



# A new European framework: MAR and CSMAD

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# Outline

- Objectives of MAD review
- Key aspects of MAR (Regulation 596/2014 on market abuse)
- Key aspects of CSMAD (Directive 2014/57/EU on criminal sanctions for market abuse)

# MAD Review (1)

Former MAD	Current MAR and CSMAD
<p><b>Directive 2003/6/EC</b> of 28 January 2003 on insider dealing and market manipulation (market abuse)</p>	<p><b>Regulation 596/2014/EU</b> on Insider Dealing and Market Manipulation (Market Abuse)* (* Legally binding and directly applicable)</p>
<p>+ Implementing measures</p>	<p><b>Directive 2014/57/EU</b> on Criminal Sanctions for Market Abuse** (** Requires transposition by the MSs)</p>
	<p>+ delegated and implementing acts</p>

## MAD Review (2)

- MAD 2003 overtaken by market and technological developments; sanctions lacking deterrent effect;
- Key objectives: update and strengthen EU market abuse framework by extending its scope (MTFs, OTFs, cross-market abuse), reinforcing capacity of regulators to detect and sanction abuse and enhance cooperation between regulators;
- Response to LIBOR scandal - extend market abuse rules to manipulation of benchmarks and criminalise such manipulation across the EU.

# Scope of the New Market Abuse Framework

1. **Transactions, orders or behaviours** relating to a **financial instrument** requested/admitted to trading or traded on a regulated market, MTF or OTF, or whose price depends on or has an effect on such an instrument (e.g. CDS); includes emission allowances;
2. **irrespective of whether or not** the behaviour or transactions actually take place on a trading venue;
3. Interaction between spot commodity contracts (not wholesale energy products) and financial instruments;
4. Behaviour in relation to benchmarks;
5. Actions and omissions in the Union and a third country.



# Exemptions

- MAR exemption for transactions, orders or behaviour, by:
  - **Member States, members of ESCB, the Union, the Commission, ministries and other public bodies (listed in Article 6 of MAR), in pursuit of monetary, exchange rate or public debt management policy**
    - **Extended to certain third-country central banks**
  - **Activities of a Member State, the Commission or other officially designated bodies in pursuite of Union's climate policy or Union's Common Fisheries Policy**
- Exemption for **buy-back programmes and stabilisation**

# Inside Information and Insider Dealing

- Information of a **precise** nature, which is **not public**, relating to an issuer or a financial instrument/spot commodity contract, and which, if made public, would have a significant effect on **prices**;
- Also price-sensitive information in relation to commodity derivatives or **spot commodity contracts** and this information is reasonably expected to be disclosed;
- Significant effect on price means information a reasonable investor would be likely to use as part of the basis of investment decisions;
- **Insider dealing** - where a person **uses inside information** by transacting, on his own account or for the account of a third party, in a financial instrument to which that inside information relates.

## ESMA Guidelines on commodity derivatives inside information

In addition to the elements defining inside information, inside information on **commodity derivatives** is information that *"is reasonably expected or required to be disclosed in accordance with legal or regulatory provisions at Union or national level, market rules, contract, practice or custom, on the relevant commodity derivatives markets or spot markets."*

Guidelines published on 30/09/2016 provide a **non-exhaustive indicative list**.

- other conditions of inside information also need to be fulfilled
- do not impose any additional information disclosure requirements



# Legitimate behaviour

For persons in possession of inside information, no presumption of insider dealing for trading in specific cases, such as

- **Adequate and effective arrangements** in place for legal persons (Information Wall);
- Legitimate business of buying /selling financial instruments by **market makers** / persons authorised to **execute orders on behalf of third parties**;
- Transaction carried out **in the discharge of an obligation** (that arose before inside information) that has become due.

# Market Manipulation

- Entering into a transaction or behaviour that:
  - gives or is likely to give false or **misleading signals** as to the supply/demand/price of financial instrument; or
  - secures or is likely to secure the price of a financial instrument at an **artificial/abnormal level**.
    - Unless carried out for legitimate reasons pursuant to accepted market practice
- Transaction or behaviour by employing a **fictitious device** or other form of deception;
- **Disseminating misleading information**;
- Transmitting false or misleading information, providing false or misleading inputs, or any action which **manipulates the calculation of a benchmark**.



# Prevention and Detection of Market Abuse

- Obligation on **trading venues** to have arrangements, procedures and systems aimed at preventing and detecting market abuse
- Obligation on any **professional** arranging or executing transactions in financial instruments to have arrangements and systems to detect and report suspicious orders and transaction



# Disclosure Requirements

- Public disclosure of inside information as soon as possible. Special cases:
  - SME Growth Markets (possible publication on a trading venue's website)
  - Emission allowance market participants (not if below minimum threshold)
- Where publication is delayed for legitimate reasons - ex post notification to CA
- Where information is systemically important, disclosure may be delayed only with prior consent of the CA
- Insider lists and Managers' transactions

# Whistleblowing

- **Whistleblowers may bring new information to the attention of competent authorities** which assists them in detecting and imposing sanctions in cases of insider dealing and market manipulation.
- However, **whistleblowing may be deterred for fear of retaliation**, or for lack of incentives.
- Measures regarding whistleblowing are necessary to facilitate detection of market abuse and to **ensure the protection and the respect of the rights of the whistleblower and the accused person.**

# Administrative Measures and Sanctions

- **Maximum administrative pecuniary sanctions :**
  - At least three times the profit/loss avoided
  - At least EUR 5 million (natural persons) for the main offences
  - At least EUR 15 million or 15% of total annual turnover (legal persons) for the main offences
- Also: disgorgement of profits gained/losses avoided, withdrawal or suspension of authorisations, ban against members of the firms' bodies
- Member States may provide for additional sanctioning powers and higher levels of sanctions than those in MAR



# Criminal Sanctions for Market Abuse Directive (CSMAD)

- Criminal sanctions have a greater **deterrent effect** – fear of imprisonment and a criminal record
- Minimum rules on criminal offences and on criminal sanctions were essential for ensuring the effectiveness of the EU policy on market integrity.
- Criminal sanctions demonstrate social disapproval of a qualitatively different nature compared to administrative sanctions or compensation mechanisms under civil law
- **Article 83(2) of the Treaty (TFEU)** (*first time*)

- **Minimum Rules** harmonising criminal offences of **Market Abuse** (when committed **intentionally** and at least in **serious cases**)
  - Insider Dealing, unlawful disclosure of inside information and market manipulation
  - Inciting, Aiding and Abetting
  - Attempt
- Scope of application the same as MAR
- Exclusions from the scope: buy-back programmes, stabilisation, monetary, exchange rate and public debt management activities; climate, agriculture and fisheries policies
- Accepted market practices, legitimate behaviours, market Soundings



## Criminal Sanctions

- MSs shall ensure criminal Offences are punishable by **effective, proportionate** and **dissuasive** criminal penalties for natural and legal persons
- For natural persons:
  - maximum term of imprisonment of at least 4 years for insider dealing and market manipulation
  - maximum term of imprisonment of at least 2 years for unlawful disclosure of inside information
- For legal persons:
  - criminal or non-criminal fines and other sanctions such as exclusion from entitlement to public benefits or aid, temporary or permanent disqualification from the practice of commercial activities, judicial supervision and judicial winding-up



# Thank you for your attention (\*)

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