

Criminal sanctions for market abuse (market abuse directive)

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OPINION OF THE EUROPEAN CENTRAL BANK

The ECB's opinion is given in response to requests from the Council of the European Union for opinions on the following :

- a [proposal for a directive](#) on markets in financial instruments repealing Directive 2004/39/EC of the European Parliament and of the Council;
- a [proposal for a regulation](#) on markets in financial instruments and amending Regulation (EMIR) on OTC derivatives, central counterparties and trade repositories;
- this **proposal for a directive** on criminal sanctions for insider dealing and market manipulation (MAD Regulation); and
- a [proposal for a regulation](#) on insider dealing and market manipulation (market abuse) (MAR Regulation).

The ECB supports the proposed measures to improve the regulation of markets in financial instruments as an important step towards strengthening the protection of investors and creating a sounder and safer financial system in the European Union. It makes the following general observations:

Single European rulebook in the financial sector and ECB's advisory role: the ECB strongly supports the development of a single European rulebook for all financial institutions. It recommends ensuring that only framework principles reflecting basic political choices and substantive matters remain subject to the ordinary legislative procedure and that technical rules should be adopted as delegated or implementing acts as appropriate through the prior development of draft regulatory or draft implementing

standards by the European Supervisory Authorities (ESAs).

The ECB expects to be consulted as appropriate in due time on these proposed Union acts. Additionally, it recommends ensuring cross-sectoral consistency of Union financial services legislation.

Powers of competent authorities, role of ESMA and of macro-prudential authorities: the ECB welcomes that the proposed framework strengthens and aligns the powers of the authorities supervising investment firms and markets in financial instruments as well as the exercise of their investigatory powers, putting special emphasis on cross-border cooperation.

It supports the strong role of the European Securities and Market Authority (ESMA) in the proposed framework and notably with regard to the facilitation and coordination function and the development of technical standards. It recommends:

- further improvements in the cooperation and exchange of information within the European System of Financial Supervision and between supervisory authorities and ESCB central banks, including the ECB, when this information is relevant for the performance of their respective tasks;
- setting up and enhancing adequate cooperation procedures with macro-prudential authorities where threats to the stability of financial system have to be assessed. This might imply cooperation between competent authorities and the national macro-prudential authorities or, in other instances, cooperation by ESMA with the European Systemic Risk Board (ESRB).

Moreover, to ensure transparency and consistency of the administrative sanctions adopted within the Union, Member States should notify the Commission and ESMA of the applicable national rules and any subsequent amendments to them.

Review of Directive 2003/6/EC (market abuse)

- **General provisions:** the ECB supports the Commission's proposal to expand the scope of the market abuse framework.

The prohibitions and requirements in the proposed MAR will also apply to actions carried out outside the Union, to hinder circumvention by moving activities outside the Union. For the effective control and sanctioning of such actions, the ECB considers cooperation agreements with third countries essential. In this respect, the ECB welcomes that the proposed MAR addresses this and also provides for ESMA to coordinate and facilitate this process through templates. Against this background, the ECB recommends extending the exclusion regime to monetary and public debt management activities in some cases also beyond the Union.

The ECB welcomes that the proposed MAR illustrates specific cases of market manipulation, referring to new trading techniques such as **algorithmic trading** including high-frequency trading. As mentioned above, although algorithmic trading practices may have legitimate purposes, they may also present a considerable risk, as they may disturb the normal functioning of the market and increase volatility, which would not serve the public interest. The ECB therefore welcomes strict monitoring of such trading techniques to protect the orderly functioning of the market and the public interest.

The proposed MAR implicitly identifies trading at the close of the market as market manipulation or an attempt to engage in market manipulation. The ECB would recommend a more detailed analysis or improvement of this definition of market manipulation.

- **Definition of inside information:** the ECB welcomes the scope of the definition of inside information. However, the reference to the commodity suggests that the spot market of a given commodity can be used to manipulate the derivatives market for the same commodity or other commodities and vice versa. A clearer definition should be provided, since, as the proposed MAR implicitly assumes, the spot and derivatives markets are interconnected both across commodities and borders and as such it is difficult to understand what type of spot trading will be able to affect only the spot market.

- **Disclosure of inside information of systemic importance:** the proposed MAR requires an issuer of financial instruments to inform the public as soon as possible of inside information which directly concerns the issuer. Moreover, the proposed MAR provides, as a new element of the disclosure regime, that a competent authority may ex ante permit the delay of the public disclosure by the issuer where: (i) the information is of systemic importance; (ii) it is in the public interest to delay its publication; and (iii) the confidentiality of information may be ensured.

The ECB supports further enhancement of the legal framework for delayed disclosure under the proposed MAR. The following comments have been made:

- in the case of financial institutions, the assessment of whether the information is of systemic importance, and whether a delay of disclosure is in the public interest, should be made in close cooperation with the national central bank and the national supervisory authority, and — if different from the central bank or supervisor — with the macro-prudential authority;
- appropriate and efficient procedures to ensure timely involvement of these authorities should be put in place at national level, underpinned by a set of principles at Union level;
- where justified by systemic importance and public interest, the competent authority should be empowered to order the delay of publication;

- notably information on central bank lending or other liquidity facilities provided to a particular credit institution, including emergency liquidity assistance, may need to be kept confidential to contribute to the stability of the financial system as a whole and maintain public confidence in a crisis.

- ***Criminal sanctions for insider dealing and market manipulation***: the ECB welcomes the proposed MAD provisions defining minimum rules for criminal sanctions for the most serious market abuse offences. These rules are essential to ensure the effectiveness and success of the legislative framework and thereby the effective implementation of Union policy on fighting market abuse. Moreover, equal, strong and deterrent sanctions regimes against financial crimes and their consistent and effective enforcement are crucial components of the rule of law, as conducive to safeguarding financial stability.