

Financial markets: insider dealing and market abuse (repeal. Directive 89/592/EEC)

2001/0118(COD) - 19/07/2002 - Council position

The common position follows the approach adopted in the Commission's proposal as amended by the European Parliament and only differs on a few points. Of the 77 amendments proposed by the European Parliament, 60 have been fully accepted and incorporated in the common position, 10 have only been partly accepted. The main changes introduced in the common position are the following: - preamble : the recitals embody the EP amendments about comitology procedure; a single competent authority; sanctions; on co-operation; respect of Human Rights; the line of the EP on terrorist attacks; on transparency, equal treatment and preventative measures; on 'insider dealing'; on take-over cases. The common position also takes on board the elements of EP amendment on the territorial scope of the Directive . Finally, another recital incorporates the wish of the EP to introduce "frontrunning" into the scope of this Directive. - defintions : regarding the definition of 'market manipulation', the Common Position takes into account the European Parliament's view to reduce the broad scope of application of an effect based definition by introducing two cumulative defences (legitimate reasons and accepted market practices). Regarding the sub-definition of 'dissemination of false or misleading information', the European Parliament proposes the introduction of knowledge and profit tests for any person concerned. The Council introduced a knowledge test in the definition applicable to anybody and a profit test applicable to journalists only. Therefore, any possible exemption for journalists by Member States, as initially proposed, was deleted. The Common Position takes also into account European Parliament's amendments by incorporation of the initially annexed list of non-exhaustive examples of market manipulation into the Article itself. Regarding the definition of 'Financial Instruments', the Common Position takes into account the European Parliament's view to incorporate the initially annexed list of financial instruments into the Article itself and to extend it to any future instrument which will be admitted on a regulated market. The Common Position takes largely into account the European Parliament's view on the definition of 'market practices'. It also integrates the European Parliaments introduction of a definition of 'Person' and of 'Competent authority'. The Common Position fully respects wishes of the European Parliament regarding comitology. Following the 11 September events, the Common Position includes persons having criminal activities into the circle of 'primary insiders', as endorsed by the European Parliament in first reading. It also integrates attempts and provides for exempting transactions based on obligations resulting from agreements concluded before becoming insider. In order to reduce the broad scope of inside information to be publicly disclosed by issuers of financial instruments, the Common Position limits the obligation to information which directly concerns such issuers. It introduces as well the European Parliament's amendment about web-posting of inside information by issuers. Concerning delaying public disclosure of inside information, the Council decided to follow partially the European Parliament's amendment about prior information to the competent authority by the issuer of this delay. The European Parliament had asked for mandatory information of this delay to competent authority. Instead, the Common Position leaves discretion to Member States to provide for such a prior information. The Commission thinks this is a sensible compromise between the wishes of the European Parliament and the Commission's initial proposal (no provision on this aspect). The Common Position is in line with the European Parliament's amendments clarifying the non-application of the selective disclosure rule and deletes the initially proposed exemption for credit rating agencies. The Common Position takes largely on board the European Parliament's amendment on mandatory disclosure of trades by corporate insiders. It also introduces the possibility for Member States to take into account specific regulation (including self-regulation) to ensure fair presentation of research and disclosure of interests or conflicts of interest. In addition, it takes on board the principle of a European Parliament's amendment on structural measures to be taken by market operators against market abuse. The Common Position embodies the European Parliament's amendment on introducing a general clause for competent authorities to intervene in order to guarantee that the public are correctly informed. The Common Position follows in part an amendment from the European

Parliament, by introducing an obligation of dissemination of statistics by public institutions in a fair way. The Common Position deletes the Commission's proposal to forbid financial intermediaries to enter into suspicious transactions. Instead, the Common Position takes into account the European Parliament's amendment about mandatory notification of suspicious trades by intermediaries to the competent authority. The Common Position incorporates the European Parliament's amendment to extend the exemption from the application of the Directive to local authorities in order to carry out their debt management. The Common Position takes into account European Parliament's amendment on comitology in order to define the application of safe harbours. In line with the European Parliament, the Common Position has introduced the exemption of public disclosure of inside information for issuers who did not request or approve admission to trading in a Member State. The Common Position adds, in line with the European Parliament, two powers as compared to the original proposal of the European Commission: power of injunction and suspension of trading. In line with the European Parliament, the Common Position clarifies that criminal sanctions can still be provided by Member States, but are not dealt by this Directive (principle of subsidiarity). Following European Parliament's amendment, the Common Position requests the Commission to draw up an informative list of administrative measures and sanctions. The Commission believes such a list could be helpful for reaching more homogeneous European standards. In line with the European Parliament, the Common Position provides for exemption of public disclosure of administrative measures or sanctions in case of serious jeopardy of the markets. In case of non-compliance from a competent authority to co-operate with the competent authority of another Member State, the Common Position provides for discussion of such case in the Committee of European Securities Regulators (CESR). Although the amendment of the European Parliament (amendments 83 and 84) to establish a system of arbitration has not been taken on board, the Commission thinks the Common Position has found a fair compromise, increasing pressure on competent authorities to comply with the co-operation requirements. Lastly, the common position has extended the period of transposition for Member States from 12 to 18 months. The Commission recognises that some Member States need an extended transposition period due to their constitution.