



Opportunities for the Market Abuse Directive Revision

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Effective fight of market abuse requires:

- **Equal and effective rules**
- **Equal supervisory powers**
- **Effective supervisory tools**
- **Effective and harmonized enforcement conditions**

Equal and effective rules

- **Scope**

Taking into consideration the growing importance of multilateral trading facilities (MTF), the expansion of the scope of MAD beyond regulated markets needs to be pursued.

- **Definition**

The definition of financial instruments in MAD should be aligned with that provided in MiFID. In particular, it should be explicit that derivatives contracts, as defined by MiFID, are covered.

- **Extension to CDS**

Extend the scope of the MAD to include OTC derivatives and fine tune the definition of manipulation of an instrument using another derivative, even if the value of the latter does not depend directly on the price of the former.

Equal and effective rules

- **Attempts**

Definition of market manipulation should be extended to explicitly include the attempt to manipulate the market as behavior subject to the market abuse regime.

- **Need for more stringent and consistent regulation on:**

- financial analysis (currently regulated by MAD and MiFID)

- requirements for journalists when quoting third parties' opinions (written or oral).

Equal and effective rules

- **Options and discretions**

Their use in MAD is a significant source of divergence across Member States.

The findings of CESR’s Review Panel on this matter have been provided to the European Commission. CESR members have also been recommended to take certain measures prior to any legislative changes in the areas considered to be particularly important, e.g. reporting of STRs on OTC derivatives.

An example of divergence in MAD application:

MAD and MTFs	
MAD regime in full	ES, HU, IS, NL
MAD in some parts on all MTFs	AT, LT, LU, NO, PL, PT, SE, SK
MAD regime in full on some MTFs	EL, MT
MAD in some parts on some MTFs	BE, DE, FI, FR, IT, UK
MTFs not covered	BG, CY, CZ, DK, EE, IE, LV, RO, SI

Supervisory powers and tools

CESR Members' powers in relation to the Market Abuse Directive

Q	CESR Members have the power to ...	Adoption %
1	... accept market practices in accordance with EC Guidelines	96
7	... establish whether or not an individual has access to inside information	93
8	... ascertain whether or not relevant persons do not misuse that information as described in Art.2.1	93
9	... ensure that the prohibition in Art. 2.1 applies to the person(s) described in Art. 2.2	93
13	... monitor and prevent market manipulation	100
14	... monitor whether or not an issuer informs the public according to Art. 6.1	96
15	... supervise whether the provisions reg. public disclosure provided for in Dir. 2003/124/EC are followed	100
16	... be informed by issuers without delay should they decide to delay public disclosure of inside information	59
17	... issue regulations with respect to the list of insiders referred to in Art. 6.3	63
20	... issue regulations with respect to the notification of transactions referred to in Art. 6.4	89
24	... monitor whether or not the provisions of Art. 6.5 are adhered to	100
26	... regulate structural provisions adopted by regulated markets to prevent market manipulation	96
31	...ensure that public institutions that disseminate statistics do so in a fair and transparent way	63
38	... supervise the exemptions of Art. 7	52

Supervisory powers and tools (cont'd)

Supervisory and investigatory powers (Art. 12); administrative measures and sanctions (Art. 14)

Q	CESR Members have the power to ...	Adoption %
43a	... have access to any document in any form whatsoever, and to receive a copy of it	100
43b	... demand information from any person	100
43c	... carry out on-site inspections	100
43d	... require existing telephone and data traffic records	89
43e	... require the cessation of any practice that is contrary to the provisions adopted in the Directive	100
43f	... suspend trading of the financial instruments concerned	100
43g	... request the freezing and/or sequestration of assets	78
43h	... request temporary prohibition of professional activity	85
44	... take appropriate admin. measures or impose admin. sanctions according to Art. 14	100
46	... determine the measures and sanctions that could be imposed	100
47	... impose sanctions for failure to cooperate in an investigation under article 12	100
49	... disclose to the public every measure or sanction to be imposed due to infringement of provisions	63

Supervisory powers and tools (cont'd)

CESR Members' cooperation and assistance powers

Q	CESR Members have the power to ...	Adoption %
50a	... render assistance to other CESR member as regards the documents	100
50b	... render assistance to other CESR member as regards information from any person	100
50d	... render assistance to other CESR member as regards the telephone and data traffic records	89
50e	... render assistance to other CESR member as regards on-site inspections	100
50f	... render assistance to other CESR member as regards the cessation of practice	96
50g	... render assistance to other CESR member as regards the suspension of trading	96
50h	... render assistance to other CESR member as regards the freezing and/or sequestration of assets	85
50i	... render assistance to other CESR member as regards the temporary prohibition of professional activity	93
51	... open an investigation solely on a request of a foreign authority	96

Supervisory powers and tools (cont'd)

- **Telephone records**

Experience has shown that access to data traffic records has been problematic in several Member States. Uncertainties on the rights of the competent authorities to obtain this data should be removed.

- **Suspicious Transaction Reports (STRs)**

MAD should be amended to make STRs on OTC derivatives mandatory.

Supervisory powers and tools

The particular case of short selling

The main issue is to **detect market manipulation**. Supervisors must have proper tools for effective supervision and enforcement:

- Identification of “short” orders: one possible way is the “flagging”, by which broker-dealers mark sell orders of securities as "long" or "short".
- a harmonized regime of communication and public disclosure of short sales, complementary of flagging, for both equity and debt markets, including derivatives, building on the recent pan-European requirement for equities approved by CESR.

Supervisory powers and tools

The particular case of short selling (cont'd)

- a common and stringent regime for settlement failures (e.g. “closing-out” rules, penalties for deliberate fails).
- Increased transparency in the OTC space, especially in bond and derivatives markets.

Supervisory powers and tools

The particular case of CDS

Detecting market manipulation is also the central issue.

Currently, supervisors have limited tools:

- substantial pre-trade transparency, but no post-trade transparency;
- Limited means to assess the connection between CDS and underlying assets' markets.

Sanctioning tools and practices

Substantial divergence across CESR members:

I.e. MAD Art. 5 - Market manipulation

Level of fines

- Max 1.200 € for individuals or 125.000 € for legal entities in Slovenia to max 75.000.000 € in Italy or unlimited in the U.K.

Level of pecuniary criminal sanctions

- Max. 10.000 € in Belgium to max. 15.000.000 € in Italy or unlimited in Germany and the U.K.

Duration of imprisonment

- Max. 1 year in Luxembourg to 15 years in Latvia.

Sanctioning tools and practices (cont'd)

Prison sentences for financial crime:

- 15 years in Latvia
- 12 years in the Czech Republic and Italy
- 10 years in Greece and Ireland
- 8 years in Poland and Slovakia
- 7 years in the United Kingdom
- 6 years in Norway and Spain
- 5 years in Austria, Germany, Portugal and Romania

Effective enforcement

CESR Survey to 29 members (2008)

- **2352 investigations started**, of which:
 - 340 for alleged insider trading;
 - 330 for market manipulation;
 - 124 for insider trading and/or market manipulation (where no distinction possible);
 - 213 for principle-based actions against market misconduct;
 - 1345 for breaches of disclosure requirements.
- **1001 investigations concluded**, of which:
 - 565 for ceased proceedings;
 - 222 for administrative measures;
 - 214 for referral to criminal authorities or taking criminal proceedings.

Effective enforcement (cont'd)

CESR Survey to 29 members (2008)

- **994 sanctions applied**, of which:
 - 653 administrative fines;
 - 201 administrative warnings;
 - 90 criminal fines;
 - 50 imprisonments.
- **Highest administrative fine** applied: from EUR 64 to 7 million.
- **Highest criminal fine** imposed: from EUR 671 to 0.15 million.
- **Longest term of prison sentence**: from 50 days to 10 years.

Closing remarks

The work on the revision of the Market Abuse Directive needs to be seen against the background of wider reforms in financial markets.

- a common regime for post trading transparency and supervision for bonds (including asset-backed securities) and derivatives (including CDS), in parallel with the establishment of a European trade repository.
- the increase of the standardization of derivatives for easiness of trading, clearing and settlement on a central counterpart.
- the existence of a central counterpart to eligible derivatives. From an investors' perspective, this also increases the number of players quoting prices, thus leading to higher competition, price representation and market integration.
- foster trading of standardized derivatives and structured products in organized markets leading to enhanced transparency and information availability for investors (a substitute could be the mandatory listing in at least one regulated market).