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"I/A" ITEM NOTE

from:	Presidency
to:	Coreper
Subject:	Proposal for a Regulation of the European Parliament and of the Council on insider dealing and market manipulation (market abuse) (MAR) - Progress Report

I. INTRODUCTION

1. On 20 October 2011 the Commission transmitted to the Council its proposal for a Regulation of the European Parliament and of the Council on insider dealing and market manipulation (market abuse).

2. The proposal has been examined by the Working Party on Financial Services in seven meetings during the Danish Presidency (4 and 25 January, 27 February, 3 April, 8 and 25 May and 14 June 2012). The last two meetings were held at attachés only level.

3. During the discussions in the Working Party on Financial Services the Presidency has tabled three overall compromise proposals (doc. 9435/12 EF 107 ECOFIN 380 DROIPEN 51 CODEC 1151, doc. 10198/12 EF 122 ECOFIN 427 DROIPEN 64 CODEC 1384, doc. 11183/12 EF 138 ECOFIN 565 DROIPEN 76 CODEC 1634) in order to make progress on the file.

II. STATE OF PLAY

4. Generally speaking, the initiative of the European Commission has been well received; there is a general consensus, that a stronger and more uniform regime in this area is needed. After the latest meeting of the Working Party on 14 June 2012, the Presidency considers that the outstanding key issues can be summarized as follows:

a) Inside information and publication – the definition and time of publication

The main remaining topic relates to the definition of inside information and the obligation on issuers to disclose inside information. Discussions during the Working Parties have shown that there is no common understanding among Member States, of the kind of information insiders are not allowed to trade on when inside information arises nor when information has to be disclosed. This is especially true for a process which occurs in stages. The Commission suggested in their proposal the addition of a new type of information defined as relevant information not generally available to the public (RINGA). This new type of information was proposed in order to make it explicit, that a person is not allowed to trade on information which is not precise enough to be disclosed by the issuer. This approach is commonly known as the two-fold notion, because it distinguishes between information one cannot trade on and information which needs to be disclosed.

Most Member States agree on the approach of the two-fold notion. However some Member States feel that this should be reached under the current definition of inside information and the obligation to disclose, while other Member States are of the opinion, that a definition of a new type of information is needed. Furthermore the European Court of Justice is expected to

issue a ruling on the interpretation of the definitions of the current market abuse directive (Directive 2003/6/EC). Member States have agreed to wait for the ruling of the ECJ before finalizing the Regulation in order to take the ruling and its rationale into consideration.

b) Insider dealing and defenses

Most delegations agree with the current approach on insider dealing, and on the need to have defenses defined in an article. However there is no agreement on the wording of these defenses as some Member States read the present wording as providing safe harbors or as reversing the burden of proof, which under their legal systems would not be possible.

c) Accepted Market Practices

An Accepted Market Practice (AMP) is a practice, which in itself constitutes market manipulation, but is authorized by a competent authority as an AMP in a Member State. In the proposed Regulation it was proposed to remove this possibility for AMP´s, but some Member States have proposed to keep this it as having AMP's is considered to be important in relation to the different markets in the Union. Most Member States agree that AMP's could be kept, but should only apply in one Member State and not be transposed to other Member States' markets. Council legal service has provided an opinion on the matter (doc 9886/12, JUR 271, EF 115, EFOFIN 404, CODEC 1293).

d) Powers of competent authorities

There is a common understanding, that there is a need for sufficient investigatory powers to each Member States competent authority as well as a deterrent sanctioning regime. As the provisions in the Regulation are Directive like and therefore need implementation in Member States, discussions have been related to the interpretation of such Directive-like provisions in a regulation. Member States consider this need to respect different legal traditions in Member States, including each Member States division of powers between the competent authority and the public prosecutor. Furthermore there is a common understanding that the powers afforded

to the competent authorities under the current market abuse directive should not be limited. Some Member States consider that the Commission Proposal would have this effect, while the Presidency is of the opinion this is not the aim of the Commission proposal.

e) Administrative sanctions

The proposed Regulation states a set of minimum administrative measures and sanctions a competent authority should have at their disposal including administrative pecuniary sanctions available for each Member States competent authority. According to the original Commission proposal Member States could provide for higher administrative sanctions in national law. As with the administrative powers the administrative measures and sanctions must be implemented into national law. As with powers the discussions have been influenced by Member States' different legal traditions, especially when it comes to the division between administrative sanctions and criminal sanctions. Further the proposed minimum of the maximum pecuniary sanctions are for some Member States very high and will be disproportionate in comparison with similar offences in that Member State. Other Member states find the proposed sanctions to be low and to lack a deterrent effect. The Danish Presidency has proposed a compromise, which would give more flexibility for Member States when implementing the administrative sanctions while at the same time keeping the possibility for Member States to impose higher administrative sanctions.

f) Publication

The Proposed Regulation provided for the Competent Authority to be obliged to make public every sanction imposed under the regulation. This publication is highly controversial in some Member States while other Member States consider it necessary for information to the market as well for its deterrent effect. The Danish Presidency has put forward a compromise under which publication is considered to be for information purposes, not a sanction in itself. Furthermore a competent authority may publish the decision on an anonymous basis or refrain from doing so under special circumstances.

5. In addition to the above mentioned issues, there is still need for further discussion on other non key issues, such as managers transaction and what transactions need notifications as well as the threshold before transactions have to be notified, market soundings as well as the exemption to draw up insider lists for issuers on SME growth markets needs further debate. Finally the scope of the Regulation needs some further discussion, however this latter discussion is primarily linked to the interconnectivity to the MIFID/MIFIR proposal, and will have to wait for further progress on this file.

III. CONCLUSION

6. Against this background the Presidency proposes that the Permanent Representatives Committee:
   - takes note of the progress achieved with regard to the proposal;
   - takes note of the latest Presidency compromise proposal, as set out in doc. 11183/12 EF 138 ECOFIN 565 DROIPEN 76 CODEC 1634, and
   - invites the incoming Cyprus Presidency to continue to work on the basis of this compromise proposal in order to reach an agreement on a general approach in the near future.