



EUROPEAN COMMISSION
Impact Assessment Board

25 FEB. 2011

Brussels,
D(2011)

Opinion

Title

Impact assessment on a legislative initiative of the European Parliament and of the Council on Market Abuse (draft of 27 January 2011)

(A) Context

The Market Abuse Directive (MAD) aims to increase investor confidence and market integrity by prohibiting those who possess inside information from trading in related financial instruments, and by prohibiting the manipulation of markets through practices such as spreading false information or rumours and conducting trades to manipulate prices. In the light of the current economic and financial crisis, the Group of Twenty (G20) agreed to strengthen financial supervision and regulation. In its Communication on "Ensuring efficient, safe and sound derivatives markets: future policy actions" the Commission undertook to extend the MAD to cover derivatives markets. A review of sanctioning powers and their practical application has been carried out in the Commission Communication on sanctions in the financial services sector. This IA report accompanies the proposal to extend and update the MAD. It will be one element in a larger package of measures to improve the transparency and integrity of financial markets.

(B) Overall assessment

While the IA report presents a considerable amount of relevant information and analysis, it requires further work on several aspects. It should clarify the scope of the initiative on the basis of a clear assessment of the extent of the problem, including an evaluation of the effectiveness of the existing legal framework. The report should explain how this initiative is related to other financial regulations, especially the Markets in Financial Instruments Directive. The report should then improve the presentation and assessment of the options, including a clear presentation of the expected overall costs and benefits of the preferred combination of options. The assessment of the proportionality of the proposed actions in terms of the requirements of the Fundamental Rights Charter should be integrated in the main text of the report. Finally, the report should justify the need to harmonise criminal law on the basis of the experience of Member States who have already introduced criminal sanctions.

(C) Main recommendations for improvements

(1) Clarify the scope of the initiative in relation to the extent of the problem. The report should explain how the performance of existing legislation has been evaluated, and how the evaluation results have informed the baseline and the problem description. It should make a greater effort to provide evidence-based estimates of the size of the damage done to the European economy as a consequence of abusive practices in the markets under consideration. When presenting the UK FSA analysis and the results of a study done by Capital Markets CRC, the report should put them into context and add caveats regarding the interpretation of the findings. It should further show to what extent the problems are linked to deficiencies in the regulation of markets within the scope of the Directive, and to what extent they originate from markets currently not regulated under the Directive. It should explain to what extent insufficient enforcement in relatively small markets may lead to regulatory arbitrage that damages (perceived) overall market integrity. In the description of the baseline the report should also take into account how other financial regulations – the Regulation on Short Selling, Regulation on OTC derivatives and in particular the Markets in Financial Instruments Directive (MIFID) - complement the MAD.

(2) Better present and assess the policy options. The report should better structure and present the policy options to improve the transparency of the report and to avoid the impression that the numerous proposed actions are unrelated. While combining these different alternatives into more aggregate options would have no clear value added, the report should at least present the package of preferred choices more clearly, and provide an assessment of the expected costs and benefits for the combined preferred option. In the presentation of the expected costs, the report should treat different cost categories in a proportionate manner and provide a more in-depth analysis of the most costly measures and of the distribution of cost impacts across sectors.

(3) Provide a concise assessment of the relevant Fundamental Rights issues in the main text. The Fundamental Rights Charter calls for a justification of the proportionality of proposed legislative actions that affect citizens' property and privacy rights. The report should provide, in the main text, concise summaries of the assessment presented in the Annex, especially in the areas of investigative powers and sanctions. It should clarify the difference in treatment between administrative and criminal offenses.

(4) Justify why approximation of criminal laws is essential for an effective EU policy. The report should substantiate the claim that approximation of criminal law is an essential precondition for an effective and enforceable legislative framework. This should be done by evaluating the available experiences with stricter criminal sanctions in the Member States which have introduced such measures on top of the existing Directive. Finally, the report should address possible subsidiarity issues with regard to the harmonisation of criminal law and present the views of stakeholders and Member States on this issue.

Some more technical comments have been transmitted directly to the author DG and are expected to be incorporated in the final version of the impact assessment report.

(D) Procedure and presentation

The presentation of the report should be rearranged to improve its transparency and accessibility to the non-expert reader. Stakeholder views should be more systematically reflected in the main text, particularly those of investors. A further effort should be made to present the main issues in no more than 30 pages, with clear references to deeper analysis or background information in the Annexes.

(E) IAB scrutiny process

Reference number	2009/MARKT/043
External expertise used	No
Date of IAB meeting	23 February 2011