

A new framework for market abuse. March 2014.

The Market Abuse Directive (MAD) (January 2003) will be replaced shortly by two dispositions that will constitute the legal framework for market abuse in the European Union: **the Directive on criminal sanctions for insider dealing and market manipulation (the new MAD), and the Regulation on insider dealing, the improper disclosure of inside information and market manipulation (Market Abuse Regulation MAR)**, that are being translated into the official languages. The plenary of the European Parliament adopted, on the 4th February, the European Commission's proposal for a Directive on criminal sanctions for market abuse. The vote follows the political agreement reached with the Council in the trilogue on 10 December, which was confirmed by COREPER on 20 December. The political agreement on the proposal for a Regulation on insider dealing and market manipulation (Market Abuse Regulation MAR) took place on the 24th June 2013, when the Council confirmed the agreement reached with the European Parliament on the European Commission's proposal for the MAR, having been published on the Council website on the 18th September 2013.

MAR establishes that ESMA shall submit to the European Commission the draft regulatory technical standards for the development of some of the MAR provisions and, to do so, ESMA published in November 2013 a discussion paper on policy orientations on possible implementing measures under the MAR on the following areas: exemption for buyback programmes and stabilisation measures, market soundings, specification of the indicators of market manipulation laid down in annex 1 MAR, accepted market practices, suspicious transactions and reporting orders, public disclosure of inside information and delays, insider list, manager's transactions, investment recommendations, and reporting of breaches.

The new MAD establishes a common regulatory framework for criminal penalties including fines and a maximum term of imprisonment of at least four years for insider dealing and market manipulation and a maximum term of imprisonment of at least two years for the unlawful disclosure of inside information, and also sets the liability of legal persons in cases of market abuse. The MAR establishes a common legal framework for administrative breaches and sanctions on insider dealing, the improper disclosure of inside information and market manipulation as well as measures to prevent market abuse. The **most relevant aspects of the new market abuse framework** are:

1. Extension of the legal scope. The new legal framework applies also to instruments admitted to trading on Multilateral Trading Facilities (MTFs) and in Organised Trading Facilities (OTFs), and to spot commodity contracts which are not wholesale energy products and derivatives -including OTC derivatives- where it has or it is likely to have an effect on the price or value of financial instruments admitted to trading in regulated markets, SMNs or OTFs.

2. Definition of inside information for commodity derivatives. ESMA shall issue guidelines to establish a non-exhaustive indicative list of information which is reasonably expected or is required to be disclosed in accordance with legal provisions applicable, market rules, contracts, practice or customs on the relevant commodity derivatives markets or spot markets related with them.

3. Expanding the definition of insider dealing. Insider dealing arises where a person possesses inside information and uses it not only by acquiring or disposing financial instruments to which that information relates, but also by cancelling or amending an order where the order was placed before the person concerned possessed the inside information. Insider dealing is, also, the use of recommendations or inducements to engage in insider information where the person using or disclosing the recommendation or inducement knows or ought to know that it is based upon insider information.

4. Improper disclosure of inside information. It is defined in detail and it occurs where a person possesses inside information and discloses that information to a third person, except where the disclosure is made in the normal exercise of an employment, a profession or duties, including where the disclosure qualifies as a market sounding.

5. Enlarging market manipulation. Market manipulation definition adds, besides transactions and orders, any other

activity or behavior provided that in all cases affects or is likely to affect the price of one or several financial instruments or a related spot commodity contract related to them. Also, it is market manipulation the transmission of false or misleading information or the provision of false or misleading inputs where the person who made the transmission or provided the input knew or ought to have known that it was false or misleading or any other behavior which manipulates the calculation of a benchmark.

6. Harmonization of the public disclosure delay regime for insider information. An issuer may delay the disclosure to the public of inside information in the case of a protracted process that occurs in stages (due to dispute, negotiations, etc.) intended to bring about results in a particular circumstance or a particular event. The issuer that, on its own responsibility, decides to delay the disclosure of inside information must inform the competent authority and shall provide a written explanation of how the conditions are met, immediately after the information is disclosed to the public. In order to preserve the stability of the financial system, a credit institution or a financial institution may delay the public disclosure of inside information, including information which is related to a temporary liquidity problems; the competent authority has to consent to the delay on the basis that it is convenient to the public interest and that the confidentiality of that information can be ensured. Where a rumour explicitly relates to inside information the disclosure of which has been delayed -where that rumour is sufficiently accurate to indicate that the confidentiality of that information is no longer ensured- the issuer shall disclose that inside information to the public as soon as possible.

7. Regulation of market soundings. A market sounding comprises the issuer's communication of information, prior to the announcement of a transaction, to one or more potential investors in order to gauge their interest in a possible transaction and its conditions (such as its potential size or pricing, etc.). The disclosure of inside information by a person intending to make a takeover bid for the securities of a company or a merger with a company to parties entitled to the securities shall also constitute a market sounding if the information is necessary to enable the parties entitled to the securities to form an opinion on the willingness to offer their securities and the willingness of parties entitled to the securities to offer their securities is reasonably required for the decision to make the takeover bid or merger.

8. Reporting of breaches: whistleblowers. Reporting of breaches regime is included for the first time. Member States shall ensure that competent authorities establish effective mechanisms enable reporting of actual or potential legal breaches to competent authorities. The mechanisms provided shall include at least:

- specific procedures for the receipt of reports of breaches including the establishment of secure communication channels for such report;
- appropriate protection for persons working under a contract of employment, who report breaches or are accused of breaches, against retaliation, discrimination or other types of unfair treatment at a minimum; and
- the protection of personal data.

9. Enlargement of the reporting of suspicious transactions. The reporting without delay to the competent authority of the trading venue is referred not only to transactions executed but also to orders that could constitute insider dealing, market manipulation or attempted in insider dealing or market manipulation.

10. Prohibition of market manipulation attempt. In addition to the notification described in the preceding paragraph, Member States shall take the necessary measures to ensure that the attempt to commit the offences describe and the inciting, aiding and abetting is punishable as a criminal offence.

11. New administrative sanctions. New administrative sanctions are, among others, the following: the disgorgement of the profits gained or losses avoided due to the breach in so far as they can be determined, and a permanent ban in the event of repeated breaches for exercising management functions in investment firms of any person discharging managerial responsibilities within and investment firm or any other natural person who is held responsible.

If you want to read the text of the MAR on which a political agreement was reached, published on the Council website on September 18th 2013, please, click on: <http://register.consilium.europa.eu/doc/srv?l=EN&t=PDF&gc=true&sc=false&f=ST%2012906%202013%20INT>

If you want to read the text of the political agreement on the Directive on criminal sanctions for insider dealing and

market manipulation, please, do click on: <http://db.eurocrim.org/db/en/doc/2023.pdf>

If you want to read the ESMA discussion paper, please, click on:
http://www.esma.europa.eu/system/files/2013-1649_discussion_paper_on_market_abuse_regulation_0.pdf