiatives, and to other EU policies?

The Market Abuse Directive (MAD) is an important part of the Financial Services Action Plan as it notably sets the legal framework to define, deter and sanction insider dealing and market manipulation. Five years of implementation have revealed that some areas of the Directive, notably its scope and some specific rules applicable to derivatives, could be improved. The crisis has also revealed the growing need, in order to deter market abuse and protect investors more effectively, to ensure competent administrative authorities have the necessary powers to investigate and sanction market abuse appropriately. The need for a review also originates in the objectives of diminishing, where appropriate, the administrative burden, particularly on SMEs, and clarifying certain provisions, such as rules on disclosure of inside information by issuers. Based on numerous meetings and contributions from stakeholders and regulators, there seems to be support for this approach.

The Revision of Market Abuse Directive will be one of the series of initiatives dealing with derivatives. The other initiatives are: Legislative proposal to improve transparency and stability in Derivatives markets planned for June 2010, Legislative initiative on short selling/CDS in October 2010, Revision of the Capital Requirements Directive (CRD IV) in December and a Review of Markets in Financial Instruments Directive in 2011.

What are the main problems identified?

Experience has shown that a number of regulatory gaps have arisen as a result of regulatory and market developments, resulting in potential risks to investor protection and market integrity which may not be fully addressed by the current Directive. The focus of the Market Abuse Directive on financial instruments traded on regulated markets has been overtaken by market developments in two respects. Firstly, in recent years Multilateral Trading Facilities (MTFs) have gained an increased share of liquidity and attracted a broader range of users - so these markets should be protected and promoted by similar rules as those applicable to regulated markets. Secondly, regulators have expressed concern recently that over-the-counter (OTC) transactions in derivatives (such as Credit Default Swaps) may be used to manipulate the value of the related instruments traded on regulated markets – and such market manipulation is not currently prohibited by the Directive. Closing these gaps will help to improve market integrity and investor confidence in the use of regulated markets and MTFs.

A second problem identified is that of inconsistent enforcement at national level, which limits the deterrent effect of the legislation and results in the risk of regulatory arbitrage. In particular, sanctions are conceived and applied in a very divergent fashion in the different Member States.

A third problem is the lack of a level playing field and unnecessary administrative burdens, especially on SMEs. Although the framework is sound and core concepts are harmonised by the Directive, some important provisions, like the obligation for issuers to disclose inside information, have not been understood in the same way across the EU. In addition, Member States have exercised differently the options and discretions they have in implementing the Directive, resulting

in the risk of regulatory arbitrage. Last but not least, experience has shown that some regulatory requirements have imposed an administrative burden on issuers (especially SMEs) and competent authorities which is out of proportion to the advantages that they have generated. Concerns have been expressed in particular about Member States imposing different reporting requirements on issuers for drawing up lists of insiders, and about the level of the threshold for the reporting of managers' transactions.

Who is affected?

Investors in financial instruments; to a lesser extent financial market operators; issuers; regulators; financial intermediaries.

(i) Is EU action justified on grounds of subsidiarity? (ii) Why can the objectives of the proposed action not be achieved sufficiently by Member States (necessity test)? (iii) As a result of this, can objectives be better achieved by action by the Community (test of EU Value Added)?

Yes. The objectives of preventing market abuse in the form of insider dealing and market manipulation cannot be sufficiently achieved by Member States acting alone; therefore, on a proposal from the European Commission, in 2003 a Directive was adopted by the European Parliament and the Council to achieve these objectives. In an increasingly integrated EU financial market, there is a need for a high level of convergence on issues such as the definition of abuses, market surveillance and enforcement. The problems identified relate largely to divergences at national level in sanction regimes, the use of options and discretions and the interpretation of key concepts, resulting in regulatory arbitrage and the lack of a level playing field. Therefore, these problems can best be resolved by revising the Directive to clarify certain provisions, reduce or eliminate options and discretions where possible and enhance consistency in national enforcement.

B. Objectives of EU initiative

What are the main policy objectives?

(i) enlarging the scope of the prohibition of market manipulation and insider dealing to cover new markets/instruments; (ii) increasing the deterrent effect of the Market Abuse Directive through more effective and consistent enforcement by competent administrative authorities, especially concerning sanctions; and (iii) moving towards a single rulebook by clarifying certain provisions, reducing options and discretions where appropriate and reducing administrative burdens, especially on SMEs.

Do the objectives imply developing EU policy in new areas or in areas of strategic importance?

No

C. Options

**(i) What are the policy options? (ii) What legislative or 'soft law' instruments could be considered?
(iii) Would any legislative initiatives go beyond routine up-date of existing legislation?**

As the shortcomings of the MAD are linked to its legal provisions, it is necessary to modify the Directive to address the abovementioned problems. Our favoured option is to deal with issues that can be gathered under 3 headings: (i) enlarging the scope of the prohibition of market manipulation and insider dealing to cover new markets/instruments; (ii) increasing the deterrent effect of the Directive through more effective and consistent enforcement by competent administrative authorities, especially concerning sanctions; and (iii) moving towards a single rulebook by clarifying certain provisions, reducing options and discretions where appropriate and reducing administrative burdens, especially on SMEs.

A number of amendments to the Directive and its implementing measures are likely to be necessary in order to achieve these objectives, notably:

- enlarging the scope of the MAD to cover new markets/instruments, notably to cover MTFs and market manipulation employing derivative instruments;
- enlarging the powers of competent authorities and increasing the level of sanctions that they can impose;
- clarifying certain provisions, such as the one on disclosure of inside information by issuers;
- diminishing the burden created by provisions on insider lists and on disclosure of transactions made by managers of listed issuers.

Does the action proposed in the options cut across several policy areas or impact on action taken/planned by other Commission departments?

No

Explain how the options respect the proportionality principle

Options are subject to public consultation and thorough impact assessment; calibrated solutions are provided for SMEs.

D. Initial assessment of impacts

What are the significant impacts likely to result from each policy option (cf. list of impacts in the Impact Assessment Guidelines pages 32-37), even if these impacts would materialise only after subsequent Commission initiatives?

Investors would benefit from increased protection and market integrity through the extension of the scope to markets and instruments not currently covered comprehensively by the current legislation. There would be a positive impact on investors and national competent authorities by making it easier for national authorities to detect and sanction market abuse. Issuers, investors and competent authorities would see a positive impact from the clarification of certain key concepts, such as the disclosure of inside information. Issuers and in particular SMEs would benefit from the reduction of administrative burden associated with the provisions on insider lists and managers transactions.

Could the options have impacts on the EU-Budget (above 5 Mio €) and/or should the IA also serve as the ex-ante evaluation, required by the Financial Regulation?

No

Could the options have significant impacts on (i) simplification, (ii) administrative burden or on (iii) relations with third countries?

Yes the proposal is expected to simplify the task of compliance by issuers and enforcement by competent authorities by clarifying certain key concepts and moving towards a single rulebook. The proposal is also expected to reduce the administrative burden on issuers, especially SMEs. Given the complexity of the policy area, the proposal should be accompanied by a risk-based implementation plan in order to propose to Member States suggestions to facilitate timely and correct implementation.

E. Planning of further impact assessment work

When will the impact assessment work start?

Work on an impact assessment has started.

(i) What information and data are already available? (ii) Will this impact assessment build on already existing impact assessment work or evaluations carried out? (iii) What further information needs to be gathered? (iv) How will this be done (e.g. internally or by an external contractor) and by when? (v) What type and level of analysis will be carried out (cf. principle of proportionate analysis)?

A call for evidence publicly launched between April and June 2009 presented a quite precise analysis of the issues and possible options. Around 90 contributions were received, including comments by CESR and ESME. Work on an impact assessment has started internally and will be completed by the autumn. Draft legislative modifications should be published for consultation in mid 2010.

Which stakeholders & experts have been/will be consulted, how and at what stage?

Various kinds of stakeholders (regulators; associations for issuers, banks, financial intermediaries, academics, expert groups...) have been and will be consulted, as outlined above.