

New European Regulatory Package regarding Market Abuse

13.06.2014

On 12 June 2014, Regulation No 596/2014 on market abuse (**Market Abuse Regulation**) and Directive 2014/57/EU on criminal sanctions for market abuse (**Market Abuse Sanctions Directive**) have been published in the Official Journal of the European Union.

1. Market Abuse Regulation

The text of the Market Abuse Regulation can be found [here](#). (Please also find the [French](#) version and [Dutch](#) version)

OVERVIEW

1.1. The reason for a European regulation instead of a European directive

By opting for a European regulation instead of a European directive, the European Parliament and the Council confirmed that it was necessary to establish a more uniform interpretation of the European Union market abuse framework as the Market Abuse Regulation is directly applicable.

1.2. Scope

The Market Abuse Regulation broadens the scope of application of the European Union market abuse regulatory framework.

a. Market abuse

According to the philosophy of the Market Abuse Regulation, any unlawful behavior in the financial markets is prohibited. The concept of market abuse typically consists of **insider dealing, unlawful disclosure of inside information and market manipulation**. The Market Abuse Regulation however provides for **some clarifications or new requirements** regarding insider dealing and market manipulation.

- Insider dealing and related preventive measures

The Market Abuse Regulation focuses on sanctioning the persons who take unfair advantage of the benefit gained from an inside information. In some cases, the utilization of the inside information is presumed.

On the preventive measures side, the Market Abuse Regulation standardizes for instance the content of the insiders lists or broadens the disclosure obligations of persons discharging managerial duties and the persons closely associated with them (with a few exceptions, the pledging of financial instruments could also trigger a disclosure duty). The duty for an issuer to immediately publicly disclose inside information is of course maintained by the Market Abuse Regulation, with the same exceptions as in the past, but some further clarifications, based on the EU Court of Justice case law are taken into account.

- Market manipulation

Aside from providing non-exhaustive examples of market manipulation, the Market Abuse Regulation confirms that **attempting to engage in market manipulation is also prohibited. So is the attempted or actual manipulation of benchmarks** (including interbank offer rates). The spreading of false and misleading information now includes rumors and false or misleading news. Moreover, those active in the financial markets who freely express information contrary to their own opinion or better judgment may also be considered as spreading false or misleading information. The dissemination of false or misleading information through **social media** is also prohibited. The national competent authorities are in charge of defining which market practices are to be considered as accepted market practices and fall out of the scope of market manipulation.

b. Financial instruments

The definition of financial instruments in the Market Abuse Regulation refers to the meaning of this concept under the 2014/65/EU (MIFID II), which is **very broad**. On top of that, the Market Abuse Regulation does not limit its scope of application to financial instruments admitted to trading on a regulated market or for which a request for admission to trading on a regulated market has been made. Financial instruments traded or admitted to trading on an MTF (multilateral trading facility) or traded on an OTF (organized trading facility) are also covered by the Market Abuse Regulation. So are other financial instruments the price or value of which depends on or has an effect on the price or value of the aforementioned financial instruments. This shall for instance be the case of credit default swaps or contracts for differences. Emission allowances which are traded on an auction platform authorized as a regulated market of emission allowances or other products based thereon are falling in the scope of application of the Market Abuse Regulation.

c. Inside information

The key characteristics of **inside information remain the same** as in the past, but the precision of the information and the likelihood of its effect on the price of the financial instrument have been further defined notably in the light of the EU Court of Justice case law and the ESMA guidelines.

d. General exceptions

The prohibition of insider dealing and market manipulation does not apply to trading in own shares in buy-back programs or trading in securities for the stabilization of securities provided that some conditions laid down in the Market Abuse Regulation are met. Moreover, the entire Market Abuse Regulation does not apply to transactions, orders or behaviors of public authorities (Member States, members of the ESBC, ministries, EU Commission or others) in pursuit of monetary, exchange rate or public debt management policy. Other specific exceptions apply in the framework of the EU's climate policy or the EU's Agricultural Policy (for instance).

1.3. Powers of the competent authorities and cooperation between the national competent authorities and with the ESMA

The Market Abuse Regulation provides for a minimum set of supervisory and investigation powers which the national competent authorities should be entrusted with under national law. Those powers should be exercised, where the national law so requires, by application to the competent judicial authorities. The said powers include, among others, (i) the access to any document or data and the right to receive or take a copy thereof, (ii) the right to carry out on-site inspections (at sites other than the private residences of natural persons) or to require existing recordings of telephone conversations, electronic communications or data traffic held by investment firms, credit institutions or financial institutions and, insofar permitted by national law, by telecommunications operators and (iii) the power to impose a temporary prohibition of the exercise of professional activity.

The swift cooperation between the national competent authorities is ensured by a clear duty to cooperate set forth in the Market Abuse Regulation and the future guidelines which ESMA shall publish for the attention of the national competent authorities. The cooperation with third countries shall take place within the framework of specific cooperation arrangements to be entered into with the relevant supervisory authorities.

1.4. Administrative measures and sanctions

Without prejudice to the criminal sanctions laid down in the Directive 2014/57/EU (see below), the Market Abuse Regulation provides for **a set of administrative sanctions and other administrative measures** which include, among others, the possibility of imposing a ban from exercising management functions within investment firms. The possibility for the Member States to impose both administrative and criminal sanctions for the same offence is confirmed by the Market Abuse Regulation.

The **maximum amount of the administrative fines** which may be imposed by the competent authorities varies in function of the offence as well as the persons at stake.

Natural persons infringing the prohibition of insider dealing or market manipulation may for instance be fined up to EUR 5,000,000 while legal persons may be fined up to EUR 15,000,000 or up to 15% of their turnover, as the case may be on a consolidated basis, for the same offences (insider dealing or market manipulation).

The publication of the decisions of the competent authorities occurs in principle on a nominative basis, save if such publication would cause disproportionate damages to the persons involved.

OTHER AMENDMENTS

As from 3 July 2016, the Directives 2003/6/EC, 2004/72/EC and 2003/124/EC and the Regulation (EC) No 2273/2003 are repealed.

ENTRY INTO FORCE

Except for the implementing measures which have to be taken by the ESMA and/or the European Commission, the Market Abuse Regulation shall apply from 3 July 2016. The new powers of the national competent authorities have to be laid down in the national laws before that date. Provisions relating to OTF's, SME growth markets or emission allowances shall apply from 3 January 2017.

2. Market Abuse Sanctions Directive

The text of the Market Abuse Sanctions Directive can be found [here](#). (Please also find the [French](#) version and [Dutch](#) version)

SUMMARY

The Directive on criminal sanctions for market abuse (Market Abuse Sanctions Directive) complements the **Market Abuse Regulation** by requiring all Member States to provide for harmonized criminal offences of insider dealing and market manipulation, and to impose maximum criminal penalties of not less than 4 or 2 years imprisonment for the most serious market abuse offences, in function of the offence at stake.

OVERVIEW

Market Abuse Sanctions Directive has brought the following major amendments:

2.1. Scope of the Directive

The scope of this Directive is aligned with the one of Regulation (EU) No 596/2014.

2.2. Introduction of criminal sanctions for at least serious market abuse offences

The Directive defines the offences which should be regarded by Member States as criminal offences: insider dealing, unlawful disclosure of inside information and market manipulation, at least when they are committed with intent and are serious.

In general, market abuse offence shall be deemed '**serious**' in case such as those where the impact on the integrity of the market, the actual or potential profit derived or loss avoided or the level of damage caused to the market is high.

The Directive provides also additional specificities by offence:

Insider dealing and **unlawful disclosure of inside information** should **also** be deemed to be **serious** in cases such as those where the overall value of the financial instruments traded is high. Other circumstances that might be taken into account are, for instance, where an offence has been committed within the framework of a criminal organization or where the person has committed such an offence before.

Market manipulation should also be deemed to be serious in cases such as those where the level of alteration of the value of the financial instrument or spot commodity contract, or the amount of funds originally used is high or where the manipulation is committed by a person employed or working in the financial sector or in a supervisory or regulatory authority.

The Directive also requires Member States to criminalize **inciting, aiding and abetting insider dealing**, unlawful disclosure of inside information and market manipulation, as well as **attempts of** insider dealing and market manipulation.

Liability is also **extended to legal persons**.

2.3. Introduction of effective, proportionate and dissuasive sanctions

Member States are required to ensure that the criminal offences transposed into their jurisdiction are punishable by criminal penalties and sanctions which are effective, proportionate and dissuasive when they are committed **intentionally** and at least in **serious case**.

The Directive provides maximum sanction levels of at least *four* years' imprisonment for market manipulation, insider dealing and recommending or inducing another person to engage in insider dealing and *two* years for the unlawful disclosure of inside information.

Legal persons might also be punishable by criminal or non-criminal fines, which may include other sanctions such as placing under judicial supervision or temporary or permanent disqualification from carrying out of commercial activities.

2.4. Regulation of commodities and commodity derivatives

The Directive strengthens the fight against market abuse across commodity and related derivative markets, explicitly bans the manipulation of benchmarks (such as EURIBOR and LIBOR).

ENTRY INTO FORCE

The Market Abuse Sanctions Directive shall enter into force on 2 July 2014.

Member States should transpose the Directive into their national law **by 3 July 2016**.

Click [here](#) for a printer-friendly version.

All rights reserved. Care has been taken to ensure that the content of this e-bulletin is as accurate as possible. However the accuracy and completeness of the information in this e-bulletin, largely based upon third party sources, cannot be guaranteed. The materials contained in this e-bulletin have been prepared and provided by Stibbe for information purposes only. They do not constitute legal or other professional advice and readers should not act upon the information contained in this e-bulletin without consulting legal counsel. Consultation of this e-bulletin will not create an attorney-client relationship between Stibbe and the reader. The e-bulletin may be used only for personal use and all other uses are prohibited.

Practice areas

Banking and Finance
Capital Markets
Corporate and M&A

Markets

Financial Institutions
Private Equity
Investment Funds

Key Contact



Marc Fyon
Partner Brussels

T. +32 2 533 53 25



Jan Peeters
Managing Partner Brussels

T. +32 2 533 53 23



Hadrien Chef
Associate Brussels

T. +32 2 533 56 11



Julien Bogaerts
Associate Brussels

T. +32 2 533 54 35



Pieter-Jan Van Houdenhove
Associate Brussels

T. +32 2 533 51 84



Michiel De Muynck
Junior Associate Brussels

T. +32 2 533 54 71