Redefining Market Abuse: How the EU's Market Abuse Regulation Shapes Enforcement, Liability and Sanctions

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This article by **Ryan Caruana** was previously submitted as part of ECL2001 and is being published with the author's permission. This article analyses how the Market Abuse Regulation (MAR) reshaped the European Union (EU)'s approach to market abuse by replacing the fragmented framework under the Market Abuse Directive (MAD) with a directly applicable and harmonised regulatory regime. MAR broadened the scope of market abuse by clearly defining insider dealing, unlawful disclosure of inside information, and market manipulation, while expanding its application to modern trading platforms and financial instruments. It also strengthened supervision through enhanced powers for national competent authorities and increased coordination with ESMA. In addition, MAR introduced harmonised administrative sanctions, complemented by criminal penalties under MAD II, creating a stronger enforcement framework. Overall, MAR represents a shift toward a more preventive, coordinated, and effective system aimed at safeguarding market integrity and investor confidence across the EU.

TAGS: Market Abuse, EU Company Law, MAR

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Introduction

One of the aspirations of the European Union (EU) is to maintain a genuine internal financial services market based on integrity and investment confidence.[1] Market abuse is one of the most serious unlawful forms of behaviour detrimental to market integrity through which select investors gain undue advantage over others.[2] Consequently, the EU intervened legislatively to safeguard integrity. This article discusses the EU's approach in combatting market abuse, particularly the developments introduced by the Market Abuse Regulation (MAR).[3]

The Need for MAR

The 2003 Market Abuse Directive (MAD) sought to establish a common legislative framework combatting market abuse.[4] However, directives grant Member States (MSs) discretion in their method of implementation, leading to national divergences in MSs' national laws on market abuse, specifically with regards to investigation, enforcement, and sanctioning, leading to disruptions in trade and competition.[5] To mitigate these diverging standards on market abuse, the European Parliament and Commission promulgated MAR whose provisions would be directly applicable, thereby requiring no transposition.[6]

MAR built on the MAD's foundations. MAD had only regulated financial instruments traded on any MS regulated market.[7] However, new trading platforms for such instruments developed which were not envisaged by MAD, primarily multilateral trading facilities, organised trading facilities, and over-the-counter trading.[8] Consequently, MAR captured all financial instruments traded on any platform, being a regulated market or otherwise. Furthermore, technological and trading advancements rendered MAD ineffective to combat new emerging abusive behaviours.[9] Simultaneously, MAD was revised into MAD-II to criminalise the most serious forms of

[1] Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (Market Abuse Regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC [2014] OJ L 173/1, Recital 1; Recital 2.
[2] Ľubomír Čunderlík, 'Implications of the New Framework for Market Abuse in the EU' (2016) 1(2) Public Governance Administration and Finances Law Review in the European Union and Central and Eastern Europe 15, 15.
[3] Market Abuse Regulation (n 1).
[4] Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (Market Abuse) [2003] OJ L 96/16.
[5] Christian Kersting, 'Insider Dealing and Ad Hoc Disclosure Requirements in the New EU Market Abuse Regulation' (2014) 33(1) Banking & Financial Services Policy Report 15, 15.
[6] Market Abuse Regulation (n 1) Recital 4.
[7] Directive 2003/6/EC (n 4) Article 9.
[8] Market Abuse Regulation (n 1) Recital 8.
[9] Tamás Tóth, 'How MAR/CS MAD Changed the EU's View on Market Abuse' (2020) 21(3) ERA Forum 365, 366.

market abuse, resulting in a two-tier EU regime combatting market abuse: MAR for enforcement and MAD-II for criminal sanctioning.[10]

MAR: Key Definitions

Being directly applicable, MAR harmonised key principles governing market abuse. Article 1 and Recital 7 define market abuse as unlawful behaviour on financial markets comprising of insider dealing, unlawful disclosure of inside information, and market manipulation.[11]

The first form of market abuse is insider dealing, defined under Article 8 MAR as the use of inside information by a person in possession thereof to acquire, dispose of, amend or cancel an order for financial instruments to which such information relates, either on his own account or third parties' account.[12] An insider may be a member of the issuer's administrative or supervisory bodies, a shareholder, employee, or anyone who knew or ought to have known that the information they possess is inside information.[13] Essentially, insider dealing grants investors undue advantage over uninformed investors.

The second form of market abuse is unlawful disclosure of inside information. Article 10 MAR defines it as when an insider, be it a natural or legal person, discloses insider information to another person.[14] However, MAR recognises that disclosure of such information in the normal course of employment or duties is lawful.[15] This establishes a delicate balance between the need for confidentiality to safeguard market integrity and the need for information exchange to keep the financial market running.

The third form of market abuse is market manipulation, defined broadly under Article 12 MAR.[16] It captures a range of behaviours which all have the potential of destroying a financial market's integrity and functioning through, among others, behaviours which may distort the market by creating false impressions in the supply, demand, and price of financial instruments, and entering into transactions which create false or misleading signals or which secure financial instruments at prices of an irregular level. Nonetheless, such practices might be legitimised if executed for a legitimate reason conforming with accepted market practices.[17] Market manipulation may also include the use of fictitious devices and the intentional spreading of false information. Furthermore, building on MAD's definition of market abuse, MAR recognises the use of technology in market manipulation, be it

[10] Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse (Market Abuse Directive) [2014] OJ L 173/179.
[11] Market Abuse Regulation (n 1).
[12] ibid.
[13] ibid Article 8(4).
[14] ibid.
[15] ibid.
[16] ibid.
[17] ibid Article 13.

through media or the internet.[18]

A central concept under MAR and its primary object of regulation is inside information.[19] Basing on MAD's foundation, Article 7 MAR defines inside information as:

> *Information of a precise nature, which has not been made public, relating, directly or indirectly, to one or more issuers or to one or more financial instruments, and which, if it were made public, would be likely to have a significant effect on the prices of those financial instruments.*[20]

This identifies four cumulative criteria defining inside information objective. First, the information is 'non-public' and is thus known only to select investors, granting them with an advantage over uninformed investors. Second, the information must be precise such that it allows investors to draw conclusions on the information's potential impact on the financial instrument's price.[21] In *Geltl v Daimler*, the CJEU explained that the probability of an event happening must be assessed through the reasonable investor test who must 'take into consideration not only the 'anticipated impact' of an event on the issuer, but also the degree of probability that the event will occur'.[22] Nonetheless, MAR fails to objective define how to assess for such a probability, giving rise to potential diverging national interpretations. Third, the information must relate to financial instruments or issuers, both of which are defined by Article 3.[23] An issuer is defined as any legal person, public or private, which issues, or intends to issue, financial instruments.[24] In defining 'financial instrument', MAR refers to the exhaustive list in Annex 1C of the Markets in Financial Instruments Directive (MiFiD), extending the scope beyond instruments traded on regulated markets under MAD to include additional securities and derivatives, including emission allowances, ensuring comprehensive coverage across modern trading values.[25] Fourth, the information must be price-sensitive such that if disclosed, it would significantly impact the price of the financial instrument to which it relates. Similar to the precise nature, price-sensitivity is assessed via the reasonable investor test which considers the likelihood that a rational market participant would make use of such information in an investment decision.[26] As underlined by the CJEU in *Spector Group Photo NV*, it is not necessary to show that such information 'actually had a significant

[18] Deborah Spiteri, 'An Insight on Market Abuse and its Effect on Consumers' (LL.B. thesis, University of Malta 2023) 12.
[19] Tamás Tóth (n 9) 367.
[20] Market Abuse Regulation (n 1).
[21] Market Abuse Regulation (n 1).
[22] Case C-19/11 *Marcus Geltl v Daimler AG* [2012] ECLI:EU:C:2012:397, para 55.
[23] Market Abuse Regulation (n 1).
[24] ibid.
[25] Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets on in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU [2014] OJ L173/349.
[26] Market Abuse Regulartion (n 1) Article 7(4).

effect on the price of the financial instruments to which it relates'.[27] These four criteria ensure that inside information is interpreted uniformly across MSs.

MAR stresses the need of an insider list to monitor inside information use.[28] Although MAD obliged MSs to ensure that issuers draw up such lists, the specifics thereto were vague and diverging between the individual MSs.[29] Insider lists identify who has access to inside information, consequently controlling its dissemination.[30] Regulation 2016/347 distinguishes between permanent insiders who have access to information permanently, and event-based insiders who have temporary access for a particular purpose, such as auditors.[31] The list must record the personal details of all insiders and must be immediately updated whenever new persons gain access or listed person lose that access. The list must be retained for five years and provided to competent authorities upon request. Furthermore, issuers must ensure that listed individuals acknowledge in writing their legal duties to confidentiality and the consequences to breaches thereto.

These definitions are critical under MAR's harmonised legislative regime, contrary to MAD's fragmented network. Through these uniform and widened definitions of market abuse and inside information, MAR enhanced the EU's capacity to achieve regulatory coherence across MSs to safeguard both market integrity and investor protection, marking a move towards preventative and standardised market supervision.

Unlawful Behaviour

A significant development from MAD to MAR is the widening of market abuse as a concept. Although MAD had recognised insider dealing and market manipulation as unlawful behaviours, MAR explicitly recognised unlawful disclosure of such information as such. MAR also prohibits attempted market abuse, reflecting the EU's attempt to establish a preventive and deterrent approach to market abuse, eliminating MAD's regulatory gaps.[32]

Article 14 prohibits both completed and attempted insider dealing, as well as recommending and inducing others to commit insider dealing.[33] MAR outlines two rebuttable presumptions on insider dealing. An insider is

[27] Case C-45/08 *Spector Photo Group NV, Chris Van Raemdonck v Commissie voor het Bank-, Financie- en Assurantiewezen (CBFA)* [2009] ECLI:EU:C:2009:806, para 69.
[28] Market Abuse Regulation (n 1) Article 18.
[29] Andrew Haynes, 'The EU Market Abuse Regulation, Where Does it Leave Us?' (2018) 26(4) Journal of Financial Regulation and Compliance, 482, 490.
[30] Market Abuse Directive (n 10) 367.
[31] Commission Implementing Regulation (EU) 2016/347 of 10 March 2016 laying down implementing technical standards with regard to the precise format of insider lists and for updating insider lists in accordance with Regulation (EU) No 596/2014 of the European Parliament and of the Council [2016].
[32] Market Abuse Directive (n 10) 9.
[33] Market Abuse Regulation (n 1).

presumed to have used inside information to acquire or dispose of financial instruments to which that information relates and is also presumed to have made use of such inside information to change or cancel an order they had made prior to the possession of such inside information.[34] This places a heavy probatory burden on the investor. The CJEU has stated that it is unnecessary to prove the insider acted negligently or with fraudulent intent as it is sufficient to prove mere use of such information for his benefit or for that of third parties.[35] Thus, what must be proven is the nexus between knowledge of inside information and use of such information for the benefit of a party.

Lawful business activities may coincide with possession of inside information without constituting market abuse. Article 9 MAR recognises this by outlining exceptions where the use of inside information does not amount to insider dealing. Market makers and persons executing their client's financial instrument orders are exempted when acting lawfully in the ordinary course of their duties. Similarly, this exemption also applies to transactions executed to honour pre-existing legal or regulatory obligations. Nonetheless, competent authorities hold the discretion of identifying an infringement if trade is concluded for an illegitimate purpose.[36]

Article 14 also prohibits the unlawful disclosure of inside information.[37] This is fundamental to prevent selective or premature disclosure of information which may disrupt the market by impacting financial instruments' prices. Nevertheless, MAR recognises that communication within the market is necessary for its efficient functioning. Thus, disclosure may be permitted in the normal course of one's employment, profession, or duty.[38] Furthermore, Article 11 introduced the notion of market sounding, the controlled disclosure of inside information prior to the public issuing of a transaction which is communicated purposefully to gauge potential investment interest.[39] This does not run contrary to Article 14 if MAR's provisions are complied with, including keeping a written record of those who information was shared with and that such persons were made aware of their legal obligation of confidentiality.[40]

MAR aims to achieve an equilibrium between prohibiting unlawful disclosure and creating a transparent market environment built on investor confidence. Article 17 obliges issuers to immediately publish information which directly concerns them and their financial instruments.[41] As noted by Kersting, this serves a dual function: to keep the public informed and to pre-

[34] ibid Recital 24; 25.
[35] Market Abuse Regulation (n 1) Article 18 para 32.
[36] Market Abuse Regulation (n 1) Article 9.
[37] ibid.
[38] Market Abuse Regulation (n 1) Article 10.
[39] ibid.
[40] Tamás Tóth (n 9) 368.
[41] Market Abuse Regulation (n 1).

emptively neutralise the risk of insider dealing.[42] Yet, disclosure may be delayed if immediate publication would prejudice the issuer's legitimate interest and if such delay is not misleading to the public. Furthermore, MAR justifies delayed disclosure when it is done to safeguard the stability of the financial system. In all cases of delay, issuers must provide a written justification to the national competent authority (NCA).

Article 15 MAR prohibits both actual market manipulation and its attempt.[43] As outlined above, Article 12 extensively lists false or misleading behaviours which are tantamount to this abusive behaviour.[44] However, not all conduct falling with this broad scope is unlawful. In this regard, Article 13 MAR envisages the concept of accepted market practices (AMPs) which, despite them amounting to market manipulation, are not considered as unlawful conduct if they are carried out for legitimate reasons in conformity with standards issued by competent authorities.[45] Such practices must promote transparency, integrity, liquidity and efficiency whilst posing no risk to financial markets.[46] Prior to recognising an AMP as such, NCAs must notify the European Securities and Markets Authority (ESMA).

Competent Authorities

MAR establishes a two-tiered authority system overseeing market abuse: ESMA and NCAs.[47] This is different from MAD's authority system which comprises solely of NCAs who possessed the merge vague power of assuming 'final responsibility for supervising compliance with the provisions adopted pursuant to [the] Directive, as well as international collaboration'.[48] Thus, MAD relied primarily on decentralised national enforcement.

On the national level, Article 22 MAR obliges each MS to have an administrative competent authority to ensure national compliance with MAR.[49] NCAs have an extensive range of supervisory and investigatory functions to allow them to ensure such compliance.[50] Such functions include gaining access to issuers' documents and information, conducting on-site inspections, entering the premises of persons to seize information relevant to market abuse, informing the public of false or misleading information, and requesting the freezing or sequestration of assets. In addition to these functions, Article 30 MAR grants NCAs the power to issue administrative sanctions in cases of breaches of MAR's provisions.[51]

[42] Christian Kersting (n 5).
[43] Market Abuse Regulation (n 1).
[44] ibid.
[45] ibid.
[46] Tamás Tóth (n 9) 372.
[47] ibid 371.
[48] Market Abuse Regulation (n 1) Article 36.
[49] ibid
[50] ibid.
[51] ibid.

Whilst MAD slightly alluded towards international cooperation, MAR emphasises such cooperation as an essential function of NCAs. These authorities must cooperate with ESMA, the authority tasked with safeguarding the single market's integrity, by providing it with all necessary information to allow it to carry out its duties. NCAs must annually provide ESMA with information on administrative measures imposed by them, allowing ESMA to draw up its annual report indicating MAR's effectiveness across MSs.[52] NCAs must also cooperate with other MSs' NCAs by exchanging information and assisting in any necessary investigations and enforcements.[53] Information exchange may be refused where the requested information may negatively impact the requested state's national security, hinder its own investigations or enforcement, or is the subject of a res judicata judgment with regards to the same person for the same facts. Unjustified cooperation within a reasonable timeframe may lead ESMA to mediate and intervene. Furthermore, when necessary, NCAs must cooperate with third countries' supervisory authorities by exchanging information and ESMA must be made aware of such cooperation.[54] Any information exchange under any of the above circumstances is subject to professional secrecy.[55] By emphasising cooperation, MAR seeks to establish a uniform communication channel between NCAs and the supranational authority to ensure that market abuse is appropriately addressed across the EU. All this reflects MAR's shift towards centralised supervisory coherence.

Sanctions

Article 14 MAD allowed MSs to issue both administrative and criminal sanctions to combat market abuse.[56] However, MAD fell short from harmonising fixed-figure administrative sanctions, resulting in large national divergences. The promulgation of MAR and MAD-II sought to remedy such divergence, with MAR harmonising the requirement of administrative sanctions and MAD-II harmonising the requirement of criminal sanctions, and both imposing thresholds within which such sanctions ought to fall.

Article 30 MAR grants NCAs the power to issue administrative sanctions for market abuse, breaches in relation to insider lists, and failure to cooperate with an investigation.[57] NCAs may also take other administrative measures in case of breaches, including ordering an issuer to cease their abusive conduct and refraining from re-engaging in it and issuing a public warning in the name of the wrongdoer.[58] Arguably, the most impactful of the

[52] Tamás Tóth (n 9) 32.
[53] Market Abuse Regulation (n 1) Article 25.
[54] ibid Article 26.
[55] ibid Article 27.
[56] ibid.
[57] ibid.
[58] ibid Article 30.

measures is administrative sanctions for market abuse which can be as high as €5,000,000 for natural persons or €15,000,000, or 15% of the annual turnover, for legal persons.[59] Such high figures are justified when one considers the extent of damage such abusive behaviours can cause on the market. In determining the proportionality and suitability of such administrative measures or sanctions, the NCA must consider all the relevant circumstances, including the gravity and duration of the infringement, the degree of the infringer's liability, the infringer's financial strength, and any previous infringements.[60]

MAD-II compliments MAR's harmonisation as it mandates all MSs to recognise the three forms of market abuse as criminal offences as well as introducing a common criminal sanctions regime with fixed thresholds.[61] Although the sanctioning of natural and legal persons is treated differently, such penalties must be 'proportionate, dissuasive and effective'.[62] Natural persons are liable to a term of imprisonment of not more than two years for unlawful disclosure and four years for insider dealing and market manipulation.[63] On the other hand, legal persons may be sanctioned through criminal and non-criminal fines, such as losing their entitlement to public benefits, being paced under judicial winding-up, and temporarily or permanently having their establishment closed.[64] Together MAR and MAD-II represent a new pattern of policy in the combatting of financial crimes, seeking to promote greater enforcement and deterrence.[65]

These two sanction regimes have given rise to the plea of ne bis in idem under the European Convention of Human Rights. In *A and B v Norway*, the ECtHR concluded that administrative and criminal sanctions may be cumulatively imposed if they are 'sufficiently closely connected in substance and in time' and they do not pose an excessive burden on the accused.[66] Quoting this judgment, the CJEU, in *bpost*, held that duplication of sanctions is not contrary to *ne bis in idem* as long as this is permitted by law and does not exceed the principle of proportionality.[67] These judgments confirm that the EU's dual sanctioning framework under MAR and MAD-II respects fundamental rights as long as the principle of proportionality is adhered to.

[59] ibid.
[60] ibid Article 31.
[61] Sarah Wilson, 'The New Market Abuse Regulation and Directive on Criminal Sanctions for Market Abuse: European Capital Markets Law and New Global Trends in Financial Crime Enforcement' (2015) 16(3) ERA Journal of the Academy of European Law 427, 427.
[62] Market Abuse Regulation (n 1) Articles 7 and 9.
[63] ibid Article 7.
[64] ibid Article 9.
[65] Sarah Wilson (n 61) 439.
[66] *A and B v Norway* App Nos. 24130/11 and 29758/11 (ECtHR, 15 November 2016) (GC), para 74, para 121.
[67] Case C-117/20 *bpost SA v Autorite belge de la concurrence* [2022] ECLI:EU:C:2022:202, para 49.

Conclusion

MAR demonstrates a major shift in the EU's approach to market abuse, from a fragmented framework under MAD to a new uniform and preventive regulatory regime. By directly harmonising and widening key definitions, MAR adopts an interventionist approach, protecting market integrity in a period where financial markets are becoming more complex and technologically advanced. This shift is further evidenced through the supervisory powers granted to NCAs and the enhanced coordination with ESMA. Likewise, the complementary sanction system of MAR and MAD-II seeks to dissuade market abuse. All these developments demonstrate the EU's acknowledgement that effective market abuse requires both rules and coherent enforcement in order to safeguard investor confidence and the integrity of the internal market.

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