



EUROPEAN COMMISSION

Brussels, 25.7.2012
COM(2012) 420 final

2011/0297 (COD)

Amended proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

on criminal sanctions for insider dealing and market manipulation

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

1. CONTEXT OF THE PROPOSAL

On 20 October 2011, the Commission adopted a proposal for a Directive of the European Parliament and of the Council on criminal sanctions for insider dealing and market manipulation. 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 was 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 EURIBOR or LIBOR may have been 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 covered by its proposal 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, adopted 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 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 manipulation and to enable and facilitate the work of competent authorities in imposing 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.

Therefore, in order to cover the manipulation of benchmarks and in order to ensure that intentional manipulation of benchmarks is a criminal offence, the Commission proposes to amend its proposal for a Directive.

2. LEGAL ELEMENTS OF THE PROPOSAL

2.1. Legal basis

The amended proposal is based on Article 83(2) 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 Directive on criminal sanctions for insider dealing and market manipulation which are required are as follows:

- Amendment to the definitions (Article 2) to include a definition of benchmarks;
- Amendment of the offence of market manipulation (Article 4) to capture manipulation of benchmarks themselves;
- Amendment of the offence of "inciting, aiding and abetting and attempt" (Article 5) to include these behaviours in relation to the manipulation of benchmarks.

3. BUDGETARY IMPLICATIONS

The amended proposal has no implications for the budget of the Union.

The Commission proposal for a Directive on criminal sanctions for insider dealing and market manipulation, COM(2011) 654 final, is amended as follows:

1. In Article 2, the following point 3 is added:

“3. '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.”

2. In Article 4, the following point (e) is added:

“(e) transmitting false or misleading information, providing false or misleading inputs, or any other equivalent activity which intentionally manipulates the calculation of a benchmark.”

3. Article 5(2) is replaced by the following:

“2. Member States shall take the necessary measures to ensure that the attempt to commit any of the offences referred to in Article 3(a) and Article 4(a), (b) **and**, (c) **and (e)** is punishable as a criminal offence.”

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Done at Brussels,

For the European Parliament
The President

For the Council
The President