



EUROPEAN COMMISSION

Brussels, 21.02.2013
C(2013) 890 final

Mr Renato SCHIFANI
President of the
Senato della Repubblica
Piazza Madama, 1
IT – 00186 ROMA

Dear President,

The Commission would like to thank the Senato della Repubblica for its Opinion on the proposal for a Regulation of the European Parliament and of the Council on insider dealing and market manipulation (market abuse) {COM (2011) 651 final} (MAR) and 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) 654 final} (MAD), and apologises for the delay in replying.

With regard to the definition of inside information, the Commission's intention was to broaden the scope of this provision compared to the existing Directive on Market Abuse in order to ensure that relevant information which is not generally available could not be abused by trading ahead of publication. However the Commission notes the concern of the Senato della Repubblica, which has also been raised by the European Parliament and the Council, and is cooperating with the co-legislators to provide legal certainty in this regard, also in light of the recent decision of the European Court of Justice in the *Markus Geltl v Daimler AG* case.¹

With regard to market manipulation committed through algorithmic trading, the Commission can confirm the indicative nature of the list of actions mentioned in the proposal for a Regulation. The list should therefore not be regarded as exhaustive. On the possibility of introducing sanctions for traders who exceed certain thresholds for the submission and subsequent cancellation of orders, the European Parliament's Committee on Economic and Monetary Affairs is exploring the option of order to transaction ratios and related fees. The Commission considers this option worthy of examination in the context of its proposal for a Regulation on markets in financial instruments, because it agrees that such abusive order entry could have an improper influence on trading.

On the delay of the publication of information of systemic importance, the Commission agrees with the Senato della Repubblica that the issuer might not be fully aware of or understand the systemic importance of the information. For this reason, the Commission considers that any decision of the issuer should always be taken in consultation with the competent authorities and the relevant authorities responsible for financial stability.

¹ Case C-19/11.

The intention of the Commission in deleting the possibility for a competent authority to accept certain market practices in the proposal for a Regulation was to ensure a single rule book for the financial services in the Union. Therefore, we welcome the Senato della Repubblica's support for the Danish Presidency's proposal which foresees a role for the European Securities Markets Authority (ESMA) and the Commission in the approval of such market practices.

Moreover, in relation to your suggestion on the reporting obligation for those entities that exercise control over the issuer or that own more than 10% of the issuer's share capital, the Commission considers that these reporting requirements are outside the remit of a proposal for a Regulation on Market Abuse and would fit better in the regime on transparency reporting obligations.

On the obligation to draw up insiders' lists, the Commission agrees with the Senato della Repubblica that the obligation to draw up and update such lists should apply to the issuers or to those acting on their behalf. However, the Commission considers that in order to facilitate the supervisory role of the relevant competent authorities, only one insiders' list per issuer should be compiled and that it should list all persons who have access to the issuer's inside information, including those with contractual links to the issuer and the credit rating agencies. The Working Group of the Council is working in this direction.

On your suggestion to impose harsher sanctions in the case of market abuse that could have an impact on the sovereign bond market, even if this involves financial instruments that are not government bonds but that are correlated to them, the Commission would like to clarify that the new market abuse regime would not only protect sovereign bonds traded on a trading venue but also sanction any manipulative behaviour concerning any related CDSs or any other related financial instrument, irrespective of whether or not they are traded on a trading venue. As a complement, in order to increase the deterrent effect of the market abuse regime, the proposal for a Directive has introduced the obligation for Member States to provide for criminal sanctions in the case of any intentional manipulative behaviour.

As to the Directive on Criminal Sanctions for Market Abuse, the European Commission agrees with the Senato della Repubblica that the proposal should in principle not exclude the possibility for a criminal and an administrative sanction to be imposed in connection with the same offence. However, sanctions must be imposed by competent authorities in full respect of the Charter of Fundamental Rights and in particular the ne bis in idem principle. The Commission will continue to assist the co-legislators in finding a solution in this respect.

The Commission shares the opinion of the Senato della Repubblica that criminal sanctions are essential and should be available for the most serious market abuse offences across the European Union. At the same time, the Commission considers that a Regulation is the most appropriate legal instrument to define the market abuse framework in the Union and to achieve the objective of a single rulebook in the Union. The direct applicability of a Regulation would reduce regulatory complexity and offer greater legal certainty for those subject to the legislation across the Union, introduce a harmonised set of core rules and contribute to the better functioning of the Single Market. As Article 83 (2) TFEU does not allow a Regulation as a legal instrument for harmonising criminal sanctions, the Commission sees no other possibility than the co-existence of a Directive and a Regulation.

The Commission hopes that these clarifications address the comments and concerns raised in your Opinion and looks forward to continuing our political dialogue in the future.

Yours faithfully,

*Maroš Šefčovič
Vice-President*