

**COMMON POSITION (EC) No 50/2002****adopted by the Council on 19 July 2002****with a view to adopting Directive 2002/.../EC of the European Parliament and of the Council of  
... on insider dealing and market manipulation (market abuse)**

(2002/C 228 E/03)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE  
EUROPEAN UNION,

Having regard to the Treaty establishing the European  
Community, and in particular Article 95 thereof,

Having regard to the proposal from the Commission <sup>(1)</sup>,

Having regard to the opinion of the Economic and Social  
Committee <sup>(2)</sup>,

Having regard to the opinion of the European Central Bank <sup>(3)</sup>,

Acting in accordance with the procedure laid down in Article  
251 <sup>(4)</sup>,

Whereas:

- (1) A genuine single market for financial services is crucial for economic growth and job creation in the Community.
- (2) An integrated and efficient financial market requires market integrity. The smooth functioning of securities markets and public confidence in markets are prerequisites for economic growth and wealth. Market abuse harms the integrity of financial markets and public confidence in securities and derivatives.
- (3) The Commission communication of 11 May 1999 entitled 'Implementing the framework for financial markets: Action plan' identifies a series of actions that are needed in order to complete the single market for financial services. The Lisbon European Council of April 2000 called for the implementation of that action plan by 2005. The action plan stresses the need to draw up a directive against market manipulation.
- (4) At its meeting on 17 July 2000, the Council set up the Committee of Wise Men on the Regulation of European Securities Markets. In its final report, the Committee of Wise Men proposed the introduction of new legislative techniques based on a four-level approach, namely

framework principles, implementing measures, cooperation and enforcement. Level 1, the Directive, should confine itself to broad general 'framework' principles while level 2 should contain technical implementing measures to be adopted by the Commission with the assistance of a committee.

- (5) The resolution adopted by the Stockholm European Council of March 2001 endorsed the final report of the Committee of Wise Men and the proposed four-level approach to make the regulatory process for Community securities legislation more efficient and transparent.
- (6) The resolution of the European Parliament of 5 February 2002 on the implementation of financial services legislation also endorsed the Committee of Wise Men's report, on the basis of the solemn declaration made before Parliament the same day by the Commission and the letter of 2 October 2001 addressed by the Internal Market Commissioner to the chairman of Parliament's Committee on Economic and Monetary Affairs with regard to the safeguards for the European Parliament's role in this process.
- (7) The measures necessary for the implementation of this Directive should be adopted in accordance with Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission <sup>(5)</sup>.
- (8) According to the Stockholm European Council, level 2 implementing measures should be used more frequently, to ensure that technical provisions can be kept up to date with market and supervisory developments, and deadlines should be set for all stages of level 2 work.
- (9) The European Parliament should be given a period of three months from the first transmission of draft implementing measures to allow it to examine them and to give its opinion. However, in urgent and duly justified cases, this period may be shortened. If, within that period, a resolution is passed by the European Parliament, the Commission should re-examine the draft measures.
- (10) New financial and technical developments enhance the incentives, means and opportunities for market abuse: through new products, new technologies, increasing cross-border activities and the Internet.

<sup>(1)</sup> OJ C 240 E, 28.8.2001, p. 265.

<sup>(2)</sup> OJ C 80, 3.4.2002, p. 61.

<sup>(3)</sup> OJ C 24, 26.1.2002, p. 8.

<sup>(4)</sup> Opinion of the European Parliament of 14 March 2002 (not yet published in the Official Journal), Council Common Position of 19 July 2002 and decision of the European Parliament of ... (not yet published in the Official Journal).

<sup>(5)</sup> OJ L 184, 17.7.1999, p. 23.

- (11) The existing Community legal framework to protect market integrity is incomplete. Legal requirements vary from one Member State to another, leaving economic actors often uncertain over concepts, definitions and enforcement. In some Member States there is no legislation addressing the issues of price manipulation and the dissemination of misleading information.
- (12) Market abuse consists of insider dealing and market manipulation. The objective of legislation against insider dealing is the same as that of legislation against market manipulation: to ensure the integrity of Community financial markets and to enhance investor confidence in those markets. It is therefore advisable to adopt combined rules to combat both insider dealing and market manipulation. A single directive will ensure throughout the Community the same framework for allocation of responsibilities, enforcement and cooperation.
- (13) Given the changes in financial markets and in Community legislation since the adoption of Council Directive 89/592/EEC of 13 November 1989 coordinating regulations on insider dealing<sup>(1)</sup>, that Directive should now be replaced, to ensure consistency with legislation against market manipulation. A new Directive is also needed to avoid loopholes in Community legislation which could be used for wrongful conduct and which would undermine public confidence and therefore prejudice the smooth functioning of the markets.
- (14) This Directive meets the concerns expressed by the Member States following the terrorist attacks on 11 September 2001 as regards the fight against financing terrorist activities.
- (15) Insider dealing and market manipulation prevent full and proper market transparency, which is a prerequisite for trading for all economic actors in integrated financial markets.
- (16) Inside information is any information of a precise nature which has not been made public, relating, directly or indirectly, to one or more issuers of financial instruments or to one or more financial instruments. Information which could have a significant effect on the evolution and forming of the prices of a regulated market as such could be considered as information which indirectly relates to one or more issuers of financial instruments or to one or more related derivative financial instruments.
- (17) As regards insider dealing, account should be taken of cases where inside information originates not from a profession or function but from criminal activities, the preparation or execution of which could have a significant effect on the prices of one or more financial instruments or on price formation in the regulated market as such.
- (18) Use of inside information can consist in the acquisition or disposal of financial instruments by a person who knows, or ought to have known, that the information possessed is inside information. In this respect, the competent authorities should consider what a normal and reasonable person would know or should have known in the circumstances. Moreover, the mere fact that market-makers, bodies authorised to act as counterparties, or persons authorised to execute orders on behalf of third parties with inside information confine themselves, in the first two cases, to pursuing their legitimate business of buying or selling financial instruments or, in the last case, to carrying out an order dutifully, should not in itself be deemed to constitute use of such inside information.
- (19) Member States should tackle the practice known as 'front running', including 'front running' in commodity derivatives, where it constitutes market abuse under the definitions contained in this Directive.
- (20) A person who enters into transactions or issues orders to trade which are constitutive of market manipulation may be able to establish that his reasons for entering into such transactions or issuing orders to trade were legitimate and that the transactions and orders to trade were in conformity with accepted practice on the regulated market concerned. A sanction could still be imposed if the competent authority established that there was another, illegitimate, reason behind these transactions or orders to trade.
- (21) The competent authority may issue guidance on matters covered by this Directive, e.g. definition of inside information in relation to derivatives on commodities or implementation of the definition of accepted market practices relating to the definition of market manipulation. This guidance should be in conformity with the provisions of the Directive and the implementing measures adopted in accordance with the comitology procedure.
- (22) Member States should be able to choose the most appropriate way to regulate persons producing or disseminating research concerning financial instruments or issuers of financial instruments or persons producing or disseminating other information recommending or suggesting investment strategy, including appropriate mechanisms for self-regulation, which should be notified to the Commission.

<sup>(1)</sup> OJ L 334, 18.11.1989, p. 30.

- (23) Posting of inside information by issuers on their Internet sites should be in accordance with the rules on transfer of personal data to third countries as laid down in Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the movement of such data <sup>(1)</sup>.
- (24) Prompt and fair disclosure of information to the public enhances market integrity, whereas selective disclosure by issuers can lead to a loss of investor confidence in the integrity of financial markets. Professional economic actors should contribute to market integrity by various means. Such measures could include, for instance, the creation of 'grey lists', the application of 'window trading' to sensitive categories of personnel, the application of internal codes of conduct and the establishment of 'Chinese walls'. Such preventive measures may contribute to combating market abuse only if they are enforced with determination and are dutifully controlled. Adequate enforcement control would imply for instance the designation of compliance officers within the bodies concerned and periodic checks conducted by independent auditors.
- (25) Modern communication methods make it possible for financial market professionals and private investors to have more equal access to financial information, but also increase the risk of the spread of false or misleading information.
- (26) Greater transparency of transactions conducted by persons discharging managerial responsibilities within issuers and, where applicable, persons closely associated with them, constitutes a preventive measure against market abuse. The publication of those transactions on either an individual or an aggregated basis can also be a highly valuable source of information to investors.
- (27) Market operators should contribute to the prevention of market abuse and adopt structural provisions aimed at preventing and detecting market manipulation practices. Such provisions may include requirements concerning transparency of transactions concluded, total disclosure of price-regularisation agreements, a fair system of order pairing, introduction of an effective atypical-order detection scheme, sufficiently robust financial instrument reference price-fixing schemes and clarity of rules on the suspension of transactions.
- (28) This Directive should be interpreted, and implemented by Member States, in a manner consistent with the requirements for effective regulation in order to protect the interests of holders of transferable securities carrying voting rights in a company (or which may carry such rights as a consequence of the exercise of rights or conversion) when the company is subject to a public takeover bid or other proposed change of control. In particular, this Directive does not in any way prevent a Member State from putting or having in place such measures as it sees fit for these purposes.
- (29) Having access to inside information relating to another company and using it in the context of a public takeover bid for the purpose of gaining control of that company or proposing a merger with that company should not in itself be deemed to constitute insider dealing.
- (30) Since the acquisition or disposal of financial instruments necessarily involves a prior decision to acquire or dispose taken by the person who undertakes one or other of these operations, the carrying-out of this acquisition or disposal should not be deemed in itself to constitute the use of inside information.
- (31) Research and estimates developed from publicly available data should not be regarded as inside information and, therefore, any transaction carried out on the basis of such research or estimates should not be deemed in itself to constitute insider dealing within the meaning of this Directive.
- (32) Member States and the European System of Central Banks, national central banks or any other officially designated body, or any person acting on their behalf, should not be restricted in carrying out monetary, exchange-rate or public debt management policy.
- (33) Stabilisation of financial instruments or trading in own shares in buy-back programmes can be legitimate, in certain circumstances, for economic reasons and should not, therefore, in themselves be regarded as market abuse. Common standards should be developed to provide practical guidance.
- (34) The widening scope of financial markets, the rapid change and the range of new products and developments require a wide application of this Directive to financial instruments and techniques involved, in order to guarantee the integrity of Community financial markets.

<sup>(1)</sup> OJ L 281, 23.11.1995, p. 31.

- (35) Establishing a level playing field in Community financial markets requires wide geographical application of the provisions covered by this Directive. As regards derivative instruments not admitted to trading but falling within the scope of this Directive, each Member State should be competent to sanction actions carried out on its territory or abroad which concern underlying financial instruments admitted to trading on a regulated market situated or operating within its territory or for which a request for admission to trading on such a regulated market has been made. Each Member State should also be competent to sanction actions carried out on its territory which concern underlying financial instruments admitted to trading on a regulated market in a Member State or for which a request for admission to trading on such a market has been made.
- (36) A variety of competent authorities in Member States, having different responsibilities, may create confusion among economic actors. A single competent authority should be designated in each Member State to assume at least final responsibility for supervising compliance with the provisions adopted pursuant to this Directive, as well as international collaboration. Such an authority should be of an administrative nature guaranteeing its independence of economic actors and avoiding conflicts of interest. That authority should have adequate arrangements for consultation concerning possible changes in national legislation such as a consultative committee composed of representatives of issuers, financial services providers and consumers, so as to be fully informed of their views and concerns.
- (37) A common minimum set of effective tools and powers for the competent authority of each Member State will guarantee supervisory effectiveness. Market undertakings and all economic actors should also contribute at their level to market integrity. In this sense, the designation of a single competent authority for market abuse does not exclude collaboration links or delegation under the responsibility of the competent authority, between that authority and market undertakings with a view to guaranteeing efficient supervision of compliance with the provisions adopted pursuant to this Directive.
- (38) In order to ensure that a Community framework against market abuse is sufficient, any infringement of the prohibitions or requirements laid down pursuant to this Directive will have to be promptly detected and sanctioned. To this end, sanctions should be sufficiently dissuasive and proportionate to the gravity of the infringement and to the gains realised and should be consistently applied.
- (39) Member States should remain alert, in determining the administrative measures and sanctions, to the need to ensure a degree of uniformity of regulation from one Member State to another.
- (40) Increasing cross-border activities requires improved cooperation and a comprehensive set of provisions for the exchange of information between national competent authorities. The organisation of supervision and of investigatory powers in each Member State should not hinder cooperation between the competent national authorities.
- (41) Since the objective of the proposed action, namely to prevent market abuse in the form of insider dealing and market manipulation, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale and effects of the measures, be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve that objective.
- (42) Technical guidance and implementing measures for the rules laid down in this Directive may from time to time be necessary to take account of new developments on financial markets. The Commission should accordingly be empowered to adopt implementing measures, provided that these do not modify the essential elements of this Directive and the Commission acts according to the principles set out in this Directive, after consulting the European Securities Committee established by Commission Decision 2001/528/EC <sup>(1)</sup>.
- (43) In exercising its implementing powers in accordance with this Directive, the Commission should respect the following principles:
- the need to ensure confidence in financial markets among investors by promoting high standards of transparency in financial markets,
  - the need to provide investors with a wide range of competing investments and a level of disclosure and protection tailored to their circumstances,
  - the need to ensure that independent regulatory authorities enforce the rules consistently, especially as regards the fight against economic crime,
  - the need for high levels of transparency and consultation with all market participants and with the European Parliament and the Council,
  - the need to encourage innovation in financial markets if they are to be dynamic and efficient,

<sup>(1)</sup> OJ L 191, 13.7.2001, p. 45.

- the need to ensure market integrity by close and reactive monitoring of financial innovation,
  - the importance of reducing the cost of, and increasing access to, capital,
  - the balance of costs and benefits to market participants on a long-term basis (including small and medium-sized businesses and small investors) in any implementing measures,
  - the need to foster the international competitiveness of EU financial markets without prejudice to a much-needed extension of international cooperation,
  - the need to achieve a level playing field for all market participants by establishing EU-wide regulations every time it is appropriate,
  - the need to respect differences in national markets where these do not unduly impinge on the coherence of the single market,
  - the need to ensure coherence with other EU legislation in this area, as imbalances in information and a lack of transparency may jeopardise the operation of the markets and above all harm consumers and small investors.
- (44) This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union and in particular by Article 11 thereof and Article 10 of the European Convention on Human Rights. In this regard, this Directive does not in any way prevent Member States from applying their constitutional rules relating to freedom of the press and freedom of expression in the media,

HAVE ADOPTED THIS DIRECTIVE:

#### Article 1

For the purposes of this Directive:

1. 'inside information' shall mean information of a precise nature which has not been made public, relating, directly or indirectly, to one or more issuers of financial instruments or to one or more financial instruments and which, if it were made public, would be likely to have a significant effect on the prices of those financial instruments or on the price of related derivative financial instruments.

In relation to derivatives on commodities, 'inside information' shall mean information of a precise nature

which has not been made public, relating, directly or indirectly, to one or more such derivatives and which users of markets on which such derivatives are traded would expect to receive in accordance with accepted market practices on those markets;

2. 'market manipulation' shall mean:

(a) transactions or orders to trade:

- which give, or are likely to give, false or misleading signals as to the supply of, demand for or price of financial instruments, or

- which secure, by a person, or persons acting in collaboration, the price of one or several financial instruments at an abnormal or artificial level,

unless the person who entered into the transactions or issued the orders to trade establishes that his/her reasons for so doing are legitimate and that these transactions or orders to trade conform to accepted market practices on the regulated market concerned;

(b) transactions or orders to trade which employ fictitious devices or any other form of deception or contrivance;

(c) dissemination of information through the media, including the Internet, or by any other means, which gives, or is likely to give, false or misleading signals as to financial instruments, including the dissemination of rumours and false or misleading news, where the person who made the dissemination knew, or ought to have known, that the information was false or misleading. In respect of journalists when they act in their professional capacity such dissemination of information is to be assessed, without prejudice to Article 11, taking into account the rules governing their profession, unless those persons derive, directly or indirectly, an advantage or profits from the dissemination of the information in question.

In particular, the following instances are derived from the core definition given in points (a), (b) and (c):

- conduct by a person, or persons acting in collaboration, to secure a dominant position over the supply of or demand for a financial instrument which has the effect of fixing, directly or indirectly, purchase or sale prices or creating other unfair trading conditions,

- the buying or selling of financial instruments at the close of the market with the effect of misleading investors acting on the basis of closing prices,

— taking advantage of occasional or regular access to the traditional or electronic media by voicing an opinion about a financial instrument (or indirectly about its issuer) while having previously taken positions on that financial instrument and profiting subsequently from the impact of the opinions voiced on the price of that instrument, without having simultaneously disclosed that conflict of interest to the public in a proper and effective way.

The definitions of market manipulation shall be adapted so as to ensure that new patterns of activity that in practice constitute market manipulation can be included;

3. 'financial instrument' shall mean:

— transferable securities as defined in Council Directive 93/22/EEC of 10 May 1993 on investment services in the securities field <sup>(1)</sup>,

— units in collective investment undertakings,

— money-market instruments,

— financial-futures contracts, including equivalent cash-settled instruments,

— forward interest-rate agreements,

— interest-rate, currency and equity swaps,

— options to acquire or dispose of any instrument falling into these categories, including equivalent cash-settled instruments. This category includes in particular options on currency and on interest rates,

— derivatives on commodities,

— any other instrument admitted to trading on a regulated market in a Member State or for which a request for admission to trading on such a market has been made;

4. 'regulated market' shall mean a market as defined by Article 1(13) of Directive 93/22/EEC;

5. 'accepted market practices' shall mean practices that are reasonably expected in one or more financial markets and are accepted by the competent authority in accordance with guidelines adopted by the Commission in accordance with the procedure laid down in Article 17(2);

6. 'person' shall mean any natural or legal person;

7. 'competent authority' shall mean the competent authority designated in accordance with Article 11.

In order to take account of developments on financial markets and to ensure uniform application of this Directive in the Community, the Commission, acting in accordance with the procedure laid down in Article 17(2), shall adopt implementing measures concerning points 1, 2 and 3 of this Article.

#### Article 2

1. Member States shall prohibit any person referred to in the second subparagraph who possesses inside information from using that information by acquiring or disposing of, or by trying to acquire or dispose of, for his/her own account or for the account of a third party, either directly or indirectly, financial instruments to which that information relates.

The first subparagraph shall apply to any person who possesses that information:

(a) by virtue of his membership of the administrative, management or supervisory bodies of the issuer; or

(b) by virtue of his holding in the capital of the issuer; or

(c) by virtue of his having access to the information through the exercise of his employment, profession or duties; or

(d) by virtue of his criminal activities.

2. Where the person referred to in paragraph 1 is a legal person, the prohibition laid down in that paragraph shall also apply to the natural persons who take part in the decision to carry out the transaction for the account of the legal person concerned.

3. This Article shall not apply to transactions conducted in the discharge of an obligation that has become due to acquire or dispose of financial instruments where that obligation results from an agreement concluded before the person concerned possessed inside information.

#### Article 3

Member States shall prohibit any person subject to the prohibition laid down in Article 2 from:

(a) disclosing inside information to any other person unless such disclosure is made in the normal course of the exercise of his employment, profession or duties;

(b) recommending or inducing another person, on the basis of inside information, to acquire or dispose of financial instruments to which that information relates.

<sup>(1)</sup> OJ L 141, 11.6.1993, p. 27. Directive as last amended by Directive 2000/64/EC of the European Parliament and of the Council (OJ L 290, 17.11.2000, p. 27).

*Article 4*

Member States shall ensure that Articles 2 and 3 also apply to any person other than those persons referred to in those Articles who possesses inside information while that person knows, or ought to have known, that it is inside information.

*Article 5*

Member States shall prohibit any person from engaging in market manipulation.

*Article 6*

1. Member States shall ensure that issuers of financial instruments inform the public as soon as possible of inside information which directly concerns the said issuers.

Without prejudice to any measures taken to comply with the provisions of the first subparagraph, Member States shall ensure that issuers, for an appropriate period, post on their Internet sites all inside information that they are required to disclose publicly.

2. An issuer may under his own responsibility delay the public disclosure of inside information, as referred to in paragraph 1, such as not to prejudice his legitimate interests provided that such omission would not be likely to mislead the public and provided that the issuer is able to ensure the confidentiality of that information. Member States may require that an issuer shall without delay inform the competent authority of the decision to delay the public disclosure of inside information.

3. Member States shall require that, whenever an issuer, or a person acting on his behalf or for his account, discloses any inside information to any third party in the normal exercise of his employment, profession or duties, as referred to in Article 3(a), he must make complete and effective public disclosure of that information, simultaneously in the case of an intentional disclosure and promptly in the case of a non-intentional disclosure.

The provisions of the first subparagraph shall not apply if the person receiving the information owes a duty of confidentiality, regardless of whether such duty is based on a law, on regulations, on articles of association or on a contract.

Member States shall require that issuers, or persons acting on their behalf or for their account, draw up a list of those persons working for them, under a contract of employment or otherwise, who have access to inside information. Issuers and persons acting on their behalf or for their account shall regularly update this list and transmit it to the competent authority whenever the latter requests it.

4. Persons discharging managerial responsibilities within an issuer of financial instruments and, where applicable, persons closely associated with them, shall, at least, notify to the

competent authority the existence of transactions conducted on their own account relating to shares of the said issuer, or to derivatives or other financial instruments linked to them. Member States shall ensure that public access to information concerning such transactions, on either an individual or on an aggregated basis, is readily available as soon as possible.

5. Member States shall ensure that there is appropriate regulation in place to ensure that persons who produce or disseminate research concerning financial instruments or issuers of financial instruments and persons who produce or disseminate other information recommending or suggesting investment strategy, intended for distribution channels or for the public, take reasonable care to ensure that such information is fairly presented and disclose their interests or indicate conflicts of interest concerning the financial instruments to which that information relates. Details of such regulation shall be notified to the Commission.

6. Member States shall ensure that market operators adopt structural provisions aimed at preventing and detecting market manipulation practices.

7. With a view to ensuring compliance with paragraphs 1 to 4, the competent authority may take all necessary measures to ensure that the public is correctly informed.

8. Public institutions disseminating statistics liable to have a significant effect on financial markets shall disseminate them in a fair and transparent way.

9. Member States shall require that any person professionally arranging transactions in financial instruments who reasonably suspects that a transaction might constitute insider dealing or market manipulation shall notify the competent authority without delay.

10. In order to take account of technical developments on financial markets and to ensure uniform application of this Directive, the Commission shall adopt, in accordance with the procedure referred to in Article 17(2), implementing measures concerning:

- the technical modalities for appropriate public disclosure of inside information as referred to in paragraphs 1 and 3,
- the technical modalities for delaying the public disclosure of inside information as referred to in paragraph 2,
- the technical modalities designed to favour a common approach in the implementation of the second sentence of paragraph 2,
- the conditions under which issuers, or entities acting on their behalf, are to draw up a list of those persons working for them and having access to inside information, as referred to in paragraph 3, together with the conditions under which such lists are to be updated,

- the categories of persons who are subject to a duty of disclosure as referred to in paragraph 4 and the characteristics of a transaction, including its size, which trigger that duty, and the technical arrangements for disclosure to the competent authority,
- technical arrangements, for the various categories of person referred to in paragraph 5, for fair presentation of research and other information recommending investment strategy and for disclosure of particular interests or conflicts of interest as referred to in paragraph 5,
- technical arrangements governing notification to the competent authority by the persons referred to in paragraph 9.

#### Article 7

This Directive shall not apply to transactions carried out in pursuit of monetary, exchange-rate or public debt-management policy by a Member State, by the European System of Central Banks, by a national central bank or by any other officially designated body, or by any person acting on their behalf. Member States may extend this exemption to their federated States or similar local authorities in respect of the management of their public debt.

#### Article 8

The prohibitions provided for in this Directive shall not apply to trading in own shares in 'buy-back' programmes or to the stabilisation of a financial instrument provided such trading is carried out in accordance with implementing measures adopted in accordance with the procedure laid down in Article 17(2).

#### Article 9

This Directive shall apply to any financial instrument admitted to trading on a regulated market in at least one Member State, or for which a request for admission to trading on such a market has been made, irrespective of whether or not the transaction itself actually takes place on that market.

Articles 2, 3 and 4 shall also apply to any financial instrument not admitted to trading on a regulated market in a Member State, but whose value depends on a financial instrument as referred to in paragraph 1.

Article 6(1) to (3) shall not apply to issuers who have not requested or approved admission of their financial instruments to trading on a regulated market in a Member State.

#### Article 10

Each Member State shall apply the prohibitions and requirements provided for in this Directive to:

- (a) actions carried out on its territory or abroad concerning financial instruments that are admitted to trading on a regulated market situated or operating within its territory

or for which a request for admission to trading on such market has been made;

- (b) actions carried out on its territory concerning financial instruments that are admitted to trading on a regulated market in a Member State or for which a request for admission to trading on such market has been made.

#### Article 11

Without prejudice to the competences of the judicial authorities, each Member State shall designate a single administrative authority competent to ensure that the provisions adopted pursuant to this Directive are applied.

Member States shall establish effective consultative arrangements and procedures with market participants concerning possible changes in national legislation. These arrangements may include consultative committees within each competent authority, the membership of which should reflect as far as possible the diversity of market participants, be they issuers, providers of financial services or consumers.

#### Article 12

1. The competent authority shall be given all supervisory and investigatory powers that are necessary for the exercise of its functions. It shall exercise such powers:

- (a) directly; or
- (b) in collaboration with other authorities or with the market undertakings; or
- (c) under its responsibility by delegation to such authorities or to the market undertakings; or
- (d) by application to the competent judicial authorities.

2. Without prejudice to Article 6(7), the powers referred to in paragraph 1 of this Article shall be exercised in conformity with national law and shall include at least the right to:

- (a) have access to any document in any form whatsoever, and to receive a copy of it;
- (b) demand information from any person, including those who are successively involved in the transmission of orders or conduct of the operations concerned, as well as their principals, and if necessary, to summon and hear any such person;
- (c) carry out on-site inspections;
- (d) require existing telephone and existing data-traffic records;
- (e) require the cessation of any practice that is contrary to the provisions adopted in the implementation of this Directive;
- (f) suspend trading of the financial instruments concerned;

- (g) request the freezing and/or sequestration of assets;
- (h) request temporary prohibition of professional activity.

3. This Article shall be without prejudice to national legal provisions on professional secrecy.

#### Article 13

The obligation of professional secrecy shall apply to all persons who work or who have worked for the competent authority or for any authority or market undertaking to whom the competent authority has delegated its powers, including auditors and experts instructed by the competent authority. Information covered by professional secrecy may not be disclosed to any other person or authority except by virtue of provisions laid down by law.

#### Article 14

1. Without prejudice to the right of Member States to impose criminal sanctions, Member States shall ensure, in conformity with their national law, that the appropriate administrative measures can be taken or administrative sanctions be imposed against the persons responsible where the provisions adopted in the implementation of this Directive have not been complied with. Member States shall ensure that these measures are effective, proportionate and dissuasive.

2. In accordance with the procedure laid down in Article 17(2), the Commission shall, for information, draw up a list of the administrative measures and sanctions referred to in paragraph 1.

3. Member States shall determine the sanctions to be applied for failure to cooperate in an investigation covered by Article 12.

4. Member States shall provide that the competent authority may disclose to the public every measure or sanction that will be imposed for infringement of the provisions adopted in the implementation of this Directive, unless such disclosure would seriously jeopardise the financial markets or cause disproportionate damage to the parties involved.

#### Article 15

Member States shall ensure that an appeal may be brought before a court against the decisions taken by the competent authority.

#### Article 16

1. Competent authorities shall cooperate with each other whenever necessary for the purpose of carrying out their duties, making use of their powers whether set out in this Directive or in national law. Competent authorities shall render assistance to competent authorities of other Member States. In particular, they shall exchange information and cooperate in investigation activities.

2. Competent authorities shall, on request, immediately supply any information required for the purpose referred to in paragraph 1. Where necessary, the competent authorities

receiving any such request shall immediately take the necessary measures in order to gather the required information. If the requested competent authority is not able to supply the required information immediately, it shall notify the requesting competent authority of the reasons. Information thus supplied shall be covered by the obligation of professional secrecy to which the persons employed or formerly employed by the competent authorities receiving the information are subject.

The competent authorities may refuse to act on a request for information where:

- communication might adversely affect the sovereignty, security or public policy of the Member State addressed,
- judicial proceedings have already been initiated in respect of the same actions and against the same persons before the authorities of the Member State addressed, or
- where a final judgment has already been delivered in relation to such persons for the same actions in the Member State addressed.

In any such case, they shall notify the requesting competent authority accordingly, providing as detailed information as possible on those proceedings or the judgment.

Without prejudice to Article 226 of the Treaty, a competent authority whose request for information is not acted upon within a reasonable time or whose request for information is rejected may bring that non-compliance to the attention of the Committee of European Securities Regulators, where discussion will take place in order to reach a rapid and effective solution.

Without prejudice to the obligations to which they are subject in judicial proceedings under criminal law, the competent authorities which receive information pursuant to paragraph 1 may use it only for the exercise of their functions within the scope of this Directive and in the context of administrative or judicial proceedings specifically related to the exercise of those functions. However, where the competent authority communicating information consents thereto, the authority receiving the information may use it for other purposes or forward it to other States' competent authorities.

3. Where a competent authority is convinced that acts contrary to the provisions of this Directive are being, or have been, carried out on the territory of another Member State or that acts are affecting financial instruments traded on a regulated market situated in another Member State, it shall give notice of that fact in as specific a manner as possible to the competent authority of the other Member State. The competent authority of the other Member State shall take appropriate action. It shall inform the notifying competent authority of the outcome and, so far as possible, of significant interim developments. This paragraph shall not prejudice the competences of the competent authority that has forwarded the information. The competent authorities of the various Member States that are competent for the purposes of Article 10 shall consult each other on the proposed follow-up to their action.

4. A competent authority of one Member State may request that an investigation be carried out by the competent authority of another Member State, on the latter's territory.

It may further request that members of its own personnel be allowed to accompany the personnel of the competent authority of that other Member State during the course of the investigation.

The investigation shall, however, be subject throughout to the overall control of the Member State on whose territory it is conducted.

The competent authorities may refuse to act on a request for an investigation to be conducted as provided for in the first subparagraph, or on a request for its personnel to be accompanied by personnel of the competent authority of another Member State as provided for in the second subparagraph, where such an investigation might adversely affect the sovereignty, security or public policy of the State addressed, or where judicial proceedings have already been initiated in respect of the same actions and against the same persons before the authorities of the State addressed or where a final judgment has already been delivered in relation to such persons for the same actions in the State addressed. In such case, they shall notify the requesting competent authority accordingly, providing information, as detailed as possible, on those proceedings or judgment.

Without prejudice to the provisions of Article 226 of the Treaty, a competent authority whose application to open an inquiry or whose request for authorisation for its officials to accompany those of the other Member State's competent authority is not acted upon within a reasonable time or is rejected may bring that non-compliance to the attention of the Committee of European Securities Regulators, where discussion will take place in order to reach a rapid and effective solution.

5. In accordance with the procedure laid down in Article 17(2), the Commission shall adopt implementing measures on the procedures for exchange of information and cross-border inspections as referred to in this Article.

#### Article 17

1. The Commission shall be assisted by the European Securities Committee instituted by Decision 2001/528/EC (hereinafter referred to as the 'Committee').

2. Where reference is made to this paragraph, Articles 5 and 7 of Decision 1999/468/EC shall apply, having regard to the provisions of Article 8 thereof, provided that the implementing measures adopted according to this procedure do not modify the essential provisions of this Directive.

The period laid down in Article 5(6) of Decision 1999/468/EC shall be set at three months.

3. The Committee shall adopt its Rules of Procedure.

4. Without prejudice to the implementing measures already adopted, on the expiry of a four-year period following the entry into force of this Directive, the application of its provisions requiring the adoption of technical rules and decisions in accordance with paragraph 2 shall be suspended. On a proposal from the Commission, the European Parliament and the Council may renew the provisions concerned in accordance with the procedure laid down in Article 251 of the Treaty and, to that end, they shall review them prior to the expiry of the period referred to above.

#### Article 18

Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive not later than [...] (\*). They shall forthwith inform the Commission thereof.

When Member States adopt those measures, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

#### Article 19

Article 11 shall not prejudice the possibility for a Member State to make separate legal and administrative arrangements for overseas European territories for whose external relations that Member State is responsible.

#### Article 20

Directive 89/592/EEC and Articles 68(1) and 81(1) of Directive 2001/34/EC of the European Parliament and of the Council of 28 May 2001 on the admission of securities to official stock exchange listing and on information to be published on those securities <sup>(1)</sup> shall be repealed with effect from the date of entry into force of this Directive.

#### Article 21

This Directive shall enter into force on the day of its publication in the *Official Journal of the European Communities*.

#### Article 22

This Directive is addressed to the Member States.

Done at Brussels, 19 July 2002.

For the Parliament  
The President

For the Council  
The President

(\*) Eighteen months after the entry into force of this Directive.  
(<sup>1</sup>) OJ L 184, 6.7.2001, p. 1.

## STATEMENT OF THE COUNCIL'S REASONS

### I. INTRODUCTION

On 30 May 2001 the Commission presented a proposal for a directive on insider dealing and market manipulation <sup>(1)</sup>, replacing existing Directive 89/592/EEC on insider dealing and extending it to market manipulation.

The European Central Bank delivered its opinion on 22 November 2001 <sup>(2)</sup>. The European Parliament delivered its opinion on 14 March 2002 and the Economic and Social Committee delivered its opinion on 17 January 2002 <sup>(3)</sup>. The Committee of the Regions decided not to deliver an opinion.

On 19 July 2002, the Council adopted its Common Position pursuant to Article 251 of the Treaty.

### II. OBJECTIVE

The overall objective of the Directive is to ensure the integrity of European financial markets and to enhance investor confidence in those markets by establishing a level playing field for all economic actors in Member States in the fight against market abuse.

The Directive introduces a Community legal framework for the prevention, detection, investigation of market abuse and the imposition of sanctions, covering both insider dealing and market manipulation, in order to ensure certainty among market participants over concepts and enforcement.

### III. ANALYSIS OF THE COMMON POSITION

The Common Position broadly follows the approach of the Commission proposal as amended by the European Parliament, diverging from it on only a few points. Of the 77 amendments proposed by the European Parliament, 60 are fully incorporated into the Common Position, for a large part verbatim, and 10 amendments are partially incorporated.

The text of the Common Position and the way in which the amendments of the European Parliament were incorporated is analysed below.

#### (a) The preamble

The preamble has been adapted to take account of the changes to the enacting terms of the Directive which are explained below and incorporates in full *Amendments 1, 3, 77, 78, 5, 6, 7, 8, 9, 10, 12, 13, 14, 15, 16, 17 and 18*.

*Amendment 2* (recital 9) is partly incorporated in the Common Position. The Council feels that a reference to possible future discussions between the European institutions is out of place in a legal act and has therefore not included the last sentence of *Amendment 2*. *Amendment 11* (recital 36) has been incorporated in a form adapted to the wording of Article 11, to which it relates.

#### (b) Article 1 — Definitions

Article 1(1) incorporates the main part of *Amendment 19*. The term 'accepted market practices', which is defined in paragraph 5, has been used instead of the term 'acceptable practices'. The definition of inside information set out in Article 1(1) does not explicitly exclude the practice known as 'front-running' from the scope of the definition, since the Council considers that in some cases front-running may not constitute market abuse. Instead, recital 19 indicates that Member States should tackle front-running, including front-running in commodities derivatives, where it constitutes market abuse under the definitions contained in the Directive.

<sup>(1)</sup> OJ C 240 E, 28.8.2001, p. 265.

<sup>(2)</sup> OJ C 24, 26.1.2002, p. 8.

<sup>(3)</sup> OJ C 80, 3.4.2002, p. 61.

*Amendments 20 and 21* were not included in the Common Position since the Council finds that the definitions of 'information of a precise nature' and 'information made public' could unnecessarily restrict the scope of the text. Since paragraph 1 is covered by the committee procedure, any necessary clarification of the definition of 'inside information' can be done by way of the implementing measures to be adopted by the Commission.

Article 1(2) partially incorporates *Amendment 79 rev.* As in *Amendment 79 rev.*, paragraph 2 of the Common Position is structured so that general definitions of market manipulation are set out first, followed by precise instances of what in particular constitutes market manipulation. To prevent the Directive prohibiting accepted market practices by defining them too rigidly, paragraph 2(a) introduces an element of flexibility: when a person enters into transactions or orders to trade which would normally constitute market manipulation, this person may establish that his/her reasons for entering into such transactions or orders are legitimate and that these transactions or orders to trade are in conformity with accepted market practices on the regulated market concerned. In that case the actions or orders to trade shall not constitute market manipulation. This element of flexibility does not apply to transactions or orders to trade which employ fictitious devices or other forms of deception referred to in paragraph 2(b), since such fictitious devices or deception would never be in conformity with accepted market practices.

The wording of Article 1(2)(c) is slightly more general than that of *Amendment 79 rev.*, stipulating that the false or misleading signals referred to should apply to financial instruments, not to particular aspects of them. The Common Position does not require that the disseminator or the persons informed derive an advantage or profit from the dissemination of misleading information. The Council finds that such a provision could exempt clear examples of market manipulation from the scope of the Directive, e.g. if the 'manipulator' for some reason fails to make the expected profit from a sustained campaign of misinformation. However, in order not to prejudice journalists and the freedom of the press, the Common Position introduces a special provision stipulating that for journalists, when acting in their professional capacity, dissemination of information which gives or is likely to give false or misleading information with regard to financial instruments, must be assessed taking into account the rules governing their profession unless the journalists involved derive, directly or indirectly, an advantage or profits from the dissemination of the information in question, in which case the normal rules of the Directive applies.

As a consequence of the incorporation of *Amendment 79 rev.* the Common Position also includes *Amendment 74*, calling for the deletion of Annex B, which was contained in the Commission proposal.

Article 1(3) incorporates *Amendment 23* and as a consequence the Common Position also includes *Amendment 73*, calling for the deletion of Annex A, which was contained in the Commission proposal.

Article 1(5) includes *Amendment 81* in a slightly amended form. The only differences between the amendment and the Common Position are that the word 'accepted' has been chosen as a more precise term and that, in order to take account of the cases where a practice relates to a new instrument and therefore is not yet customary, the term 'reasonably expected' has been used instead of 'customary'.

Article 1(6) and (7) incorporate *Amendments 24 and 25* respectively.

The final sentence of Article 1 incorporates *Amendment 86* and extends the committee procedure to cover implementing measures concerning the definition or dissemination of false or misleading information set out in paragraph 2(c).

(c) **Articles 2 to 5 — Prohibition of insider dealing and market manipulation**

Article 2 incorporates *Amendments 27, 28 and 29*. The Council is reluctant to include a special provision explicitly relating to takeover bids and omitting mergers. However, recital 29 makes it clear that having access to insider information of another company and using it in the context of a public takeover bid for the purpose of gaining control of the company or proposing a merger with it should not in itself be deemed to constitute insider dealing. So, while the Common Position takes account of the concerns expressed in *Amendment 30*, this amendment is not included as such in the Common Position.

Articles 3 and 4 incorporate *Amendments 31 and 32* respectively.

Article 5 incorporates *Amendments 33 and 34*.

(d) **Article 6 — Disclosure**

Article 6 is structured to achieve precise and cohesive wording, and differs slightly from the structure of the Commission proposal on which the amendments of the European Parliament are based. The order of paragraphs 2 and 3 is reversed and all provisions relating to implementing measures to be adopted by the Commission are set out in paragraph 10. Thus, paragraph 10 includes *Amendment 39* on implementing measures relating to drawing up the list of persons having inside information.

Article 6(1) fully incorporates *Amendment 36*. The main part of *Amendment 35* is incorporated, but the reference to Article 1(1)(c) has not been taken on board, since *Amendment 21* relating to that provision is not included in the Common Position.

Article 6(2) includes an option for Member States to require that an issuer shall, without delay, inform the competent authority of the decision to delay the public disclosure of inside information, that was not present in the Commission proposal. The Council feels it would be wrong for Member States to be obliged to require notification of the delay, mainly since this could result in a degree of liability for the competent authority in that such prior information might be construed as tacit approval of the delay in disclosure should the authority fail to act. *Amendment 41* has thus been partially included.

Article 6(3) (Article 6(2) of the Commission proposal) incorporates *Amendment 37*, and also *Amendment 38* by deleting Article 6(2)(b) of the Commission proposal relating to issuance of credit ratings.

Article 6(4) incorporates the spirit of *Amendment 40* with some changes in the wording. A different balance has been struck between the need to keep the public informed and the need to ensure the right to privacy of the managers and persons associated with them. On the one hand, the words 'at least' have been added to make it clear that the notification requirement can be given a broader scope than that set out in the Directive. On the other hand, the Common Position refers only to shares and derivatives and other financial instruments linked to them, since the Council finds it unnecessary to extend the notification requirement to debt securities where the price is normally less volatile or sensitive to this kind of information. Finally, it will be possible for Member States to ensure publication on an aggregate basis in order to protect the privacy rights of the individuals involved. The last part of *Amendment 40* relating to implementing measures has been incorporated in paragraph 10.

Article 6(5) incorporates *Amendment 85*.

Article 6(6) incorporates part of *Amendment 80*. The first sentence of *Amendment 80* has been included in a more precise drafting. Examples of what may constitute such provisions have been included in recital 27.

Article 6(7) incorporates *Amendment 43*.

Article 6(8) incorporates *Amendment 82*, in a wording which aims to ensure that the provision will not impede the communication of data to public authorities, e.g. Ministries of Finance, to carry out their functions before such data are made available to the public.

Article 6(9) incorporates *Amendment 45*.

Article 6(10) incorporates *Amendment 46* and aspects of *Amendment 40*, using different wording adapted to the structure of Article 6 (see above).

**(e) Articles 7 to 10 — Scope**

Article 7 incorporates *Amendment 47*.

Article 8 incorporates the spirit of *Amendment 48*, and sets out the same substantive provisions but in a simplified form which merges the two paragraphs of Article 8 contained in the Commission proposal.

Article 9 and 10 incorporate *Amendments 49 and 50* respectively.

**(f) Articles 11 and 12 — The competent authority**

Article 11 incorporates part of *Amendment 51*. The first subparagraph of *Amendment 51* is included in the Common Position. The second subparagraph on consultative arrangements reflects the concern of the European Parliament that market participants should be consulted. The Council finds, however, that introducing an obligation for Member States to set up a consultative committee at national level would run counter to the principle of subsidiarity laid down in the Treaty and a more flexible wording has been introduced, stressing the aim of this provision while leaving its implementation to Member States. The wording also makes it clear that the consultation in question relates to changes in national legislation, since another forum for the consultation of market participants at European level will be set up, attached to the Committee of European Securities Regulators (CESR).

The third subparagraph of *Amendment 51*, concerning the financing of the supervisory authority, is not included in the Common Position because the Council finds such a provision out of place in a legislative instrument of this kind. Instead, the Council has decided to enter a statement in the Council minutes to the effect that achievement of an effective system of securities markets supervision requires that adequate resources are allocated to competent authorities to allow them to discharge properly their legal duties.

Article 12 incorporates *Amendments 52, 53, 54, 55, 56 and 57*. The Council finds that the introductory phrase in Article 12(2) makes it sufficiently clear that the powers listed in this provision shall be exercised in conformity with national law and that no further stipulation in the specific indents is necessary. The Council also finds it inappropriate to restrict the scope of point (d) to professional dealers in financial instruments and *Amendment 58* is therefore not included. The only change made to point (d) as contained in the Commission proposal is to make it clear in the Common Position that this provision concerns existing records only.

**(g) Articles 13 to 21 — Other provisions**

Article 13 incorporates the substance of *Amendment 59* but with different wording. The Council shares the concerns of the European Parliament that it should be possible to disclose information to persons to whom the competent authority has delegated powers and the Common Position makes it clear that these persons must be bound by an obligation of professional secrecy in the same way as persons working in the competent authority.

Article 14 incorporates *Amendments 60, 61 and 62*, with the sole exception that the Council finds that the word 'informative' better expresses the nature of the list referred to in paragraph 2.

Article 15 is unchanged from the Commission proposal.

Article 16(1) is unchanged from the Commission proposal. In the light of Article 11, the Council finds it inappropriate to extend the obligation to assist to other authorities and delegates and therefore *Amendment 63* is not included in the Common Position. The same is true for *Amendment 65*, which amends Article 16(2) and is linked to Amendment 63.

The third subparagraph of Article 16(2) of the Common Position amends Article 16(2) of the Commission proposal in the light of Amendment 83 of the European Parliament. The Council agrees with Parliament that it is useful to stipulate that the refusal of or non-compliance with a request for information should be brought to the attention of the Committee of European Securities Regulators (CESR). However, the Council would emphasise that, while the CESR should be a forum for debate, it is not the aim of this Directive to entrust this Committee with formal judicial or arbitration powers and the text of the provision has been drafted accordingly. The Common Position thus partially incorporates *Amendment 83*.

Article 16(3) incorporates *Amendment 66*.

Article 16(4) does not incorporate *Amendment 67* nor the first part of *Amendment 84* for the same reasons as led the Council to reject Amendment 63. The part of this provision which concerns the CESR is drafted in the same way as Article 16(2) and the Common Position thus partially incorporates *Amendment 84*.

Article 17 relating to the committee procedure includes *Amendments 69 and 70*.

Article 18 sets implementation at 18 months after entry into force, which is the minimum period required in some Member States to implement the new regime laid down by the Directive.

Article 19 incorporates *Amendment 71*.

Article 20 incorporates *Amendment 72*.

#### IV. CONCLUSIONS

The Council considers that all the changes to the Commission proposal are fully in line with the objectives of the Directive. The main changes to the text of the Commission have been made in accordance with the amendments proposed by the European Parliament, the overwhelming majority of which are included in the Common Position.

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