



EUROPEAN COMMISSION

Brussels, 24.1.2013
C(2012) 263 final

Dr Norbert LAMMERT
President of the Bundestag
Platz der Republik 1
D – 11011 BERLIN

Dear President,

The Commission would like to thank the German Bundestag for its Opinion on the proposal for a Directive on criminal sanctions for insider dealing and market manipulation {COM(2011) 654 final} and apologises for the delay in replying.

The Commission welcomes the support expressed in the Opinion for the goal of the proposal to strengthen the confidence of investors in the financial markets through effective measures against insider dealing and market manipulation.

It fully shares the view of the Bundestag concerning the ultima ratio character of criminal law measures and the need to ensure legal certainty in the definitions of criminal offences.

Concerning the Bundestag's specific requests, the Commission would like to make the following observations:

The Commission takes due note of the request by the Bundestag for additional justification concerning the "essential" character of criminal law measures to ensure the effective implementation of the EU rules against market abuse.

Prior to presenting the proposal for a Directive, and following the methodology set out in its Communication "Towards an EU Criminal Policy – Ensuring the Effective Implementation of EU policies through criminal law",¹ the Commission conducted a thorough analysis of the legal and factual situation in the area of financial market regulation. The results of this analysis are set out in the Impact Assessment accompanying the proposal for a directive,² which was preceded by a public consultation and which shows why criminal law measures are considered essential to ensure the effective implementation of the EU policy against market abuse.³

In line with this analysis, the focus of the proposal for a directive is the approximation of the definitions of criminal offences to ensure that the same serious forms of abusive conduct are considered criminal offences throughout the EU while at the same time strengthening the administrative sanction regime through the proposal for a regulation⁴.

¹ *Ibid.*, pp. 7 and 8.

² SEC (2011) 1217 final of 20 October 2011.

³ See in particular pp. 52 – 57 with further references.

⁴ COM(2011)653 final of 20 October 2011.

With regard to the sanctions to be applied and in strict respect of the principle of proportionality, the Commission proposal leaves flexibility to the Member States as long as they ensure that the sanctions are "effective, proportionate and dissuasive" and have, for natural persons, a criminal character. Only if under the review report, to be presented after four years, further approximation of the sanctions were to be considered essential to ensure the effective implementation of the rules, would the Commission propose such additional measures.

With regard to the necessity to impose criminal sanctions on secondary insiders, the Commission considers that market abuse committed within insider rings by primary or secondary insiders has the same negative impact in terms of market integrity and investor protection. Therefore, it would not be appropriate to subject only the primary insiders to criminal sanctions and not those secondary insiders who knew or ought to have known that they were dealing on the basis of inside information. In fact, according to the data from the European Securities Markets Authority⁵, most countries provide for criminal sanctions for secondary insiders and the Commission considers that harmonization on this basis is the most appropriate way to proceed in order to ensure effective deterrence and cooperation between judicial authorities in cross-border cases.

Concerning the possibility to take into account the European Court of Justice's (ECJ) interpretation of the central concept of insider information, the Commission notes the concern of the German Bundestag, which has also been raised in the framework of the ongoing legislative procedure. The Danish and Cyprus Presidencies have kept open the discussion on the issue of the definition of inside information until the ECJ issued its ruling in the case mentioned by the German Bundestag. Now that the ECJ has ruled⁶, the Cyprus Presidency has incorporated the Gelt ruling in its proposed compromise. The Commission is therefore cooperating with the co-legislators to address this concern.

In relation to description of the offence of market manipulation, despite the fact that it is contained in a Directive, the aim of the Commission was to be as prescriptive as possible in the definition of that offence in order to take into account the principle of criminal legal certainty. The Commission notes the concern of the German Bundestag and will cooperate with the co-legislators to address this concern and clarify its objective.

The Commission hopes that these clarifications address the concerns raised by the German Bundestag and looks forward to continuing our political dialogue in the future.

Yours faithfully,

Maroš Šefčovič
Vice-President

⁵ Executive summary to the report on administrative measures and sanctions as well as criminal sanctions available in Member States under the market abuse directive (MAD), CESR/08-099, available at www.esma.eu and additional information received from Member States in 2010.

⁶ Case-law of the Court of Justice, Judgment of the Court (Second Chamber), 28 June 2012, In Case C-19/11, reference for a preliminary ruling under Article 267 TFEU from the Bundesgerichtshof (Germany), made by decision of 22 November 2010, received at the Court on 14 January 2011, in the proceedings Markus Gelt v Daimler AG