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Amended proposal for a

REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

on insider dealing and market manipulation (market abuse)

(submitted in accordance with article 293(2) TFEU)

(Text with EEA relevance)

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1. CONTEXT OF THE PROPOSAL

On 20 October 2011, the Commission adopted a proposal for a Regulation of the European Parliament and of the Council on insider dealing and market manipulation (market abuse)¹. This proposal was forwarded to the European Parliament and the Council on 20 October 2011. The Economic and Social Committee gave its opinion on 28 March 2012.

Since March 2011, investigations have been taking place in relation to possible manipulation of the EURIBOR and LIBOR benchmarks for interbank lending rates by a number of banks. It is suspected that banks had provided estimates of the interest rate at which they would accept offers of funding which were different from the rate they would have accepted in practice. As a result, the level of EURIBOR and LIBOR rates –which are used as a benchmark for borrowing and as a reference for the pricing of many financial instruments, such as interest rate swaps – may have been altered and the integrity of LIBOR and EURIBOR called into question. Furthermore the individual contributor banks' estimates provided misleading information to the market about their likely costs of funding.

The Commission has assessed whether the possible manipulation of benchmarks including LIBOR and EURIBOR would be captured by its proposals for a Regulation on insider dealing and market manipulation and the related proposal for a Directive on criminal sanctions for insider dealing and market manipulation, presented in October 2011. In particular the European Parliament has also emphasised the importance of this matter. Given that benchmarks are not currently covered by either proposal, the Commission has concluded that direct manipulation of benchmarks does not fall within the scope of either proposal.

While it may be difficult or impossible for a competent authority to prove that manipulation of a benchmark has had an effect on the price of related financial instruments, any actual or attempted manipulation of important benchmarks can have a serious impact on market confidence and could result in significant losses for investors and distortions of the real economy, given the wide use of benchmark indexes as a reference rate e.g. for interest swaps and variable rate mortgages. It is therefore essential to clarify that competent authorities should be able to impose administrative sanctions as regards the offence of market manipulation in these cases, without the need to prove or demonstrate incidental issues such as price effects. It is also essential that all necessary steps are taken to prevent such manipulations and to enable and facilitate the work of the competent authorities in imposing

¹ COM(2011) 651 final

sanctions. A stringent legal framework will act as a credible deterrent for this kind of behaviour, thereby protecting investors and restoring market confidence. These regulatory steps should include criminal sanctions, which is the subject of the amended proposal for a Directive which accompanies the present proposal.

Therefore, in order to ensure that the manipulation of benchmarks is covered by common European rules to prevent market abuse, the Commission proposes to amend its proposal for a Regulation.

2. LEGAL ELEMENTS OF THE PROPOSAL

2.1. Legal basis

The amended proposal is based on Article 114 TFEU and submitted in accordance with Article 293(2) TFEU.

2.2. Subsidiarity and proportionality

According to the principle of subsidiarity (Article 5(3) TEU), action at Union level should be taken only when the aims envisaged cannot be achieved sufficiently by Member States alone and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Union. The cross-border dimension of many benchmarks and the entities that contribute data to these benchmarks, as well as of the international character of many of the financial instruments which can be affected by any manipulation of benchmarks, means that there is a real risk that responses to manipulation of benchmarks at a national level would be circumvented or ineffective in the absence of action at Union level. Against this background Union action appears appropriate in terms of the principle of subsidiarity.

The principle of proportionality requires that any intervention is targeted and does not go beyond what is necessary to achieve the objectives. This principle has guided the drafting of this proposal.

2.3. Detailed explanation of the proposal

The changes to the proposal for a Regulation on insider dealing and market manipulation which are required are as follows:

- Amendment to the scope of the proposed regulation (Article 2) to include benchmarks;
- Amendment to the definitions (Article 5) to include a definition of benchmarks, based on an expanded version of the definition used in the proposal for a Regulation on Markets in Financial Instruments (MiFIR);
- Amendments to the definition of the offence of market manipulation (Article 8) to capture manipulation of benchmarks and attempts at such manipulation; and
- Addition of a recital to clarify that the extension of the scope of the Regulation and the market manipulation offence include benchmarks.

3. BUDGETARY IMPLICATIONS

This amended proposal has no budgetary implications beyond those already identified in the initial proposal for a Regulation on insider dealing and market manipulation.

The Commission proposal² for a regulation on insider dealing and market manipulation (market abuse) COM(2011) 651final is amended as follows:

1. Recital (20a) is added:

"(20a) Many financial instruments are priced by reference to benchmarks. The actual or attempted manipulation of benchmarks, such as interbank offer rates, can have a serious impact on market confidence and may result in significant losses to investors or distort the real economy. Therefore, specific provisions in relation to benchmarks are required in order to preserve the integrity of the markets and ensure that competent authorities can enforce a clear prohibition of the manipulation of benchmarks. It is necessary to complement the general prohibition of market manipulation by prohibiting the manipulation of the benchmark itself and any transmission of false or misleading information, provision of false or misleading inputs, or any other action that manipulates the calculation of a benchmark, including the benchmark's methodology. Those rules are in addition to Regulation (EU) No 1227/2011 of the European Parliament and the Council on Wholesale Energy Market Integrity and Transparency which prohibits the deliberate provision of false information to undertakings which provide price assessments or market reports on wholesale energy products with the effect of misleading market participants acting on the basis of those price assessments or market reports."

2. In Article 2(3) the following point (d) is added:

"(d) benchmarks, where any transmission of information, input, calculation or behaviour is used to affect, affects, or is likely to affect the calculation of the benchmark."

3. In Article 5 the following paragraph 20 is added:

"20. 'benchmark' means any commercial index or published figure calculated by the application of a formula to the value of one or more underlying assets or prices, including estimated prices, interest rates or other values, or surveys by reference to which the amount payable under a financial instrument is determined"

4. In Article 8(1) the following point (d) is added:

"(d) transmitting false or misleading information, providing false or misleading inputs, or any action which manipulates the calculation of a benchmark."

Done at Brussels,

*For the European Parliament
The President*

*For the Council
The President*

² COM(2011) 651 final