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THE EUROPEAN UNION**

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Subject: Proposal for a Directive of the European Parliament and of the Council on criminal sanctions for insider dealing and market manipulation (MAD)  
- Partial general approach: outcome of discussions in Coreper on 18 April 2012

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1. On 18 April 2012 the Presidency submitted a part of the draft text of the Directive to Coreper for discussion in view of the proposed adoption of a partial general approach by the JHA Council on 26-27 April 2012.<sup>1</sup>
2. In Annex I to this note delegations will find the proposed text of the partial general approach as resulting from those discussions. Delegation's positions are set out in the footnotes to the text.

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<sup>1</sup> See doc. 8647/12.

3. Furthermore, at the meeting of Coreper one delegation requested the inclusion of a declaration in the minutes of the meeting. The text of the declaration is set out in Annex II to this note.
  4. Following the discussions in Coreper, the Presidency concluded that the Council would be asked to endorse the partial general approach on the text as set out in Annex I.
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2011/0297 (COD)

Proposal for a

**DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**

**on criminal sanctions for insider dealing and market manipulation**

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 83 (2) thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national Parliaments,

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

Acting in accordance with the ordinary legislative procedure,

Whereas:

- (1) 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.

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<sup>2</sup> OJ C , , p. .

- (2) Directive 2003/6/EC<sup>3</sup> of the European Parliament and the Council on insider dealing and market manipulation (market abuse) required Member States to ensure that competent authorities have the powers to detect and investigate market abuse. Without prejudice to the right of Member States to impose criminal sanctions, Directive 2003/6/EC also required Member States to ensure that the appropriate administrative measures can be taken or administrative sanctions be imposed against the persons responsible for violations of the national rules implementing that Directive.
- (3) The report by the High-Level Group on Financial Supervision in the EU recommended that a sound prudential and conduct of business framework for the financial sector must rest on strong supervisory and sanctioning regimes. To this end, the Group considered that supervisory authorities must be equipped with sufficient powers to act and there should also be equal, strong and deterrent sanctions regimes against all financial crimes, sanctions which should be enforced effectively. The Group concluded that Member States sanctioning regimes are in general weak and heterogeneous.
- (4) A well-functioning legislative framework on market abuse requires effective enforcement. An evaluation of the national regimes for administrative sanctions under Directive 2003/6/EC showed that not all national competent authorities had a full set of powers at their disposal to ensure that they could respond to market abuses with the appropriate sanction. In particular, not all Member States had pecuniary administrative sanctions available for insider dealing and market manipulation, and the level of these sanctions varied widely among Member States.
- (5) The adoption of administrative sanctions by the Member States has proven insufficient to ensure compliance with the rules on preventing and fighting market abuse.

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<sup>3</sup> OJ L 16, 12.4.2003, p.16.

- (6) It is essential that compliance be strengthened by the availability of criminal sanctions which demonstrate a social disapproval of a qualitatively different nature compared to administrative penalties. Establishing criminal offences for the most serious forms of market abuse sets clear boundaries in law that such behaviours are regarded as unacceptable and sends a message to the public and potential offenders that these are taken very seriously by competent authorities.
- (7) Not all Member States have provided for criminal sanctions for some forms of serious breaches of national legislation implementing Directive 2003/6/EC. These different approaches undermine the uniformity of conditions of operation in the internal market and may provide an incentive for persons to carry out market abuse in Member States which do not provide for criminal sanctions for these offences. In addition, until now there has been no Union-wide understanding on which conduct is considered to be such a serious breach. Therefore, minimum rules concerning the definition of criminal offences (...) and of sanctions should be set. Common minimum rules would make it also possible to use more effective methods of investigation and effective cooperation within and between Member States. **In addition, the imposition of criminal sanctions for market abuse offences will have an increased deterrent effect on potential offenders.**
- (8) The introduction of criminal sanctions for the most serious market abuse offences by all Member States is therefore essential to ensure the effective implementation of Union policy on fighting market abuse (...)
- (9) (omissis)<sup>4</sup>
- (10) (omissis)

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<sup>4</sup> The recitals and Articles not included in this document do not form part of the partial general approach.

- (11) Due to the adverse effects attempted insider dealing and attempted market manipulation have on the integrity of the financial markets and on investor confidence in these markets, these forms of behaviour should also be punishable as a criminal offence.
- (11a) This Directive should oblige Member States to provide in their national legislation for criminal penalties in respect of the behaviours of insider dealing and market manipulation to which this Directive applies. This Directive should not create obligations regarding the application of such penalties or any other available system of law enforcement, to individual cases.<sup>5</sup>
- (12) This Directive should also require Member States to ensure that inciting<sup>6</sup> as well as aiding and abetting the criminal offences are also punishable.
- (13) (omissis)
- (14) In order to ensure effective implementation of the European policy for ensuring the integrity of the financial markets set out in Regulation (EU) No...of the European Parliament and the Council on insider dealing and market manipulation, Member States should also extend liability for the offences provided for in this Directive to legal persons where such offences have been committed for their benefit, through the imposition of sanctions which are effective, proportionate and dissuasive.(...)<sup>7</sup>
- (15) As this Directive provides for minimum rules, Member States are free to adopt or maintain more stringent criminal law rules for market abuse.
- (15a) (omissis)

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<sup>5</sup> Scrutiny reservation by COM; **DELETED** asked for clarification of the second sentence; **DELETED** oppose the inclusion of this recital; **DELETED** supports it.

<sup>6</sup> Scrutiny reservation by **DELETED**.

<sup>7</sup> Scrutiny reservation **DELETED**.

- (16) (omissis)
- (17) Since the objective of this Directive, namely to ensure the availability of criminal sanctions for the most serious market abuse offences across the Union, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale and effects of this Directive, be better achieved at Union level, the Union 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 to achieve that objective.
- (18) (omissis)
- (19) The Commission should assess the implementation of this Directive in the Member States, also with a view to assessing a possible future need for introducing minimum harmonisation of the types and levels of criminal sanctions.
- (20) (omissis)
- (21) (omissis)
- (22) (omissis)

HAVE ADOPTED THIS DIRECTIVE:

(omissis)

*Article 5*

*Inciting, aiding and abetting, and attempt*

1. Member States shall take the necessary measures to ensure that inciting, aiding and abetting the criminal offences referred to in Articles 3 and 4 are punishable as criminal offences.
2. <sup>8</sup>Member States shall take the necessary measures to ensure that the attempt to commit any of the offences referred to in Articles [3(a) and 4(a), (b) and (c)]<sup>9</sup> is punishable as a criminal offence<sup>10</sup>.

*Article 6*

*Criminal sanctions*

Member States shall take the necessary measures to ensure that criminal offences referred to in Articles 3 to 5 are punishable by criminal sanctions which are effective, proportionate and dissuasive<sup>11</sup>.

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<sup>8</sup> **DELETED** opposes criminalisation of attempt.

<sup>9</sup> The indication of the concrete provisions to be referred to in this Article will be agreed upon at a later stage.

<sup>10</sup> **DELETED** proposed adding the requirement that the action amounting to attempt should be likely to produce the effect envisaged by the finalized form of the offence.

<sup>11</sup> **DELETED** question the absence of provisions approximating the types and levels of sanctions for the offences in the Directive; **DELETED** oppose this view.



*Article 7*  
*Liability of legal persons*

1. Member States shall take the necessary measures to ensure that legal persons<sup>12</sup> can be held liable for offences<sup>13</sup> referred to in Articles 3 to 5 where such offences have been committed for their benefit by any person who has a leading position within the legal person, acting either individually or as part of an organ of the legal person, based on:
  - (a) a power of representation of the legal person;
  - (b) an authority to take decisions on behalf of the legal person; or
  - (c) an authority to exercise control within the legal person.
2. Member States shall also take the necessary measures to ensure that legal persons can be held liable where the lack of supervision or control, by a person referred to in paragraph 1, has made possible the commission of an offence referred to in Articles 3 to 5 for the benefit of the legal person by a person under its authority.
3. Liability of legal persons under paragraphs 1 and 2 shall not exclude criminal proceedings against natural persons who are involved as perpetrators, inciters or accessories in the offences referred to in Articles 3 to 5.

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<sup>12</sup> **DELETED** suggested adding a definition of legal persons, drafted along lines of that contained in the Council conclusions of 2009 on model criminal provisions, guiding the Council's criminal law deliberations, which reads as follows: "'Legal person' shall mean any entity having legal personality under the applicable law, except for States, or public bodies in the exercise of State authority and for public international organisations". COM can accept this proposal. This will be further discussed at a later stage together with the other definitions contained in Article 2 of the draft Directive. **DELETED** has observed that the extension of the definition of legal persons will depend upon the scope of application of MAR.

<sup>13</sup> **DELETED** suggested amending the word "offences" to read "illegal conduct".

*Article 8*  
*Sanctions for legal persons*

Member States shall take the necessary measures to ensure that legal persons held liable pursuant to Article 7 are punishable by effective, proportionate and dissuasive sanctions.

*Article 9*  
*Report*

By [4 years after entry into force of this Directive], the Commission shall report to the European Parliament and the Council on the application of this Directive and, if necessary, on the need to review it, **including with regard to the appropriateness of introducing common minimum rules on types and levels of criminal sanctions**.<sup>14</sup>

The Commission shall submit its report accompanied, if appropriate, by a legislative proposal.

*Article 10*  
*Transposition*

1. Member States shall adopt and publish, by [24 months after entry into force of this Directive] at the latest, the laws, regulations and administrative provisions necessary to comply with this Directive. They shall forthwith communicate to the Commission the text of those provisions (...).

They shall apply those provisions from [24 months after entry into force of this Directive] and subject to and on the date of the entry into force of Regulation (EU) No...of the European Parliament and the Council on insider dealing and market manipulation.

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<sup>14</sup> **DELETED** oppose the inclusion of the last part of this paragraph; **DELETED** stated that it should be maintained in the text.

When Member States adopt those provisions, 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.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

*Article 11*

*Entry into force*

This Directive shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

*Article 12*

*Addressees*

This Directive is addressed to the Member States in accordance with the Treaties.

Done at Brussels,

*For the European Parliament*

*The President*

*For the Council*

*The President*

**Declaration of the **DELETED** Delegation to the minutes of COREPER on 18 April 2012**

While agreeing to the proposed partial approach of the Council on this dossier, **DELETED** recalls its initial position in favour of the approximation of the levels of sanctions. **DELETED** therefore expects that the subject can be revisited during the discussions on the remaining articles of the draft Directive and the negotiations with the European Parliament.

**DELETED** also reserves its right to come back to the articles that are object of this partial approach within the context of the forthcoming discussion on articles 1 to 4.

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